



# **ASIAN HUMAN RIGHTS COMMISSION**

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## **THE ASIAN HUMAN RIGHTS COMMISSION (AHRC)**

### **HUMAN RIGHTS REPORT – 2006**

#### **THE STATE OF HUMAN RIGHTS IN ELEVEN ASIAN NATIONS**

**BANGLADESH, BURMA, CAMBODIA, INDIA, INDONESIA, MALDIVES,  
NEPAL, PAKISTAN, PHILIPPINES, SRI LANKA, THAILAND**

**December 21, 2006**

# THE ASIAN HUMAN RIGHTS COMMISSION (AHRC)

## HUMAN RIGHTS REPORT – 2006

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## **International Human Rights Day Statements for 2006**

### **ASIA: Flawed criminal justice systems negate the realisation of human rights in Asia**

Discontent over malfunctioning democracies and legal systems and the consequent setbacks these shortcomings cause for human rights and the rule of law, as well as aggressively expressed aspirations to resolve such problems, are marked features that define the year 2006 in many Asian countries.

Specifically, Asia's people feel discontent over the authoritarianism of democratically elected governments as well as military regimes. They are restless over restrictions on their freedom of expression, association and assembly. They are angry at the use of martial law and emergency and terrorism laws that steal their rights in the name of making them secure. They are frustrated over rampant corruption and dissatisfied over the ineffectiveness of states to stop manifold forms of discrimination that are widely experienced throughout the continent. They are distressed as extrajudicial killings, disappearances and torture continue unabated, and they are disappointed over the ineffectiveness of parliaments, judiciaries, police forces and prosecution systems to address these deficiencies. Moreover, states are not dealing with this discontent in a positive manner by trying to resolve these problems. Instead, governments resort to even worse military and policing methods to deal with them. This is the grim picture of Asia as it approaches 2007.

In our International Human Rights Day message for 2005, the AHRC stated, "Although there are complex factors that contribute to the denial of people's rights, one factor stands clearly above all others: the rule of law does not exist in most parts of this vast continent." In the year that has followed this message, respect for the rule of law has worsened in most countries of Asia, and there is hardly any nation that can claim an improvement in this vital area, which, in fact, is the only foundation on which democracy and human rights can be built. Many more people still ask, "Where are my rights?" To this question, neither governments nor the United Nations and international community are able to give a satisfactory answer.

The absence of effort to improve respect for people's rights is very much linked to the criminal justice systems in these countries. There is a common failure to develop a criminal justice system before which everyone is equal, everyone enjoys the equal protection of the law and every violation of rights has a remedy. Such a legal system is, in fact, a far-off dream in many countries. Social elites and powerful forces within each of these societies act strongly to thwart the development of the criminal justice system. Abuse of power and corruption are severely restrained as a credible criminal justice

system develops, and consequently, these elites and powerful forces seek to obstruct the development of the criminal justice system through the regimes in power. Thus, in Asia, most governments would not like to see the development of a proper criminal justice system. When the state itself prevents the development of such a system, by what means can the people achieve such an objective? The sense of powerlessness of the people expressed in many different ways in various parts of Asia arises from the strong opposition the government itself has to the development of a criminal justice system.

Arising from the state's connivance in preventing the development of a criminal justice system are the manifold forms of violence that the state in many places perpetrate on the people—abductions, disappearances, extrajudicial killings, torture and other forms of violence. States often claim these acts not only as their right but also as their obligation. Indeed, states do not plead forgiveness for violations of the basic rights of people. Instead, states claim they are carrying out their obligations as a state by engaging in extrajudicial killings, disappearances, mass murder, torture and even crimes against humanity. To this list, other human rights violations—illegal arrests and detentions, the maintenance of illegal prisons and torture chambers, etc.—can be added.

Perhaps one of the marked features of change in the nature of repression in several Asian countries in recent times is that there is not just the abuse of rights, such as illegal arrests and illegal imprisonment following the denial of a fair trial, but the dismissal by the state of trials or, for that matter, due process itself. Secret arrests, assassinations and the disposal of bodies are now means that states employ often under the pretext of responding to terrorism. The complete bypassing of legal norms and standards makes the experience of present times much more frightening.

The courts are becoming less and less important as institutions for the protection of rights and the defence of the rule of law. In many places, there is serious undermining of the Constitution through the constitutional process itself. Many of the constitutions of Asian countries are not a product of the tradition of constitutionalism that creates safeguards and limits on state power. Instead, rulers give themselves unlimited powers by creating for themselves “Constitutions” that virtually give them powers similar to those of absolute monarchs. Although some of the language of democratic constitutions is still maintained, actual power positions developed through such “Constitutions” negate the power of parliaments and courts. This process becomes even worse when the judges of higher courts themselves begin to adjust to and take advantage of the new power relationships. Subjugation to executive control, on one hand, and an increase of corruption, on the other, have become marked features of judicial institutions in many countries at the present time (for more details on this phenomenon, kindly see the consultation paper on the Asian Charter on the Rule of Law: [Elimination of Corruption](#)).

All the major struggles against discrimination are also trapped within this problem of state complicity in violence, the state's failure to protect people's rights and the collapse of the rule of law that mainly manifests itself through neglect of the criminal justice system. While there has been a great deal of discussion about women's rights and those of children, there are no signs of improvement. Sadly, violence against women and

children has not been affected for the better by merely improving laws as the implementation systems remain seriously flawed. Other forms of discrimination, like that against Dalits in India and Nepal, indigenous peoples and other minorities in various parts of Asia, have seen no effective measures taken for the betterment of their lives and living conditions. While the global critique against discrimination on the basis of caste and descent has grown stronger, the internal dynamics needed to improve the lives of Dalits in India and Nepal have not changed. Lobbies that work to eliminate all forms of discrimination need to address the problems arising from rule-of-law issues if the rights of discriminated groups are to be realised.

In such contexts, none of the aspects of the rule of law are clear any longer. Do law enforcement officers have an obligation to protect people taken into custody by them? What is to prevent the person in custody from being killed? When deaths in custody occur, what is the role of magistrates? Do they really have the capacity to insist on proper investigations and to refuse to give orders stating that such killings are justifiable homicides done in self-defence? If a magistrate does their duty in the manner required by the law, can they expect the higher judiciary and the state to protect them? On the other hand, when the state, on such pretexts as anti-terrorism, associates itself with extrajudicial killings, is it in a position to prosecute state officers who fall foul of the law?

These are thus disturbing times for living in most Asian countries. No principle is any longer clear or sacred. There is no place that may be called a sanctuary or a place to resort to when everything else fails. "Who is my protector?" any innocent person caught in present-day tensions may ask. This is not a question that anyone can answer anymore. (AHRC, AS-304-2006 - <http://www.ahrchk.net/statements/mainfile.php/2006statements/851/>)

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## **ASIA: Extrajudicial killings, disappearances, torture and other forms of gross human rights violations still engulf Asia's nations**

In addition to the general statement issued by the Asian Human Rights Commission (AHRC) for International Human Rights Day on December 10, we are also making the brief comments below on the human rights situation in several Asian countries.

### **Sri Lanka**

The most violent place in Asia at the moment is Sri Lanka, and the state has not taken any serious steps to bring it under control. The state blames the Liberation Tigers of Tamil Eelam (LTTE) for creating the violence in the country, and the LTTE blames the Sri Lankan government, acting through the military and its paramilitary forces, as being

responsible. There is talk of "war" on both sides, but each claims to be merely in defensive military positions. Such propaganda only manifests the absence of an agent to bring the violence under control. In response to local and international criticism of abductions, disappearances, extrajudicial killings, torture and other forms of serious crimes and gross abuses of human rights, the president has appointed a local commission of inquiry, and a group of people from the international community has been given permission to observe their work. However, this move has not created confidence or credibility inside or outside of the country.

The violence in Sri Lanka that presently afflicts the country has been aggravated by the collapse of the rule of law for a considerable time. The policing system suffers from an institutional collapse; the judiciary is faced with a serious crisis; the government lacks the capacity to carry out its normal functions of protection. Meanwhile, the enforcement of strict emergency regulations will only aggravate the violent situation, and there are no local or international initiatives to address the problems plaguing the country.

The president acted in open defiance of the Constitution and the provision of the 17th Amendment that was adopted in 2001 to deal with the crisis of the rule of law. The Constitution does not grant any power to the president to abandon the implementation of parts of the Constitution. However, the courts of Sri Lanka have interpreted the impunity of the president for acts and omissions, both official and personal, as granted under Article 35(1) of the Constitution as a blanket clause, and the judges consequently have excluded themselves from adjudication relating to acts of the president. The Supreme Court, however, did hold the president's signature to the optional protocol of the International Covenant on Civil and Political Rights (ICCPR) as ultra vires. In short, the courts in recent years have minimised their role in the protection of the rights of the people.

## **Philippines**

Extrajudicial killings have become a common feature of life in the Philippines during this year. Extrajudicial killings, in fact, have increased in 2006 as the government has failed to stop the killings. Promises of inquiries have not resulted in any credible measures. Task Force Usig and the Melo Commission have not proved capable of conducting any serious investigations into the killings. The absence of any deterrence through credible investigations, arrests, detentions and prosecutions offers encouragement for anyone who wishes to engage in such killings.

The moral condemnation from within the country and from the international community against the extrajudicial killings in the Philippines though has increased during the year. However, such condemnation and pressure does not seem to generate any aggressive response on the part of the government to stop the killings. The absence of a credible policy on the part of the government to stop the killings has given credence to the view that the state itself is complicit in these killings.

Aggravating these circumstances is the collapse of the institutions of justice and rule of law in the country. The police, for instance, are known to be inefficient and corrupt; but in spite of this, there is no move on the part of the state to reform the police. The judiciary is also accused of being corrupt, inefficient and slow. Thus, the mechanism of enforcement and implementation of human rights does not exist in the Philippines. International efforts to intervene to stop the killings in the Philippines have not yet developed beyond condemnation.

## **Thailand**

Respect for human rights and the rule of law in Thailand were set back many years with the return to power of the military on September 19. The military regime insisted that it had taken power to avert a national crisis; but in the following months, it has failed to produce any evidence to show that widespread violence was imminent as it claimed to justify its actions, which began with the scrapping of the people's Constitution of 1997 and its replacement with an interim charter modelled upon those of earlier military regimes. The army is now working hard to build a fictional constitutional order and resecuring power for the military elite while trying to give the opposite impression. Although it has expressed commitment to the rule of law, its actions all demonstrate the opposite.

The military government has persistently directed public attention towards the excesses of the previous administration while playing down or entirely ignoring its shared responsibility for human rights abuses of recent years. The interim prime minister has apologised for the killing of some 84 people in Narathiwat Province in 2004 but has not acknowledged the liability of the army for these deaths, least of all the 78 who died in its custody. He has ordered the security forces to cease using "blacklists" to hunt for suspects but has not yet explained anything about how they were made, who used them, which abuses occurred as a result of them and what investigations of wrongdoing will follow due to the use of the lists. Nor has his government yet lifted the emergency decree over the southern provinces, which a U.N. expert in July said "makes it possible for soldiers and police officers to get away with murder." Martial law remains in effect across half of the rest of the country nearly three months since the military took power.

Furthermore, there has been no improvement in overall conditions of human rights throughout the country. Human rights defenders and social activists continue to be abducted and killed with impunity. Most recently, Thanee Sodsri, an environmentalist in Ratchaburi Province, was apparently shot and removed from his house on December 1. Not one case in recent years has been solved, including the disappearance of lawyer Somchai Neelaphaijit more than two years ago.

Meanwhile, a senior bureaucrat acknowledged the scale of problems in the Thai justice system by saying that the police have no evidence with which to lay charges in some 30 percent of cases that are deliberated by the courts, and, most importantly, there remains no way to complain of such abuse. There are also no laws to prohibit torture and forced disappearance or an effective witness protection scheme. Even a National Human Rights

commissioner who was seriously threatened obtained no protection from the state nor did his case arouse any official concern.

## **Burma**

During 2006, Burma continued to be characterised by wanton criminality of state officers at all levels and the absence of the rule of law and rational government. The growing numbers of bloody assaults, rapes and killings of ordinary people by police and other state officers in the cities and towns of Burma are exposing the myth of "state stability" that the military government uses to justify its prolonged existence. Most of the victims of such crimes are innocent people accused of ordinary crimes— if anything—often due to personal grievances or out of favour to others. The officials responsible usually completely ignore ordinary criminal and judicial procedures, have no interest in genuine investigation methods and present no avenues for anyone to make a complaint. Those who attempt to complain are usually made the target of countercomplaints, such as farmer U Tin Kyi who was imprisoned for having allegedly resisted efforts to turn adjacent land into a plantation under a government scheme. Although a few people linked to similar cases involving the International Labour Organisation (ILO) were released from detention, their cases and the circumstances under which they were freed were exceptional. Unfortunately, none of the people remaining in detention can be visited by the International Committee of the Red Cross (ICRC) as the group has been blocked from visiting prisoners since December 2005. In October, the government also ordered five ICRC field offices to close without apparently any explanation.

Internally displaced people, refugees and others in remote areas and border regions of the country continue to be subject to some of the worst human rights abuses in Asia, mostly at the hands of the military. In October, the Bangkok-based Thailand Burma Border Consortium reported that more than a million people are now displaced in eastern Burma alone with 82,000 forced from their homes in the last year through the systematic destruction or forced abandonment of more than 200 villages. Out of this population, more than half are believed to be living in the jungles and hills due to "systematic human rights abuses and humanitarian atrocities."

## **Singapore**

Singapore is the most complete authoritarian system in Asia today and perhaps also in the world. It is an authoritarian system that has entrenched itself on a small island which, due to certain circumstances, is relatively an economic success. The founder of the modern authoritarian system, Lee Kuan Yew, has consistently claimed that it is due to strong leadership that Singapore has become an economic success story. By strong leadership, he means a draconian system of control which restricts any possibility of people's participation in political affairs. That ruling is the business of the ruling political party and that the people should keep out of political affairs is a latent political philosophy that has been a pillar of the system for decades. The suppression of attempts to build a political party as an alternative to the People's Action Party (PAP) is resisted with



ruthless efficiency through mainly rigorous imposition of some laws which obstruct freedom of expression and organisation.

Laws, for instance, relating to defamation, with the possibility of large sums of money being awarded to political leaders who claim to have been defamed, makes bankruptcy proceedings one of the most powerful tools in the suppression of political movements in Singapore. The notion that political movements will lead to chaos within the country and that ethnic factors will play havoc with the situation if free political expression is allowed is part of the dogma of the state of Singapore. Singapore prevents monitoring of human rights by U.N. agencies and tacitly claims human rights as an alien concept that can harm national interests, which, in fact, mean the interests of the ruling party.

The constant suppression of freedom of expression and organisation has manifested itself in various events throughout the last few decades. The most recent example is the imprisonment of Singapore's opposition leader, Dr. Chee Soon Juan, a neuropsychologist whose crime is speaking in a public place.

Chee was imprisoned earlier this year for speaking in public on April 22 prior to Singapore's latest general election. He and other members of the Singapore Democratic Party (SDP) were speaking to passing citizens in the course of selling the party newspaper on the street.

The current sentence is five weeks in prison. Two of Chee's SDP colleagues, Gandhi Ambalam and Yap Keng Ho, were sentenced to shorter incarceration terms. All three had initially received heavy fines but have now been jailed by the Singapore Subordinate Court due to their refusal to pay. Recent reports indicate a deterioration in Chee's health as a result of imprisonment.

Chee refused to pay the fine as a matter of principle. In a statement read in court on November 23, 2006, he exhorted the judiciary to recognise the "difference in punishing someone who has committed a crime versus punishing someone who is fighting for democracy and the rights of the people." Chee pointed out that criminal punishment is typically meant to either deter or rehabilitate the offender.

Imprisoning Chee for pursuing his peaceful campaign for democracy will not serve either purpose. As he put it, "What will punishing me achieve? Do you think it will rehabilitate me and deter me from doing what I am doing?"

## **Maldives**

Current abuse of the human rights of political activists, journalists and dissenters in the Maldives involve a pattern of arbitrary arrests and detentions bypassing basic guarantees of due process, such as the right to be told of the reasons for the arrest, the right to have charges served upon the arrestee and the right to trial without undue delay. While some detainees are released following international and domestic protests, others who are charged are imprisoned and then released without formal notification of the charges being

dropped against them. Others are pardoned by presidential intervention while yet others are not given this same clemency. The manner in which charges are left pending evidence a common tactic of harassment and intimidation.

Though a range of proposals towards constitutional reform have been announced (including a draft Constitution, the redrawing of electoral boundaries and the introduction of a voter education programme) with multiparty elections to be held in 2008, there is widespread public cynicism as to whether the government headed by President Abdul Maumoon Gayoom is committed to implementing these reform proposals. There is no doubt that if democratic rule is to be enhanced in the Maldives the present totalitarian authority of the presidency will need to be drastically reduced and/or replaced by a politically pluralistic framework which balances powers between the office of the presidency, a democratically functioning legislature and an independent judiciary.

It is imperative that the country's judicial and legal system is headed by a Supreme Court with judges, including the chief justice, appointed through an independent process and with security of tenure rather than the present arrangement based on dependency on the president. In addition, the Constitution needs to have a justiciable chapter on rights that can be enforced through the Supreme Court, and systematic codes of criminal and civil procedure, evidence and a revised Penal Code should be enacted as well. Moreover, the office of the attorney general must be made independent and divested of the political colour in which it is currently shrouded, and the promulgation of presidential decrees has to stop.

Furthermore, freedoms of speech and expression, association and assembly need to be secured both in law and practice. The Freedom of the Press Bill ought to be redrafted in consonance with modern-day principles and should not be allowed to give rise to new media crimes. Political parties need to be allowed to enjoy their rights of democratic assembly and association, and practices of arbitrarily arresting political activists on charges of high treason or terrorism purely for taking part in a demonstration or engaging in comment critical of the government needs to be halted.

Lastly, bodies vested with the task of monitoring abuses by government officials, such as the National Human Rights Commission (NHRC), ought to be allowed to function independently and should be staffed by members having established credentials in the field of human rights and chosen through a process of consultation with political parties and civil society rather than purely appointed by the president.

## **Nepal**

The year 2006 has been a landmark year in Nepal and has included vast popular demonstrations against King Gyanendra and his government, which finally led to the government's demise and the creation of a new platform upon which progress toward peace, security and human rights could be built. During the period since the April uprisings, Nepal has been under a state of political flux with difficult questions being addressed step by step. By the end of the year, a comprehensive peace accord had been

signed by the Seven Party Alliance (SPA) and the Maoists, bringing an end to a bloody decade-long war that claimed the lives of more than 13,000 people and seriously affected many more. The Maoists are in the process of being disarmed and brought into the political mainstream. If all parties stick to their commitments made as part of various agreements, notably that reached on November 8, then there is reason to hope that the country is heading into a period of sustained democratic development and peace. It is rare to see such sweeping changes in the course of one year, and full credit must be given to the people of Nepal and all other actors that have enabled this positive development.

However, from a human rights perspective, much remains to be done. Violations continue to be committed by all sides, including abductions, torture and extrajudicial killings, and this violence will persist while the culture of impunity that has accompanied the widespread abuses of the past continues in the country. In order to ensure that impunity is dismantled, justice cannot be sacrificed on the altar of political expediency. All allegations of human rights abuses committed by any party must be effectively investigated and prosecuted in line with Nepal's international obligations. To enable these investigations to be effective, the institutions of the rule of law must be strengthened to allow them to cope with this sizeable task. Investigations and prosecutions should commence without further delay as the legal institutions can develop as the process proceeds as long as there are no undue political restrictions on their actions. It is also vital that an effective, credible and well-resourced system of witness protection be created. Otherwise, the investigation and prosecution of alleged perpetrators will fail. In the process of ensuring that the people responsible for human rights violations are held accountable, Nepal can establish a deterrent against future violations and the victims can feel secure that adequate compensation will be provided. Such a deterrent will enable a more peaceful, less fractured society to emerge. The only way to move beyond past grievances is for justice to be done. By ignoring such grievances in order to sidestep difficult issues that may threaten ongoing political progress, there may be short-term gains, but ultimately, the door will remain open to a return to violence and insecurity as those that profited from such a situation will remain protected and may later opt to offend again.

While there has been significant political progress during the year, many difficult decisions remain. It is hoped that the new political dynamics in Nepal will enable the implementation of much-needed reforms to now begin in earnest.

## **Indonesia**

There is alarm at the lack of action taken by the attorney general in prosecuting the perpetrators of the May 1998 riots and the student killings in Trisakti and Semanggi that took the lives of more than 1,000 people with many others suffering serious injuries and damage to their property and possessions. The victims of these abuses have been awaiting justice for more than eight years, which is simply unacceptable for a state that is a member of the U.N. Human Rights Council and a party to a number of U.N. human rights conventions. Because of the lack of effective investigations by the prosecution system into these gross abuses, genuinely concerned independent organisations, such as the

National Human Rights Commission (Komnas Ham), have conducted their own independent investigations into these human rights violations and have submitted a formal report of their investigative findings to the attorney general. Time and time again, however, these reports have been dismissed and discarded on the flimsy pretence of legal technicalities. Not only is the Attorney General's Department guilty of failing to undertake its own investigations into these serious abuses, but it is also guilty of refusing to act on the credible evidence accumulated by independent bodies.

This negligence raises fundamental questions about the role of the attorney general, the senior-most authority of the state prosecution system who is responsible for the impartial investigation and prosecution of perpetrators of human rights abuses and other crimes. Thus, it is the responsibility of the prosecution to ensure that effective investigations are conducted and sufficient evidence is collected to ensure a fair trial. This must be done with the highest level of impartiality and objectivity. The prosecution should not be susceptible to external political pressure and influence.

## **Pakistan**

Pakistan is still in the strong grip of a military regime. Although there was an election for Parliament in 2002, the military still controls all policy matters. The president of Pakistan still wears his army uniform and has no plan to separate the office of the chief of army staff from the office of the president of the country. Appointments to the higher judiciary are made by the president himself with the independence of the judiciary sacrificed in the process. Moreover, there are 56,000 army officers in various government and corporate positions, including communication, power and educational institutions.

Since 1998, Pakistan has been under emergency rule. Consequently, all basic rights have been suspended for the past eight years, including Articles 16, 17, 18 and 19 of the Constitution which guarantee freedom of assembly, association, speech and movement. The judiciary labours under the provisional Constitution made by the army in 2000; and since then, the judiciary has not taken its oath on the country's Constitution although the Parliament has been restored.

Since Pakistan was thrust to the forefront of the “war against terror,” human rights violations have increased in comparison with previous years. Military operations in at least two out of four of Pakistan’s provinces have resulted in the death of more than 3,000 people since 2001. In addition, there is no rule of law, and government agencies have a free hand to arrest anyone and torture them. Whoever is killed or tortured or fatally shot in fake encounters are labelled by the state as “terrorists.” Furthermore, disappearances after arrest were first introduced in the country after 9/11, a phenomenon that was not common in Pakistan previously. There has also been a tremendous increase in the use of torture by the military agencies with new methods being employed—an illegal development that even the higher courts cannot question. Moreover, the high judiciary does not have the jurisdiction to search the military’s torture cells.

Another check on the government—the media—also was under threat in 2006. More than 20 journalists were killed, tortured or disappeared by state agencies, and more than 90 cases of threats, harassment and attacks on journalists and their offices were reported. In addition, more than three FM radio stations and one television station were banned by the government's regulatory agency.

## **Cambodia**

In 2006, Cambodia witnessed a variety of human rights violations—land-grabbing, political discrimination and the repression of freedom of expression and labour rights. These abuses occurred in an environment in which the rule of law is collapsing. Some people are above the law in Cambodia as the majority of criminal cases involving high-ranking government officials have never resulted in justice. Police officers and soldiers use their guns to solve problems by threatening or shooting people, but they are never found guilty of infringing on the rights of people or breaking the law.

Large-scale land disputes between powerless people, on one hand, and private companies and high-ranking government officials, on the other, are becoming a serious problem that affects people's daily lives. No solution is presented to people who cannot cultivate their land. Injustice for the innocent is prevalent, and corruption is becoming further embedded in the political culture of the country.

## **Bangladesh**

In the area of criminal justice, Bangladesh has not taken steps towards democracy or improvement of the rule of law.

In the lower courts, it is the civil servants that exercise judicial power. This allows the police to get whatever they wish from these courts where no proper scrutiny of the papers filed by the police takes place. The result often is prolonged detention of many people who have to have recourse to higher courts to get bail through appeals. Meanwhile, while the appeal process takes place, they are kept in custody. The attempt by the Supreme Court to end the practice of civil servants exercising judicial power and to transfer this power to judicial magistrates where it properly belongs has not yet received a positive response from the government.

The corruption of the Bangladeshi police is frequently experienced by ordinary people in the country as it is often not the law but money that is behind arrests and illegal detentions. The guilty can escape through payments to the police with the innocent substituted in their place.

Moreover, the use of torture is endemic within the policing system of Bangladesh. The police are also utilised to suppress political dissent by opponents of the government and to use violence to control political or trade union demonstrations.

The most dismal aspect of human rights in Bangladesh is that there is no means by which victims can make complaints and have them investigated. The internal process of discipline within the police force itself does not exist. Even in cases where an inquiry begins due to public agitation, investigations are commonly characterised by corrupt interventions. Fundamental reform of the police is not only a necessary condition for democracy and the rule of law but also for the maintenance of any form of rational order within the country.

The Rapid Action Battalion (RAB), brought into force to deal with increased crime, is itself engaged in serious crimes, such as extrajudicial killings, torture and abductions. The concept of the control of crime is not to improve criminal investigations and to institute prosecutions but to deal with alleged criminals by extralegal means. This policy itself is an acknowledgement that the law enforcement system has collapsed under the weight of corruption. Since the law cannot be imposed through legal means due to institutionalised corruption, a more naked use of force is now used. The RAB, in effect, simultaneously acts as informers, judges and executioners.

In recent times, the chief justice and the attorney general have also come under severe criticism for being politicised and biased. All these factors cause tremendous confusion to the people and disrupt the development of more rational forms of administering society and ensuring security.

## **China**

China's struggle to replace the rule of man by the rule of law has still not reached the stage of success needed to achieve the latter. In many areas, the philosophy is still to maintain order with or without the law. Respect for the law as the final criterion in all matters has not yet become established despite claims and efforts made since the end of the Cultural Revolution three decades ago. China's economic success has not yet translated into a transformation of society that is based on the rule of law. As such, there is still fear among the ordinary people to express themselves and to participate in the life of their society in a more vigorous manner. A rule-of-law-based society cannot develop without genuine independence of the judiciary. While the educational level of judges has improved to some extent in many places, this improvement has not been the common feature everywhere.

However, the real problem area is the judicial role. The judiciary is still under political control and does not enjoy equal status with the executive. Much of the disciplinary control of the judges is carried out through party processes. This control of judges through party disciplinary processes is a hindrance to the development of an independent judiciary. The control of judicial discipline must shift to more credible internal processes of accountability from within the judiciary itself.

The role of lawyers, while having improved from their former position, has also not yet become similar to that of countries based on the rule of law. Often lawyers can be punished or harassed for acts that in normal circumstances would be considered the

professional duty of a lawyer. An independent legal profession is one of the most basic requirements of the development of a system based on the rule of law.

One of China's claims in recent times is that it is struggling to eliminate corruption. However, the elimination of corruption and the development of a progressive system of criminal justice cannot be separated. On this score, mainland China has much to learn from its administrative region in Hong Kong. Since the 1960s and 1970s, Hong Kong has achieved a great degree of success in the elimination of corruption through the improvement of its criminal justice system. A component of the system introduced in 1974—the Independent Commission against Corruption (ICAC)—is not merely a corruption control agency but a very important component of the criminal justice system of Hong Kong.

It is due to the lack of improvement of the criminal justice system that China is not making attempts to eliminate the death sentence. The feeling for the need for the death sentence is itself an indication that the state does still not trust its criminal justice system to deal with serious crimes. The basic dictum that it is not the severity of the punishment but the certainty of punishment through the certainty of detection of the crime that can eliminate criminal activity has not become part of jurisprudence in China.

## **India**

India has not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) with torture remaining rampant as a method of criminal investigation in the country. Even in more developed areas of India, from the point of view of the educational level of the people, like Kerala, torture is still common. The widespread use of torture occurs despite commendable judicial decisions, such as the famous *Basu vs. the State of West Bengal*, which laid down detailed rules on arrest, detention and the like, which, if applied, would lead toward the elimination of torture. The prevalence of torture is also not due to the lack of forensic facilities or forensic training available to the Indian police; for in recent years, there has been considerable sophistication achieved with regard to equipment and training. Torture though remains endemic due to other factors, such as bribery and corruption and the lack of a speedy and efficient disciplinary control mechanism. The tolerance of torture by higher-ranking officers and some prominent politicians of the central government as well as various states has not ceased. The failure of the Indian government to ratify CAT is itself a manifestation of the irresoluteness on the part of the state to bring this evil practice to an end.

In addition, India's record on delays in adjudication, including matters of criminal justice, are among the worst in the world. Court cases may go on for five or 10 years or even longer—delays in the judicial system that virtually distort the whole process of justice. The prevalence of these delays prevents the possibility of judicial enforcement of the basic rights of the people. While the higher courts still produce significant judgments, the justice that the average litigant receives is still of a primitive nature. Delays allow

corruption and negligence. Accusations of corruption among some of the judiciary of all ranks are now an open accusation that has not been reputed in any credible way.

Another major problem facing the country is the caste system. Despite many commitments expressed by India's best-known leaders since independence to end this great social divide, it is still one of the greatest obstacles to progress in Indian society. Dalits, or "Untouchables," for instance, are among the worst victims of torture and other abuses of human rights in the country. Dalits also suffer from delays in justice and the absence of access to justice. Thus, their misery is specifically linked to serious defects in the criminal justice system.

The absence of justice also contributes to deeply entrenched poverty and starvation. The AHRC's studies on starvation deaths have revealed that there have been deaths caused by starvation even due to the negligence of magistrates who have particular responsibilities relating to these matters.

In short, the neglect of justice in India is of such a proportion that it challenges India's claim of being a vibrant democracy. India's democracy, in fact, is fundamentally flawed and is unable to maintain the rights of its ordinary folk. The powerful, for the most part, are still above the law.

(AHRC, AS-305-2006 - <http://www.ahrchk.net/statements/mainfile.php/2006statements/852/>)





## **ASIAN HUMAN RIGHTS COMMISSION**

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### **BANGLADESH: The Human Rights Situation in 2006**

#### ***Bangladesh, a corrupted & tortured nation***

Although Bangladesh has twice gone through independence struggles, culminating in full political independence in 1971, its laws have not yet emerged from the 19th century. Meanwhile, policing has for the most part degenerated back into the feudal ages. At no stage has there been a serious attempt to modernise it or to take advantage of significant developments happening elsewhere in the world. Legal and investigative reforms are moving so slowly as to place Bangladesh completely out of touch with the rapid developments in communications, transportation and sense of time among people in other countries. The last “sweeping reforms” referred to on the Bangladesh Police webpage of the Ministry of Home Affairs occurred in 1861. The atrophy and its consequences are manifest.

#### **Arbitrary arrest: Anyone, anywhere, anytime, any excuse**

Despite a constitutional prohibition, arbitrary arrest is among the most common features of policing in Bangladesh. It is routinely accompanied by assault and extortion, and also often leads to torture, killing and other grave abuses of the arrested person and others. Laws in Bangladesh make it easy for a police officer to arrest someone on a suspicion and try to pry some information out, with which to conjure up a better excuse to hold the person in custody. Section 54 of the Code of Criminal Procedure 1898, which permits arrest on “a reasonable suspicion” of a crime, is perhaps the most commonly used provision. For police in Dhaka, section 86 of the Dhaka Metropolitan Police Ordinance is frequently used to make arrests without valid reason after dark wherever someone is found “without any satisfactory answers”. The section carries a summary one year penalty, fine or both. A person can also be held in detention through provisions such as the Special Power Act 1974, through which the police can propose to the district commissioner (executive officer) who is also the district magistrate (judicial officer), that any person shall be detained for a certain period of time.

Under these laws a hapless ordinary pedestrian may end up in jail for months simply for crossing the road at the wrong time and in the wrong place: namely, where police were present. Many others are targeted arrestees, having been identified as political opponents of a local official, or the government as a whole. Some descriptions of incidents help to understand how easily this works in practice.

On 24 November 2005 Mohammed Abul Kashem Gazi was on his way to buy spare parts for his refrigerator shop. He was stopped by a number of policemen in front of the Khilgaon police outpost, apparently without any particular reason. Somehow an altercation followed, and it soon led to three of the officers assaulting Gazi on the street, and dragging him back to their main station, where they kept him in detention overnight and took his mobile phone. He was brought before a magistrate the next day under section 54, who mercifully released him on bail due to health grounds. Police commonly arrest people as a service to someone they know, or in exchange for money or other rewards. On 28 December 2005, a young man named Imon Chowdhury went to collect his pregnant wife from her family's house in Barisal and return home to Gaibandha together. When he arrived, a dispute erupted and his in-laws allegedly beat him up. His father-in-law had a connection with an assistant superintendent of police in the district, and he handed Chowdhury over to the officer. He was taken back to the police station and assaulted, apparently as a favour to the family, after which he was held in custody under section 54, despite differing police accounts of what had taken place at the house. The periodic use of these laws to make mass arrests also encourages the continued routine detention of innocent persons on a whim. In the first week of February 2006, for instance, some 10,000 or more people were detained simply in order to thwart opposition party plans for a mass rally. Many were not produced before a court for some days. On February 5 the Supreme Court ordered that the arrests stop. It also went so far as to question the constitutional legality of section 86. Although the court's injunction had the effect of halting that wave of arrests, the laws and practices that allowed for them still stand. Some other laws which ostensibly have been intended to protect human rights have also been used instead to arrest innocent persons. For instance, as it is easy to secure a temporary detention order under the Women and Children Repression Prevention (Special Provision) (Amended) Act 2003, the law is used by political, personal or business rivals to harass one another. This is one of the reasons that the overwhelming number of cases brought to courts under that law are reported to fail.

### **Section 54(1) of the Code of Criminal Procedure 1898**

Any police officer may, without an order from a Magistrate and without a warrant, arrest first, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned; secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; thirdly, any person who has been proclaimed as an offender either under this Code or by order of the [Government]; fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property [and] who may reasonably be suspected of having committed an offence with reference to such thing; fifthly, any person who obstructs a police officer while in the execution of his duty, or has escaped, or attempts to escape, from lawful custody; sixthly, any person reasonably suspected of being a deserter from [the armed forces of {Bangladesh}]; seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been

received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh; eighthly, any released convict committing a breach of any rule made under section 565, sub-section (3); ninthly, any person for whose arrest a requisition has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

### **Section 86 of the Dhaka Metropolitan Police Ordinance**

If any person is found between the periods of dusk to dawn: a) equipped with dangerous machineries without any satisfactory account; or b) covered the face or disguised or masked without any satisfactory account; or c) present in the house of anybody else or in a building of anybody else or on board or on a boat or in any vehicle without any satisfactory account; or d) lying or moving in, on any street, any yard or any other place without any satisfactory account; or e) entering in any house along with weapons without any satisfactory account; then, that person shall be imprisoned up to maximum one year or shall be fined up to Taka two thousand, or shall be punished in both ways.

### **Torture, the Third Degree Method**

Once a person is under custody, the police have a range of alternative ways to proceed. If the detainee can be accused of a serious offence like murder or storing illegal weapons then the investigating officer will already be calculating how much money can be made and from whom it can be collected. On one side, he will be taking money from the complainant (such as on the pretext of needing to purchase fuel for the police vehicle). On the other, he will be bargaining with the accused about how much it will cost to escape from the charges, or at least from the Third Degree Method, or death by “crossfire” (see further: Nick Cheesman, “Fighting lawlessness with lawlessness [or] the rise & rise of the Rapid Action Battalion”, 2006).

If threats and negotiations with an accused do not yield anything lucrative, police will turn to what is euphemistically known as the Third Degree Method. The third degree starts out light, and is gradually increased in intensity as the interrogation continues. The scale of torture also depends upon the severity of the charges and amount of money involved, as well as other factors such as the amount of interest in the case from politicians or other influential persons, and the identity of the accused. The methods start with beating with sticks and other objects on the joints and soles of the feet; then, walking over the body, forcing hot or cold water into the nose (depending on the season), applying chilli or itching powders, and Banshdola: rolling and pressing on the body with bamboo; then, hanging upside-down from the ceiling or a tree and beating, inserting

sharp objects under fingernails and into other sensitive parts of the body, and hanging a heavy weight from the penis and forcing to stand on a table or chair. The Third Degree Method is an all-round winner for police who use it. It brings in money and helps curry favour with senior officers, members of parliament and other important people. It reinforces the status quo, as the only truly effective means that victims have at their disposal to deal with it is to pay the police and other influential people to escape. The relatives of persons under the Third Degree can be seen rushing in and out of police remand cells and other places of detention, doing their bit for one of the most corrupt economies in the world: making mobile phone calls, negotiating with middlemen, seeking help from political leaders or high-ranking civil or police officials, and spending huge amounts which they are forced to borrow from rich persons, money lenders or micro-credit groups, or by selling valuables like gold and land on the cheap.

Many others have an indirect interest in keeping this whole performance going. Lawyers get more clients, magistrates have an endless supply of easy prey, and the government earns revenue out of every transaction. Prison staff must be bribed to take even so much as a bar of soap to a new inmate. After the accused is released, he needs medical treatment and drugs, which if they are to be of a reasonable standard must be paid for through a private clinic and pharmacy. By contrast, the victims of the Third Degree Method often become unemployed, traumatised burdens on their families. They may need treatment for years or decades to come. They remain a permanent physical reminder of the violence and injustice meted out by the state, for their own generation and the next. So the new generation learns that the best way to survive is to be cautious, less innovative and more submissive. Police officers who use the Third Degree Method run very few risks of ever being punished. Although article 35(5) of the Constitution of Bangladesh prohibits torture and the country has ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, there is no law to prohibit the method or any effective means through which to lodge a complaint, initiate an independent investigation and have a perpetrator prosecuted. The government has also said that it will apply article 14(1) of the UN convention, which stipulates the right to redress, compensation and rehabilitation for a victim, only in accordance with existing laws. As there are no existing laws for redress, compensation and rehabilitation for torture victims in Bangladesh, it is not difficult for the government to say that it has fulfilled its obligation by doing nothing.

### **Article 35(5) of the Constitution of Bangladesh**

No person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment.

### **Article 14 (1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

**By refusing to implement article 14(1) of the Convention against Torture, the government has negated its commitment to the entire treaty**

By refusing to implement article 14(1) of the Convention against Torture, the government has effectively negated its commitment to the entire treaty. It has also shown that it has no sincerity to see international standards on torture introduced in Bangladesh. Instead it has strongly endorsed impunity, and by implication, given the green light to the Third Degree. The government of Germany was among others which at the time of ratification objected to the reservation on article 14(1). It noted with concern that it “raises doubts as to the full commitment of Bangladesh to the object and purpose of the Convention”. That is diplomatic talk for, “We can see that you aren't going to do what you say you're going to do.” All other evidence points us to the same conclusion: despite its continued pretences to be a good international citizen, the government of Bangladesh has not yet lodged a report on its compliance with the treaty to the UN monitoring body. Its first report was due in 1999, the second in 2003. Somehow, non-submission of reports to UN human rights treaty bodies did not seem to count against Bangladesh when it came to being elected to the new UN Human Rights Council. Or perhaps no one noticed. Presumably the diplomats from Dhaka did not make a point of bringing it up. It follows from above that no coherent legal provisions exist to enable victims of torture and other serious abuses to make claims for compensation or rehabilitation. The state does not provide medical facilities for physical and psychological injuries suffered. Only after high-profile incidents such as the assault on sports journalists at an international cricket match, might some compensation and rehabilitation be used as a way to set aside pressure to lay legal charges against the accused. But more often than not, as in the case of the villagers in Meherpur, victims are left to obtain treatment themselves.

The Government of Bangladesh has shown no commitment to the implementation of the international instruments that it has ratified. It is playing a game of ratification in order to seem credible at first glance, without having any intention of actually living up to its commitments.

Bangladesh was elected to the newly-formed UN Human Rights Council this year, having delivered significant pledges to the international community. Not a single pledge has yet been implemented by the authorities to prove their respect for human rights and rule of law issues. Due to the continuous inaction of the government of Bangladesh and its absolute failure to address human rights issues, the international community should ensure that Bangladesh is removed from the Human Rights Council at the first possible opportunity, as its presence discredits the entire body.

## **Corruption, the god of all institutions**

In Bangladesh corruption is the one and only god of all public institutions. Each and every person has to think about how much money will be needed to get something done. Corruption starts from the top political leaders and runs right down to the most junior functionaries. The ruling party, whichever it may be, wallows in it: being in government is first and foremost a chance to make money illegally, and for one's supporters to make it too. There are few exceptions to this rule, and there is not a single institution in the country that is corruption-free. Whether recruiting, training or transferring staff; purchasing, deciding or investigating anything; collecting, registering and recording land or goods; auctioning or transporting something, it always takes a bribe. Corruption in policing, as noted, has a close relationship to the use of torture. But it is also found in every transaction involving police, in one way or another. When a person goes to a police station, the on-duty officer or others there will assess the complaint not on its merits but rather according to the identities of the two parties:

**1. What is the identity of the complainant?** Does she belong to a political party? If so, is it the ruling party or the opposition party, or a minor party? Is her family well-known? Do they have money? Does she have relatives in the government bureaucracy or police department?

**2. What is the identity of the accused?** Does he belong to a political party? If so, is it the ruling party or the opposition party, or a minor party? Is his family well-known? Do they have money? Is he a police officer or government officer? Does he have relatives in the government bureaucracy or police department? How do the answers to all these questions compare to those of the complainant? If the complainant is a poor and illiterate person, then she will be refused, or asked to pay some money for the expenditure of the policemen, and given a false assurance that someone will solve the problem. She will be advised not to file a case against the alleged perpetrators. If the complainant belongs to a rural middle class family, then her case can be filed following the intervention of some local influential persons such as the Union Council chairperson, a local political party leader or any representative of a powerful family in the locality, together with a sum of money. If the complainant belongs to the ruling political party, then the case will be recorded without any question provided that the accused is not also someone equally or more powerful and that there is no evidence of any request coming from someone more powerful not to take the complaint. Of course, some cigarettes and money will also still change hands. Unquestionably, complainants belonging to the ruling party or moneyed groups of people are warmly welcomed and entertained in police stations, their complaints recorded with assurances that the alleged perpetrators along with all their surviving family members will be thrown into prison in the shortest possible time. If the complaint is against any police officer, then the complainant, whatever is his qualification or identity, shall be refused, threatened, intimidated and ousted from the police station.

## **The tiger's claws**

In 2004, the government was compelled to pass the “Anti-Corruption Commission Act-2004” as the result of international and local pressure. At this point, Bangladesh was ranked as being among the most corrupt nations in the world, according to Transparency International. In February 2005 the former Bureau of Anti-Corruption was turned into an “independent” Anti-Corruption Commission, after repeated pressure by the international community and donors to Bangladesh. The commission is to date an irrelevance. This is partly as a result of legal and administrative hiccups in its formation and also the persistent lack of necessary rules and regulations to guide its functioning. The commission is unstructured, lacking in staff and resources, and still tied to the government through budgetary and recruiting constraints.

### **A malfunctioning policing system is not merely a defect of society; it is a threat to society**

Today the ordinary person in Bangladesh will try to avoid going to a police station even if his house is robbed. This is because the cost of the robbery is likely to be less than the cost of trying to get the case solved. When asked, the person may repeat a popular expression: “A tiger's claws inflict 18 injuries; a policeman's hands inflict 36.” A malfunctioning policing system is not merely a defect of society; it is a threat to society. As in Bangladesh today, where the police are out of control, it encourages crime. As in Bangladesh today, where they lack both competence and interest in criminal investigations, it destroys people's faith in the prospects for redress. As in Bangladesh today, where the police are corrupted from top to bottom, bridges between organised crime and the state are firmly secured. As in Bangladesh today, where they are thoroughly politicised, it allows for easy violent revenge against persons with opposing views. Where policing is such, to talk of human rights is meaningless.

### **Laws without order & courts of no relief in Bangladesh**

While the whole of Bangladesh is struggling for some justice, the country's laws and judiciary are compromised and incapable of meeting the people's needs. At every point there are contradictions and inconsistencies. Meanwhile, the police and other security forces kill and torture with impunity, and there is no relief in sight for the victims or their families.

### **Laws are designed to protect officials, not citizens**

Section 46 of the Constitution of Bangladesh empowers the government to extend immunity from prosecution to any state officer on any grounds: Notwithstanding anything in the foregoing provisions of this part, Parliament may by the law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or

the maintenance or restoration or order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area), to make the above-mentioned law. Although this provision was originally intended with reference to the 1971 war for independence from Pakistan, it is now being used to protect police and joint operations units from prosecution for human rights abuses. Notably, the Joint Drive Indemnity Ordinance 2003 removed from the hands of victims and their families the right to take legal action against soldiers, police and other security forces responsible for the gross abuses that occurred from 16 October 2002 to 9 January 2003 under Operation Clean Heart (see further: Nick Cheesman, "Fighting lawlessness with lawlessness [or] the rise & rise of the Rapid Action Battalion", *article 2*, vol. 5, no. 4, August 2006). But aside from the passing of special laws under section 46, there are barriers built into ordinary criminal procedure that prevent people in Bangladesh from making a complaint against an official. Sections 132 and 197 of the Code of Criminal Procedure 1898 are those that prove the best defence.

### **Under section 132, no criminal complaint can be lodged against any official without prior sanction from the government**

Under section 132, no criminal complaint can be lodged against any official without prior sanction from the government. This means that complainants must first lodge a case with a magistrate, argue the case and have it investigated simply in order to get it opened. Furthermore, an accused person who is found to have been acting "on simple faith" and following orders from a superior shall never be charged and his actions shall never be considered a crime. These provisions appear to have been incorporated into Bengal's criminal procedure by the British colonial regime to protect its personnel at all costs from being pursued into a court by a "native" whom they had wronged. It is also an article that seems to have much more in keeping with antiquated French administrative regulations than with the common law tradition. Even as Bangladesh's criminal procedure was being established, the eminent British legal scholar A V Dicey wrote of the "essential opposition" between the idea that a government official should have special protection from a court on the grounds that they were merely carrying out an order and the basic principles for the rule of law and justice in England: The personal immunities of officials who take part... in any breach of law, though consistent even with the modern *droit administratif* of France are inconsistent with the ideas which underlie the common law of England. (A V Dicey, *Introduction to the study of the law of the constitution*, 8th ed., Liberty Fund, Indianapolis, 1982 [1915], p. 267)

The government of Bangladesh has never sought to make changes that would overcome this inconsistency. On the contrary, it has exploited the section to an extent that perhaps even the British regime would never have imagined. And although section 132 runs contrary to decades of development in international jurisprudence aimed at establishing that to claim to have simply been following orders is no excuse from responsibility, still in Bangladesh it lives on. The courageous attempts of Shahin Sultana Santa and her husband to overcome these massive obstacles are illustrative. Santa was assaulted in front of television cameras and mercilessly tortured by the police in Dhaka during March 2006:



she was pregnant at the time, but lost her child shortly afterwards. In any sane and properly functioning society, such an incident recorded for the whole world to see would lead to swift and severe punishment of the perpetrators, and probably highlevel inquiries to determine what went wrong and make legal and structural changes to prevent similar atrocities in the future. But the police, judiciary and administration of Bangladesh are neither sane nor properly functioning.

What happened when Santa went to lodge a complaint? The Mohammadpur police refused to record it: not once, but repeatedly. Her husband, a lawyer, lodged two cases directly in the court. One of the cases was investigated by a judicial probe commission, on an order from the judge. The probe did not finish the job. The judge then ordered a supplementary report. The report concluded that “the victim was excessively tortured unnecessarily, which is a punishable crime under the Penal Code, if it is sanctioned by the authority according to the section 132 of the Code of Criminal Procedure”. So far so good, but what happened? The judge dismissed the case on a technicality: that the probe had not established the intent of the police as required under the Women and Children Repression Prevention (Special Provision) (Amended) Act 2003. Never mind that the judicial investigator had concluded that there was a case to be answered under the Penal Code, the whole thing was thrown out even before anyone was taken to trial. Santa and her husband are now pinning their hopes on the Supreme Court. But few others would have the know-how and determination to carry on if in their shoes.

Section 197 for its part iterates that a court must obtain government approval to hear a case against one of its officers, and then, that even if it is approved, the government has complete control over how the case is heard: Section 197- (1) When any person who is a Judge within the meaning of section 19 of the [Penal Code], or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of the [Government], is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the [previous sanction of the Government]- (2) [The Government] may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judge, [Magistrate] or public servant is to be conducted, and may specify the Court before which the trial is to be held. Under these circumstances it is no exaggeration to say that the notion of redress for rights abuses by state agents is nonexistent in Bangladesh. Where politicians use the police, magistrates and prosecutors for personal gain, what approval can be expected from them when an ordinary person alleges torture, death by “crossfire” or some other terrible wrong committed by police or other security officers? All claims by the government that there is justice and enjoyment of human rights in Bangladesh are made farcical when viewed through the lens of these laws.

### **Who’s afraid of a judicial probe?**

A judicial probe is an investigative inquiry into an active case by a magistrate under the Code of Criminal Procedure. According to its section 202, it is possible for (1) Any

Magistrate, on receipt of a complaint of any offence of which he is authorized to take cognizance, or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, of the purpose of ascertaining the truth or falsehood of the complaint; [“Provide that, save where the complaint has been made by a court, no such direction shall be made unless the provisions of section 200 have been complied with.”]

In Santa’s case, a judicial probe found that she had been tortured and prosecutions could follow under the Penal Code, but still the judge found a way to enforce the wishes of the police rather than due process. This is the usual fate of a judicial probe in a human rights case. Take the brutal assault on journalists on 16 March 2006 in the Chittagong stadium at the start of a test cricket match between Bangladesh and Australia. This police attack also was televised and could not be disputed. Under heavy pressure, a judicial probe commission was set up under the District and Session Judge of Comilla. The State Minister of Home Affairs, Md. Lutfuzzaman Babar, promised that the probe report would be published in the media the day after it was submitted to his ministry and the alleged perpetrators would be prosecuted in accordance with its findings. The minister subsequently forgot all about these promises. The report was never published and nor have any perpetrators ever been punished, instead receiving only departmental disciplinary action.

Ultimately, most probe commission reports are useless documents that anyhow are ignored or manipulated by the authorities to reach whatever conclusion they would have come to in the first place: i.e. one that will ensure that the perpetrators escape punishment. Sometimes the failure is due in part to the work of the person heading the probe, who may deliberately distort and delay their findings to protect the accused, or who may simply have a lack of genuine commitment and interest in the needs of the victim. In other instances, it is the efforts of other authorities to undermine the probe that are its downfall. Many times it is due to both. In either case, most reports end up gathering dust on a shelf or in a wastepaper basket. In fact, whereas a judicial probe is intended to reveal truths that may cause the case to progress, it can also be used to dispatch a case without giving the complainant any chance to speak. This is because under section 202(2B) if the police are entrusted with the probe, “When the police submit the final report, the magistrate shall be competent to accept such report and discharge the accused.” This is what happened in the case of Abdur Razzak, who died in Bogra district jail on 27 June 2005 after illness and an assault which was allegedly on the orders of the jail authorities.

When Razzak’s mother lodged a complaint in court about the death of her son, the magistrate instructed the officer in charge of the local station, Police Inspector Mansur Ali Mondol, to investigate the case. Mondol lodged a final report with the court without investigating and recording the complaint as required. The case was closed without

Razzak's mother being informed. She was thereafter forced to open another case against the alleged perpetrators. Other human rights cases where judicial reports have come to little or naught include the assault of Rashida Khatun; the mass killings and assaults in Nawabganj, and the shooting deaths of two men and a boy and injury of at least 16 others on the orders of a magistrate in Kustia.

### **No rule of law + non-separation of powers = No independent judiciary**

In his 2004 report, the UN Special Rapporteur on the independence of judges and lawyers described how the rule of law and separation of powers are the pillars of the independence of judiciary: The rule of law and separation of powers not only constitute the pillars of the system of democracy but also open the way to an administration of justice that provides guarantees of independence, impartiality and transparency. These guarantees are... universal in scope... (E/CN.4/2004/60, para. 28) Although section 22 of the Constitution of Bangladesh directs the government to ensure an independent judiciary, in fact the entire lower judiciary in Bangladesh moves on strings extending from government departments. The components of the special rapporteur's equation—rule of law, separation of powers, independence of judiciary and for that matter, democracy—are all missing from Bangladesh today.

To understand why, it is necessary to look in more detail at the structure, work and characteristics of its judges. The judiciary in Bangladesh has three major parts, starting with magistrate's courts and then judge's courts in each of the country's 64 districts, and at its peak, the Supreme Court, which comprises of a High Court Division and Appellate Division. To open a case, it is necessary to go through a magistrate. Here a complainant will find the first problems, particularly if the complaint is against a state official. Magistrates are not independent of the government. In fact, they are petty administrators-cum-judges. All magistrates throughout the country, and at the four metropolitan cities, where they work in Chief Metropolitan Magistrate's Courts, are answerable to the district deputy commissioner. This person is the chief executive officer of the area. The deputy commissioner will also hold the position of district magistrate, who is in turn the boss of the additional district magistrate. The latter handles the assigning of duties to the sitting magistrates throughout the jurisdiction in consultation with the district magistrate/deputy commissioner: these may include revenue collection and other administrative functions.

So magistrates work for not only the Ministry of Home Affairs but also the Ministry of Establishment and the Ministry of Finance. They can also at any time be assigned duties from other ministries. A "magistrate" may at 9am start work as a revenue collector, after 11 am go to sit as a judge in court and conduct trials and after lunch be engaged in some other government business. Needless to say, the first priority of these so-called magistrates is to implement government orders, rather than adhere to any notion of judicial integrity. They also are actively involved in investigations of cases as well as arriving at verdicts: an executive magistrate and judicial magistrate rolled into one, but less efficient than two separate persons.

Judge's courts are the second line of defence for the state and its functionaries. Each is headed by a district and session judge, accompanied by an additional district and session judge and a number of sub judges, senior assistant judges and assistant judges. Perhaps the titles are intended to be ironic, or to convince the public that through reiteration of the word "judge", one can be found somewhere. In fact, none can be properly called a judge in the sense that the word is understood in developed jurisdictions or international law. Instead, these are just a higher level of state agents. The Ministry of Law, Justice & Parliamentary Affairs oversees recruitment, posting and promotion.

Although the "judges" may not have to run around collecting taxes and looking after government property like magistrates, still they are subject to the dictates of the executive, not any judicial authority. It is obvious to any intelligent onlooker that when judges are under executive control, the government can interfere in undertrial cases whenever it feels like it. And it does. Much of the time this is done through various indirect means. But sometimes also it is direct, particularly where a politician from the ruling party needs to be rescued from prosecution. The case against Bangladesh National Party (BNP) leader Mirza Khokon in connection with a series of bomb blasts on 10 November 1998 is a good example. Khokon, the brother of BNP Joint Secretary General Mirza Abbas (later a government minister) was leading an opposition rally through the Khilgaon area of Dhaka when bombs went off in the vicinity, killing one person. Participants in the rally were blamed.

On 21 September 2000 six persons, including Khokon, were charged. After the BNP took power, the case was kept pending. Then, Sheikh Momen, a Senior Assistant Secretary of the Ministry of Home Affairs wrote to the Additional District Magistrate of Dhaka on 19 June 2006 "recommending" that the court drop Khokon from the charges. On July 3, the magistrate asked the prosecutor to comply and, not surprisingly, on July 17 an application was lodged to drop Khokon's name from the case. Finally, on July 25 the Metropolitan Session Judge's Court did as instructed. The Ministry of Home Affairs said that the murder case had been politically-motivated and that by removing Khokon from the charge sheet they were saving an "innocent" man. Whether or not Khokon had anything to do with the blasts will never be known as in either case there is no means under the present judicial system to try such a person without political interference one way or the other.

The Supreme Court of Bangladesh, including both of its divisions, is the only genuinely independent court in the country. In fact, in contrast to other parts of Bangladesh's odd judiciary, it has up to the present obtained public respect for its uprightness and non-partisan decisions. Among its historic verdicts in recent times was its order to the government to cleave off the two lower tiers from the various ministries to which they are answerable (in *State vs. Mr. Mazdar Hossain*, 2 December 1999). That order included 12 directives to the government, including to establish a Judicial Service Commission for recruitment of judges of the subordinate courts and to ensure financial upkeep of the courts. The problem is that as the one island of relative coherence and consistency in a sea of corruption and maladministration, the Supreme Court judges have difficulty enforcing these directives. Even the staff members of the Supreme Court offices, such as

bench clerks, are known to compel litigants to pay bribes every step of the way, and offer extra services, such as pushing cases up the queue, for more money.

### **Hollow commitments to an independent judiciary**

Successive governments have for the last 15 years promised to separate the judiciary from the executive. In 1991, when the BNP won the election after nine years of military rule, this was among its key pledges. It was such a fine-sounding pledge that after five years of having done nothing about it, not only the BNP but all of the major political parties made the same commitment before the general election in 1996. The new administration, led by the Awami League, took a leaf from the BNP's book and also let five years pass without any evidence that it could recall having made such a promise. In 2001 a caretaker government led by a retired chief justice of the Supreme Court gave signs for hope. Freed from the usual party political shackles, it began steps to make good on the government's now legal obligations for an independent judiciary (keep in mind that the Supreme Court in 1999 had ordered that the earlier election promises be made reality). But the former chief justice was advised on the phone by the subsequent Prime Minister, Begum Khaleda Zia, to leave the job for her "elected people's government". As her BNP-led four party alliance had put the separation of the judiciary at the forefront of its pledges, the caretaker government took Khaleda's word for it, and left the job to the "people's representatives". The opportunity was lost. Nearly five years have passed and the government has again, predictably, done nothing. Meanwhile, the government has kept playing the Supreme Court for time. After its order to separate the judiciary from executive branch, the government began applying for extensions.

Like a schoolboy coming to class with one implausible excuse after the next about why he could not do his homework, it applied on 23 occasions for more time, saying that framing new laws and amending old ones is not easy. For instance, it pointed out that the antique laws and procedures governing the magistrate's courts, notably the Code of Criminal Procedure, need a bit of work to bring them into the 21st century. It has since managed to frame some basic rules and regulations, but for the most part has just wasted time and allowed the bureaucracy to move at snail-pace as usual. Finally, the Supreme Court lost its patience. On 5 January 2006 it rejected the government's latest request for more time, and said that it would not entertain any more. The government had taken almost five years to formulate the Judicial Commission and the Pay Commission, while the Rules of Bangladesh Judicial Service (Formulation, Recruitment, Transfer, Suspension, Termination and Removal) 2006 and the Rules of Bangladesh Judicial Service (Posting, Leave, Grants, Discipline and other conditions of service etc.) 2006 have been prepared after the imposing of the Rules of the Judicial Service Commission by the president. A contempt of court case has now been opened against the government over its failure to implement the 1999 order. How long that takes, remains to be seen. Meanwhile, people in Bangladesh are left to suffer injustice heaped on injustice by their ridiculous lower judiciary.

## **The politics of prosecutors**

As if the deliberate non-independence of judges alone was not enough of a problem, the government of Bangladesh also plays havoc with the way that cases are prosecuted. Public prosecutors are political party playthings. Each time a new government comes to power—that is, each time power rotates from one of the two main parties to the other—all of the public prosecutors and assistant public prosecutors in the country are replaced, from attorney general down. They carry on until the next power flipflop, and again the other side puts its own people back in. Prosecutors are also thrown out during a government's tenure if they dissatisfy the whims of a local member of parliament, a minister, or some other political heavy. Their appointment and job security is not determined by their ability or professionalism but by the extent to which they have served the financial and political interests of the appointing party, its leaders and followers.

The obvious consequence of this mad system of appointment and promotion is that there is no building of a functioning institution and tradition of good prosecutors. They do not accumulate experience or build an institutional legacy to pass from generation to generation as they are in and out the door every few years. The skills needed for proper prosecuting do not develop, and instead political bias is the sole determining factor. Prosecutors simply make the most of the time that they have in their positions to benefit themselves and their patrons. The prosecuting and investigating branches also are completely detached. If the police do not investigate a crime, the prosecutor has no responsibility. Most of the time public prosecutors accept charge sheets prepared by police officers solely because of bribes or other external pressure. They will only challenge the police when there is a direct conflict between the police and their political masters. Under any circumstances, in most instances the police will also simply choose to go along with whatever the political party in power at the time wants and expects of them. As long as they can keep making money and getting away with whatever else they are up to, they adopt a mercenary approach.

The March 1999 bomb blasts case is a good example of all these problems with prosecutors and politics in court cases. Around midnight on March 6 that year, two explosions killed ten persons and injured around a hundred attending a cultural programme in Jessore. More than ten of the wounded suffered permanent injuries. The same night Sub Inspector Abdul Aziz lodged two cases with the district police station. Assistant Superintendent of Police Dulal Uddin Akand in the Criminal Investigation Department was assigned to investigate. Finally, in December ASP Akand laid charges against 24 persons, including a top leader of the BNP (later a government minister), Tarikul Islam. Other persons connected to the BNP, which was then in opposition, were also named.

In response, Islam submitted a petition to the court seeking to get his name removed from the charge sheet, which was finally done by the Appellate Division of the Supreme Court on 12 August 2003. Only then could the trial proceed. On 28 June 2006, with the BNP in power, the Special Tribunal of the Session Judge of Jessore released all of the alleged

perpetrators unconditionally. Judge Abul Hossain Bapari said that the prosecution was completely “evidence-free” and proposed that “the investigating officer should be prosecuted for preparing a false charge sheet”, the accuracy of which the prosecutor had failed to verify. He gave as an example that on 19 January 2006, ASP Akand admitted in court to having forced five of the accused and seven witnesses to sign blank papers which were used to construct fake testimonies. None of those persons were ever produced before magistrates. The officer also admitted that he had intended to use the case to frame Tarikul Islam and other BNP members.

After the verdict, a discouraged victim who saw that among the group there were persons who got off because the police messed up the case by dragging in political opponents of the government was reported as saying that, “I have lost one of my legs, ten people died and more than 100 were injured like me. Now the killers are doing victory lap around the town. What have we got out of the trial?” This is the question that each and every helpless person asks as they watch killers, torturers and rapists leaving the court, or cases destroyed by political interference, while the jails are packed to the ceiling with innocents. Although the judge in this case sanctioned the investigating police for wrongdoing, there was nothing to be said of the prosecutor. The prosecutor has no obligation to check facts and allegations before taking a case to court. Even if a prosecutor goes in “evidence-free”, it is other people who have the problems. The prosecutor feels answerable only to his party bosses. He does not share blame when truth is distorted. Nor do politicians who get targeted by such practices take initiatives to change the system: after all, when they are in power, they hope to do the same to their rivals.

### **An independent judiciary remains a dream in Bangladesh**

Another political government has finished its five-year tenure with fake promises of making the judiciary independent from executive control. Moreover, the outgoing four party alliance government used its power to release party activists and the relatives of party leaders. In the cases of the ruling party political leaders and their relatives, the government used Home Ministry officials to request the concerned courts that are directly controlled by the ministry to drop the names of a certain number of accused persons from trials, which was executed accordingly by the respective courts. The Public Prosecutors (PP), who were in almost all cases politically recruited by the Ministry of Law, Justice and Parliamentary Affairs, had to play dubious roles regarding the withdrawal of cases following the ministry’s direction.

The Home Ministry has no hesitation in deciding itself qualified to adjudicate these cases on behalf of the courts, which are anyhow compliant with its wishes and not independent. In this manner, justice is mocked and political expediency reigns supreme.

The manner in which the Home Ministry chooses to withdraw cases against its people suggests that either it itself does not have any faith in the judicial system, or it is harbouring killers. If it did, and the accused in these cases were truly innocent, then

surely it could let a trial run its course and see the accused redeemed before the law and the country through full proceedings. Instead, by acquitting them itself it is sending a message to the country that the courts cannot be trusted to make a reliable decision. The only other conclusion that can be reached about this behaviour is that the accused persons in these cases were in fact guilty and the purpose of withdrawing charges against them was to free them from legitimate punishment. The message sent in this case is that anyone with ruling party connections is guaranteed impunity. In either case, what expectations can anyone else have whose interests come before a judge?

The same concerns arise with regards to the police and public prosecutors. All of the accused were charged following criminal investigations. Were the police investigators also politically motivated? Can their investigations be trusted? If the Home Ministry is so confident that the charges were brought without any basis, what action will now be taken regarding those who carried out the investigations? And what can be said of the public prosecution each time a case such as this is withdrawn, other than that it is an open humiliation of its role and personnel? Again, the ordinary person will be forgiven for lacking confidence in these institutions when they are rubbished by the government itself.

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

The notion of independent courts has been all but lost to the people of Bangladesh. There is in its stead the notion of courts as an asset of the state, and specifically, whichever party is in power at the time. Faith in the system will only be restored over time if a concerted effort is made to separate the courts from the Home Ministry, and so, from the clutches of the political parties.

The victims of the crimes committed by the persons having political identities of ruling party lost all the hopes to get justice any more due the said trial by the Home Ministry instead of the courts of law.

Before handing over the power the outgoing Law Minister, Barrister Moudud Ahmed, claimed that because of no more sessions of the parliament his government failed to complete the separation of judiciary that require an amendment of the Code of Criminal Procedure in the parliament. The government passed five years in the office promising the separation of the judiciary from the executive did not consider and respect its own parliament, its laws and its country. If the administration had five years in which to get "only an amendment" to the Criminal Procedure Code through parliament towards fundamental changes in the management of courts in Bangladesh that could bring them closer to compliance with international law, why has it failed to do so? The minister



offered the pretext that parliament was out of session. But if the matter were important enough, it could be a simple matter to call another session before parliament was dissolved.

The government also seemed to have forgotten a ruling of the Supreme Court on this matter. In *Secretary, Finance Ministry vs. Masdar Hossain*, the Supreme Court on 2 December 1999 ordered the government to separate the lower judiciary from the executive in accordance with 12 points. Among those, point 11 set aside an earlier ruling that it was not necessary to amend the constitution in order to ensure fulfil this obligation. "If the parliament so wishes, it can amend the constitution to make the separation more meaningful, pronounced, effective and complete," the court ruled. So why has the parliament not so wished? Have its members, together with the minister, suffered collective amnesia of this unprecedented ruling? And why have they spent five years seeking extensions of time, rather than comply with the court's instructions?

### **The only sure things in Bangladesh: Death and Impunity**

Impunity and death are the only sure things in Bangladesh today. Both come in many forms, but whereas one is an inevitable part of the natural order, the other is part of the country's unnatural and degenerate political, legal and administrative goings-on. The unfortunate thing about impunity is, of course, that it just keeps creating more impunity. A person who assaults another on behalf of a political party and gets its protection when it is in office becomes more committed to keeping that party in power at whatever cost.

A police officer who kills for a superior and is protected by him afterwards has entered into an extralegal contract that will be far harder to break than anything the country's pathetic legal system can enforce, if it ever had the inclination. A politician who steals government money and is protected by his appointee in the court will do her best to see that judge brought up through the ranks. In fact, everything is about the movement of officials from this post to that, through chains of command from political patrons: an entirely different structure in reality from the charts drawn up on paper for the sake of bureaucracy and to be reviewed by international organisations and donors.

This is the legacy that is being left to the children of Bangladesh. The legacy of scratching backs, of give and take. It is a legacy that causes enormous frustration to the millions who suffer from impunity, rather than benefit from it. These people have lost trust almost completely in those claiming themselves to be police, judges, prosecutors and administrators. As a result, they do not go to seek help from the police, or lodge a case in a court. If worse comes to worse, they find their own way of dealing with problems, or withdraw completely. The entire nation is filled with mistrust, fear and hatred; democracy, human rights and the rule of law are figments of the imagination in today's Bangladesh.

## **Fighting lawlessness with lawlessness (or) the rise & rise of the Rapid Action Battalion**

There is an armed group in Bangladesh today which is beyond the reach of the law. It moves by night and makes its own rules. It kills and threatens with impunity. It robs and steals. It is responsible for escalating public anxiety about the level of crime and terrorism. It is the Rapid Action Battalion, or RAB.

The Rapid Action Battalion, which was inaugurated on 26 March 2004 and began its operations on June 21 of the same year, is depicted by the government of Bangladesh as an elite joint-operations crime-fighting force. In fact, RAB personnel operate as hired guns for whichever political party happens to have its hands on the reins of power. Through systemic violence and trademark “crossfire” killings, their great success has been the spreading of more panic and lawlessness throughout Bangladesh: the very things needed to justify the RAB’s continued existence. Where did the RAB come from, how does it get away with what it does, where is it going, and why?

## **The 86-Day Tragedy a.k.a. Operation Clean Heart**

In late 2002 the government of Bangladesh issued an executive order that launched a drive to arrest “wanted criminals” and recover “illegal arms”. The order was aimed at curtailing a rapid rise in cases of murder, extortion, kidnapping, and crimes against women by warring gangs that were allegedly linked to members of both the major political parties. Codenamed Operation Clean Heart, it comprised of army, police, village defence force, and border security personnel. It lasted for 86 days, from 16 October 2002 to 9 January 2003. During this time there were 58 deaths in custody, all “heart attacks” according to the concerned authorities. Over an estimated 11,000 people were arrested, held and brutalised at military camps. At least 8000 were persons against whom no case had ever been lodged. A few “wanted criminals” were captured, but most managed to hide elsewhere until the whole thing blew over. Undeterred, the government cooked up some statistics upon which to claim success. Countless ordinary citizens, meanwhile, had been traumatised and panicked out of their wits. Little wonder that at least a few of the heart attacks were genuine: during Clean Heart, the sound of a military vehicle or boots approaching your front door was enough for a few persons to literally die of fear. And so Clean Heart became synonymous with Heart Attack. Some victims sought to lodge criminal complaints. The government, fearing that criminal complaints could multiply, threw a blanket of impunity over the 50,000 or so personnel involved in the operation. On 24 February 2003 it passed an indemnity law in accordance with section 46 of the constitution, which denied the possibility of justice for anyone whose rights had been violated during the period, including those killed (see further: Md. Ashrafuzzaman, “Laws without order & courts of no relief in Bangladesh”, *article 2*, August 2006, vol. 5, no. 4). Two independent UN human rights experts communicated their “serious concern” over the Joint Drive Indemnity Ordinance 2003.

On January 21 the Special Rapporteurs on torture and extrajudicial executions together called for the government to abide by international standards and “ensure that all allegations of torture and death in custody are promptly, independently and thoroughly investigated”. The indemnity law ensured that this did not happen. It instead gave immunity from prosecution to all concerned personnel and officials for involvement in “any casualty, damage to life and property, violation of rights, physical or mental damage” throughout the 86-Day Tragedy. Although it was challenged in court, no state officer responsible for deaths, serious injuries or other offences during those 86 days is known to have ever been punished in accordance with the criminal law. The indemnity law also flies in the face of a global trend away from such enactments. In his 2005 report, the UN Special Rapporteur on the independence of judges and lawyers observed that “The granting of immunity by means of amnesty laws is being rejected by national and regional courts... Argentina, Chile and Poland have repealed the amnesty laws adopted by the authoritarian regimes or at the time of transition which infringed their international obligations... Several recent decisions have confirmed the incompatibility of amnesty measures with States’ obligation to punish serious crimes covered by international law...”

The appeals chamber of the Special Court for Sierra Leone recently declared it to be a well-established rule of international law that a Government may not grant amnesty for serious crimes under international law. (E/CN.4/2005/60, para. 48) Never let it be said that the government of Bangladesh did not do its best to run contrary to international trends in human rights (despite its best efforts to appear to be doing the opposite).

### **RAB, from heart attacks to confused minds**

Operation Clean Heart and the Joint Drive Indemnity Ordinance were the chronological and ideological mother and father of the Rapid Action Battalion. The government explained—in the broadest sense of the word—that there was a “felt necessity” due to the “unstable law and order situation” in the country to establish a permanent joint anti-crime force along the lines of that used during the 86-Day Tragedy. At first, policymakers dreamed of a Rapid Action Team, a “RAT”, but somebody woke up in time and it was renamed RAB. The RAB was legalised through the Armed Police Battalions (Amendment) Act 2003, which has its origins in the Armed Police Battalions Ordinance 1979. The amended law gives the RAB wide responsibilities, including “intelligence in respect of crime and criminal activities” and “investigation of any offence on the direction of the Government”. And then there is section 6B (1): “The Government may, at any time, direct the Rapid Action Battalion to investigate any offence”. Any offence, any time: this is what justifies the description of the RAB as hired guns. Translated, section 6B (1) reads as follows: “The Government may, on any whim, use the Rapid Action Battalion to harass and otherwise maltreat any person without cause for its own purposes.”

The government of Bangladesh has told the UN Special Rapporteur on extrajudicial executions that the RAB is “guided strictly by the Code of Criminal Procedure” (E/CN.4/2004/7/ Add.1, para. 26). This is in reference to the latter subsections of section

6 in the 2003 act. In reality, nothing could be further from the truth. Here is one small example. According to section 103 of the code, police who search a certain premises must first obtain two or more “respectable inhabitants” of the locality to witness the search and countersign any record of seized items. When RAB personnel take persons in their custody to search and retrieve weapons or other illegal objects at 3am they completely ignore this obligation. It is under these circumstances that RAB personnel conveniently get into “crossfire” and the person in their custody dies. Perhaps the RAB members are not complying with the code out of concern for the safety of the respectable inhabitants.

The entire reference to the Code of Criminal Procedure is spurious anyhow, for reason that criminal procedure in Bangladesh is both devised and carried out with the purpose of blocking the possibility of any complaint against state officers, including through provisions of the code itself (see Ashrafuzzaman, “Laws without order”.) The mingling of both personnel and law in the RAB has intentionally caused confusion. The majority of RAB personnel are soldiers. Out of the nine of its 12 regional battalion commanders listed on its website at time of writing, eight are army lieutenant colonels. Only one is a police officer. Informed observers in Bangladesh tell that the overwhelming majority of the RAB command is from the military. In this, RAB is a replica of the joint-force used for the 86-Day Tragedy. However, RAB is part of the Bangladesh Police and technically under command of the police chief. Police personnel are obligated to follow the Police Regulation of Bengal and Police Act 1861. Yet the 2003 amended act makes no mention about whose guidelines it is meant to follow, and at the same time gives authority for the making of orders to the Ministry of Home Affairs rather than the chief of police.

The multiplicity of persons apparently or actually in charge of the RAB, and duplication of command hierarchies, frees the RAB from any particular responsibility to anyone. Whereas the control of behaviour in law enforcement depends upon a sequence of functioning posts and departments, if these are jumbled up, maintenance of internal order is lost. All that is left is a RAB on the loose. The Policy to Confuse through the RAB can be understood by looking at the procedure for conducting and forwarding the results of a criminal investigation. Its 12 separate battalions are spread out across the country in perceived high-crime areas, and under them there are smaller units that are designated to various localities. They work independently of the police. Meanwhile, the police have a headquarters in each of the country’s 64 districts, a number of stations under each headquarters, and a number of outposts again under each of those. Officers ranked sub inspector and above are entitled to conduct criminal investigations, unless directed otherwise by a court or the Ministry of Home Affairs. The investigation report is submitted to the officer in charge of the police station, who submits it to the district superintendent of police, who bumps it on to a court. But instead of taking responsibility for submitting its own reports to the courts through an established procedure, the RAB palms its work off to the regular police, to whom it owes nothing, who then have to do the job on its behalf. Section 6C (2) of the 2003 amended act states that a RAB investigator “shall file his report to the OC of the concerned police station; the OC shall, within 48 hours of receipt of such report, forward the same... to the competent court or tribunal”.

Any court receiving a report on a RAB investigation is getting it by way of a proxy. And that proxy has no responsibility to ensure the contents of the report are accurate or in any way reliable, or to seek clarifications where necessary and procedurally allowable. Another important aspect of the RAB is that its personnel are not permanently appointed. Rather they are “seconded” to the battalion, and after a period return to their original posts in the armed forces, border security force, police and the village defence units, often with promotions. So the lessons learned from RAB—i.e. that abducting, killing and robbing are permissible—get carried back into other parts of the security forces. The current police chief, for instance, is a RAB alumnus. This may be one of the reasons that since the battalion’s inception the number of murders and other gross abuses committed by the regular police also appears to have increased: recent documentation by the Bangladesh Institute of Human Rights puts the (much larger) police force ahead in the killing contest for the first half of 2006, the police credited with an innings of 83 killings for 58 incidents, while the RAB had 78 for 73.

### **“Crossfire”, the slogan, the storyline & the take**

Wherever extrajudicial killing is made policy, a routine explanation is needed for each body sent to the morgue. For instance, in three months of 2003 more than 2500 alleged drug traffickers were shot dead in Thailand during the first “war on drugs” launched by an executive order of the prime minister there. An unknown number were killed by the police and their accomplices: as almost no investigations have ever been conducted into the killings, it is also unlikely that it will ever be known. The number of victims who were actually involved in the drug trade as against innocent victims also is unknown. By contrast, what is well-known are the prefabricated stories told, with minor variations, to explain the every new body. First there was the slogan, for advertising purposes: “killed to cut the link”. The second feature, the storyline, kept the audience interested: the person’s name was on the list of suspects; he was called to the police station for inquiries; he confessed to some wrongdoing; he was released after signing a statement; his drug-trafficking pals shot him on his way home/at home/a few days later “to cut the link”; they were not identified.

Thirdly, there was the take, the stuff brought back in “evidence”: those signed “confessions”, and lots of little blue plastic bags neatly packed with an identical number of amphetamine pills in the back pockets of victims’ pants. Then again, according to independent forensic scientists, it was a small number of little blue plastic bags being neatly reused after the victims were already shot dead. No matter, they were dead, the prime minister was happy. A few lawyers or human rights commissioners may stir up some trouble. No one else would care, the reasoning went. Now let’s look at Bangladesh. By the RAB’s own tally, 283 persons have “died during exchange of fire”/ “in crossfire”/ “in the line of fire” since it was established.

As in Thailand, the actual number remains unknown, although independent fact-finders and journalists estimate it to be several times higher. Again, what is well-known is how it

works, thanks to the storyline: the person was arrested as a suspected violent criminal/terrorist/whatever; he confessed to having hidden some weapons outside of town; he was taken there (oddly, sometime between midnight and dawn) to recover the weapons; somehow his criminal buddies found out and ambushed; there was a crossfire/exchange of fire; he tried to escape; he died in crossfire/ during exchange of fire/in the line of fire; the assailants got away; there were five to ten serious criminal cases against him. Part three, the take: an old pistol or two, a few rounds of ammunition “recovered” from the site of the killing. Sometimes some other stuff. RAB battalions list among their “successes” the recovery of toy revolvers; Viagra; fake dishwashing items, and black stone statues.

Thanks to RAB Bangladesh has been freed from the scourge of toy revolvers, perhaps being wielded by stone statues on Viagra. Two people who were recently taken to see how this works in practice were Harun-ur-Rashid and Aslam Hossein. Like many of the victims in Thailand, they had earlier had criminal records but had come clean under a government programme. Like many in Thailand, they had had no further criminal records since that time, and had gone into legitimate business. But as in Thailand, their old files could be pulled out whenever a few of the usual suspects were needed. In Rashid and Hossein’s case, they had reportedly been pressured by politicians and old contacts to get back into crime, but had resisted and moved to another part of the country to avoid harassment. RAB found them anyway, and on 14 July 2006 sent them back to their hometown, Jessore. In the early hours of July 16 RAB-6 personnel took them in two different directions and both died in separate and yet virtually identical “crossfire” scenarios. The RAB lodged cases against both to the effect that they had murdered many persons each, an allegation contested by their families and doubted by villagers in the area.

Then there was Mohammad Masudur Rahman, also known as Iman Ali. The RAB allegedly killed Ali in Savar, Dhaka on 9 March 2006 after taking him from the front of the Dhaka Session Judge’s Court premises the previous day. Security guards stationed nearby where he was killed said that they witnessed RAB members “exchanging fire” by shooting their guns overhead. Perhaps the criminal gang with whom they were engaged had suddenly sprouted wings and flown away. For its part, the battalion claimed that Iman Ali was an accused in four murder cases. His family lodged a case against the RAB, home affairs minister and chief of police on March 22. The magistrate said it was outside of the court’s jurisdiction. Iman’s brother, Nazrul Islam, lodged a revised petition with the Metropolitan Session Judge’s Court, alleging that his brother was murdered because he supported the inhabitants of Miton village against land-grabbing by a cousin of the home affairs minister. He also alleged that the officer in charge of the Savar police station, Haidar Ali, told him as much when he went to the premises shortly after Ali was abducted, saying that, “Your brother leads a movement against the home minister’s cousin and you have come to learn about him. How dare you! He [Iman Ali] has been sent for ‘crossfire’.”

Despite the case being lodged, there is no evidence of progress, and no investigation has been conducted into the family’s allegations. How about Abul Kalam Azad Sumon? The

23-year-old opposition party activist was taken into a field at Rampura Banosri residential area under the Khilgaon police station in Dhaka late at night on 31 May 2005 and came out dead thanks to RAB-3 personnel. Eyewitnesses in that case have said that they saw the RAB shoot Sumon at close range. Predictably, a RAB press release said that the victim had six cases listed against him in different police stations around Dhaka. Human rights defenders and journalists took the time to check. None of the stations could produce a scrap of paper on Sumon. Again, a complaint with little hope of success was lodged in the metropolitan magistrate's court, with the help of opposition party leaders.

The policy of killing through crossfire has been reaffirmed by members of government. Minister for Law, Justice and Parliamentary Affairs Maudud Ahmed, the overseer of Bangladesh's lower judiciary, made clear in a press briefing on 30 November 2004 that death in crossfire under RAB or police custody could not be considered custodial death. This, he reasoned, was so because the state officers would only be opening fire to save themselves. Since that time, no member of the RAB has ever been prosecuted for a killing. Most families of victims do not even bother to complain as they are aware that it will be fruitless and only cost money, time, energy and risks to their own security. Only those with some personal involvement in a political party or other outside assistance and support try to raise their voices. The policy is also ensured by procedure. In keeping with the Clean Heart spirit of 2002-03, under the Armed Police Battalion Ordinance RAB members are indemnified from prosecution for any action "done in good faith" under the law.

Where exactly does "good faith" come into the picture when detainees are marched into fields at 3am and shot on the pretext of an encounter? The question has not been answered, as the only known steps taken following the hundreds of almost identical deaths have been through routine executive inquiries. These require that after police have discharged firearms the reasons be ascertained and the shooting be found to be in compliance with regulations. The reports from these executive inquiries are useless. The investigating officers aim to find some justification for the shooting and get on with other things. Their reports are never made public, but a former police chief has been quoted as having said that the overwhelming number of them conclude that "crossfire" was justified.

### **Why RAB & crossfire, not courts & due process?**

Rather than attempt to address the deep institutional problems in Bangladeshi courts, including the non-independence of judges, political control of prosecutors and rampant corruption described elsewhere in this report, the government has found it easier—and more suitable for its own purposes—to mete "justice" through the gun, no matter the consequences. Basil Fernando, director of the Asian Legal Resource Centre, has described how this thinking was applied in his own country of Sri Lanka, and the consequences: The situation of instability and insecurity prevailing in the country during the last three decades, particularly during the last decade, has given rise to a 'consensus' that order has to be maintained with or without law. The underlying assumption in this

way of thinking is that the law itself could be an enemy of order. According to this way of thinking, certain provisions of law restrict the powers of law enforcement officers to deal with disorderly conduct by some persons or groups. It follows that the perceived restrictions need to be removed and that, once freed from such restrictions, the law enforcement officers may return order and stability to society. This way of thinking is usually regarded as 'realistic'. The maintenance of order through legal means is considered unrealistic for the following reasons, among others:

- Financially speaking, the country cannot afford to have well-functioning law enforcement machinery and must therefore be resigned to defective machinery;
- Too much insistence on law may discourage law enforcement officers from carrying out their functions even to the extent that they are doing them;
- As corruption and abuse of power are facts of life in the country, it may not be a wise policy to fight too hard against them; and,
- As the insistence on law may lead to conflict, it may be necessary to restrict such agencies that insist on observing the rule of law, such as the judiciary.

These and other similar considerations form the basis for encouraging practices such as killing under certain circumstances. The country now has the lessons gained by the experience of testing the practices ruthlessly launched on the basis of such a social philosophy. Instead of bringing about order, these practices have confounded the situation a thousand-fold. Ironically, the worsening of the situation may reinforce this same philosophy. It is like the situation of a creditor who gives further credit to a debtor in the hope of regaining his earlier loans. [WJ Basil Fernando, 'Disappearances of persons & the disappearance of a system', in *The right to speak loudly*, Asian Legal Resource Centre, Hong Kong, 2004, pp. 41-42] This is both a description of Sri Lanka and a prediction for Bangladesh.

While innocent people go to jail, real criminals in Bangladesh have many means at their disposal to be freed on bail. Legal loopholes and bribery are plentiful, political influence, normal. The members of local Union Councils whose alleged acts of rape are described in this document (stories 26 & 33) appear to have had no difficulty in obtaining their get-out-of-jail cards, one of them repeatedly. So have virtually all of the other alleged perpetrators with connections to the police whose cases have been studied by rights groups. Where the intervention is early enough, the matter may be dealt with even before it is fully recorded and lodged in court. Where a complaint is already made, the police officer is then made aware of the situation, with some harsh words and threats if necessary from the concerned politician or overlord, and the necessary arrangements are made to sort the matter out in court. Magistrate, prosecutor and any other persons involved will all be made to understand that the case is not to proceed. If the accused is a political party member, the party may launch demonstrations for the person to obtain bail. Inevitably, enormous frustration wells up among the victims and general public, as well as among many police officers and other public officials who are daily made aware that they are engaged in a farce. So it comes as no surprise that many applaud when "bad guys" get shot dead rather than bothering with messy criminal procedures, rights and obligations. A key related problem is the absence of witness protection.



Where witnesses have no guarantees of security will they give testimony in an open court? This is a common and grave concern that is deeply undermining the judicial systems of many countries throughout Asia, particularly where state officers are among the accused. In the Philippines it has gone so far that families whose relatives are shot dead in the doors of their houses are not willing to lodge complaints and identify suspects. When a wife refuses to name the person who shot her husband dead in front of her it can only be for the reason that she knows the same awaits her if she speaks. In Bangladesh, over three and a half decades since independence the government has apparently shown no inkling about the notion of witness protection, nor any interest to do anything about it.

The death of Sumon Ahmed Mazumdar says it all. Mazumdar, a witness to the murder of Member of Parliament Ahsan Ullah Master, was pulled from his house in the Amtali area of Gazipur by RAB personnel at around 3:45pm on 15 July 2004. The arresting officers told others present that they needed to interrogate him as he was a witness in the murder case. Even before Mazumdar was in their vehicle they had assaulted and blindfolded him. He was taken back to the Dhaka headquarters at Uttara, where he was held incommunicado and severely tortured. Around midnight the Tongi police station called his family to say that the witness was in their custody. However, the family was also unable to see him there. That morning, they received an anonymous call to the effect that Mazumdar was dead. At around 8am Monir Ahmed Mazumdar located his son's body on the floor of a hospital, next to a staircase.

The police record showed that the witness-turned-victim had been detained by the RAB for extorting money from a businessman on the afternoon of July 15, although the complaint was only recorded with the police station at 11pm that night. The police record and RAB media release gave different accounts of how the dead man obtained his injuries, which in either case absolved all of them from any wrongdoing. Independent fact-finders were unable to locate one businessman in the area who could support the allegation that the victim had been extorting money. Attempts by members of the judiciary to address the frequency of killings by "crossfire" seem to have been negligible. As discussed elsewhere, magistrates and district judges are unreliable officials to call upon for redress in any case of abuse by state agents.

As for the Supreme Court, Chief Justice Mohammad Habibor Rahman was quoted as having said at a public gathering in January 2005 that, "We have belatedly decided to get a report on every death in crossfire. We ought to have asked for a report when the first incidents of death occurred. That would make the law and order men more cautious." (Daily Star, 19 January 2005) Whether or not the court ever received its reports, the killings have continued regardless. Clearly more is needed to make the "law and order men more cautious".

## **RAB goes ROB**

Apart from killing people, the RAB is also itself reported to be keen on a host of other criminal activities. Many of these have been widely reported in the local media. RAB personnel and former personnel have in recent times earned a reputation for robbery. In July 2006, newspapers described an incident involving a covered van on its way from the port in Chittagong to Dhaka with a load of imported goods. It was still early morning on July 13 when the vehicle passed through the Shanir Akhra area of Narayanganj district. A minivan came from behind and pulled it over. Two persons in black uniforms introduced themselves as RAB officers; five others were with them. They claimed to have received information that the van was carrying contraband goods before making off with it and its cargo. The driver and his assistant lodged a complaint with the Demra police station in Dhaka, but later found that the police had failed to respond and had anyhow recorded the robbery as a lesser offence of theft. The importer then complained directly to the chief of police, both about the incident and also the officers at Demra. Only then did a real investigation begin. Most goods were recovered and the culprits arrested. One was a RAB corporal on leave; the other a sergeant who had earlier been dismissed.

A few days later, on July 16, RAB officers were reported to have snatched money from two businessmen who had been traveling by bus and buy motorbikes for their shop. When the bus reached the Baipile area of Dhaka, a RAB team led by Deputy Assistant Director Humayan Kabir searched its passengers. The team found over two million Taka (USD 29,300) on the two men, which they were carrying in order to pay for the new bikes. *The RAB* seized the money on the allegation that it was for an illegal transaction. Back at base, the team recorded that only 1.8 million Taka was taken from the two passengers. Local police got wind of the theft and recovered the missing amount the next day.

Anecdotal evidence suggests that such incidents are common. This should come as no surprise. RAB personnel have been given the impression that they are beyond the law: If I can kill, detain and torture people, why can't I also rob a little? The relatively minor non-criminal penalties applied to personnel found to have committed offences that are not part of the battalion agenda do nothing to discourage further wrongdoing, particularly when most personnel may expect that the worst that will happen is for them to be sent back to their old jobs. Docking of wages, demotion or forced retirement are small risks when there is big money to be made from lots of good opportunities.

### **Beyond lawlessness**

The creation of the Rapid Action Battalion is an implied admission by the government that Bangladesh has descended into lawlessness. Despite the external appearance of some courts, police and administrators, most state institutions are today without public legitimacy. By choosing to fight lawlessness with lawlessness, the government has also admitted that these institutions cannot be relied upon, lending credence to the popular view. Bangladesh is today a deeply frustrated nation. Its government's policy of extrajudicial killings is a symptom of that frustration; not its cure. On the contrary, the licence to kill handed out to RAB officers is only rapidly exacerbating problems and

speeding the growth in a new generation of killer state personnel who will carry the lessons learnt with the RAB throughout their professional lives. These men will be unable to ever perform their future tasks with a sense of integrity or decency, whether as police, soldiers or other government officers: once a RAB man, always a RAB man.

The systemic use of military personnel for policing has been the cause of repeated tragedies throughout Asia. The people of Bangladesh need only look to Nepal, Sri Lanka, Burma and Indonesia to obtain their lessons. Sri Lankan police were once relatively well-disciplined and law-abiding. Then they were told to hunt down insurgents and terrorists. The lessons learnt from that time carry on until today in horrendous forms of torture and killing for the most trivial reasons. In neighbouring Burma, an army general is police commander. His men understand their duties only in terms of “security of the state”. In Indonesia the police force under the Soeharto regime was a part of the military structure itself. Now the country faces the monumental task of teasing the two apart. And Nepal is just starting to come to terms with what was done by joint operation forces under the royal dictatorship there in recent years. Are any of these desirable models? Are any of them prosperous or stable societies? Do any of them suggest to the people of Bangladesh how they would like to be?

The removal of controls on law-enforcing officers is easy. Its re-imposition is not. Even with the RAB gone, the rebuilding of orderly law enforcement will be formidable task. Nevertheless, every day that this task is delayed poses a greater threat to the people of Bangladesh and their society. It is a threat not only to the victims of abuses and their families, friends and colleagues, but a threat to everyone. It is a threat that is capable of destroying the entire society, its bureaucrats, government ministers, judges and functionaries included.



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### **BURMA: The Human Rights Situation in 2006**

#### ***The myth of state stability & a system of injustice***

During 2006 Burma continued to be characterised by wanton criminality of state officers at all levels, and the absence of the rule of law and rational government. Throughout the year, the Asian Human Rights Commission (AHRC) documented violent crimes caused by state officers, and the concomitant lack of any means for victims to complain and have action taken against accused perpetrators.

#### **Three versions of violent crime in Burma**

In July 2006, staff persons of the AHRC were surprised to read the assertion in the December 2005 country report on Burma of the UN Office on Drugs and Crime (UNODC) that

“As in many tightly controlled and socially conservative societies, there is very little violent crime: not even anecdotal reports of murders, rapes or kidnappings. There is some petty crime, especially burglaries, but these tend [sic] to be non-violent. In general, crime does not appear to be a major concern among the population...”

Similar statements were repeated elsewhere in the report: all of them contradict the findings of human rights defenders, independent journalists, lawyers and others which reveal that Burma is no exception from most other countries in Southeast Asia in that the primary cause of lawlessness there today is the violent crime committed by police, soldiers, local government officials and officials of mass-movement bodies, and paramilitary units.

The AHRC immediately wrote to the UNODC, and in addition to citing cases, asked the office to identify the research, studies or other work conducted by its office that have led it to this conclusion. It also raised questions about the capacity of the UNODC to function effectively in Burma:

“Where the police, state authorities and their accomplices are themselves responsible for perpetrating and instigating crimes with impunity, what possibility is there that other

criminal activities can be addressed? How can the UN Office on Drugs and Crime expect to deal with the massive narcotics trade of Burma or ‘transnational organised crime’ with which it seems more concerned than day-to-day criminality when the state agents themselves are the planners and agents of killing, torture, abduction and cross-border trafficking? How can it expect to sincerely raise questions about violence against women and children or arbitrary detention without recognition of this reality? That violent crime by state officers is the primary cause of lawlessness in Burma appears to be an enormous and glaring omission from the work of your agency there.”

The AHRC received no reply from the UNODC, and staff persons at the office who were contacted by broadcast journalists on the matter also declined to comment. However, a letter was received from the government’s representative in Hong Kong, Chan Kyaw Aung:

“We would like to inform you that the accusations you described in the letter were groundless and exaggerated. It was mainly based on information obtained from anti-government elements or neo-colonialists who just want to create unrest in our country for the sake of outside intervention. Our government’s position and policy toward law and order situation [sic] is very clear and well known...

“In any country, legal action will be taken against those who violate respective law [sic] and regulations. You can not claim the law breakers as victims of Human Rights violation [sic].”

In reply, the AHRC wrote that,

“You argue that persons who violate a country’s laws should face sanctions. In fact, this is the essence of our letter to the UNODC. Where legitimate complaints of illegal actions are made by citizens against state officers, it is a duty of the state to investigate these, and where necessary, commence prosecutions. It is a duty of the state to put in place proper institutions to receive and investigate such complaints, so that the work will be credible and the public will have confidence in its outcomes. International organisations like the UNODC may be able to assist with money and training.

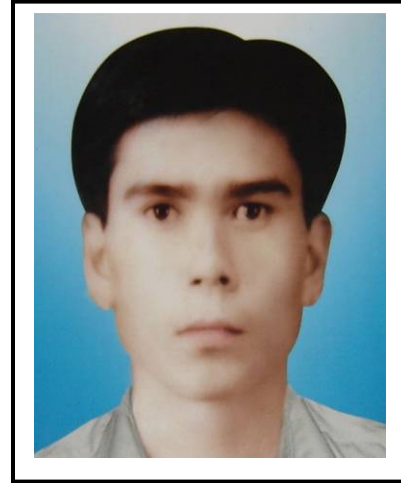
“Unfortunately, at this time in Myanmar [Burma] no such institutions exist for credible investigations of state officers. Therefore, criminality is rampant among the police and other government officials...”

Earlier, an unusual story had appeared in state-run daily newspapers. It said that a man identified as Wai Phyo Naung killed himself in a police lock up in Mandalay after being arrested for loitering in the early morning of March 25. According to the report, he had twisted his sarong into a rope and hanged himself from a bar in the ceiling at around 2pm on March 26.

The report followed a press conference in which the chief of police emerged to answer questions together with the ubiquitous military officers. A journalist from a weekly crime journal asked him,

“Due to the accusations of foreign media, there were suspicions among the public that some members of [the police] tortured and bullied the people. Are there any such incidents or not? If such incidents are found, is there any response? If there is any, to what extent action is taken against those who committed the incidents?”

In reply, Police Brigadier General Khin Yi cited the case of Ko Thet Naing Oo, which had been widely reported on from outside the country and was by that time already well known to people around Rangoon. Thet Naing Oo was beaten to death by municipal authorities and reservist fire fighters in a suburban marketplace on March 17. They had set upon him after an altercation over his supposedly urinating in a public place. His mother’s attempts to obtain justice led to a special tribunal being established to examine the case. It operated behind closed doors and ended with some innocent bicycle rickshaw drivers being charged instead of the actual perpetrators. Thet Naing Oo’s friends were also taken into custody and forced to go along with the government version of events.



*Ko Thet Naing Oo*  
(Source: ABFSU)

It was in the past uncommon for Burma’s tightly-controlled press to carry detailed rebuttals of individual cases of alleged abuse. But with more and more stories spreading of brutality by police and local authorities, the government seems to have decided that it is better to construct its own version of reality, rather than let others come up with it first.

Interestingly, the style and content of rebuttal has more in common with that of governments in neighbouring countries of South and Southeast Asia than with the conventional propaganda to which people in Burma are accustomed. Specifically, it has two important characteristics.

Firstly, the authorities portray the victim as a person of bad character. It is then understood that whatever happened, he somehow deserved it. Wai Phyo Naung is described as having had a record of loitering, been covered in tattoos, and apparently on drugs. “His brothers told police that he was a bad youth, never listened to his parents, and used to be on alcohol,” the newspapers reported. As for Thet Naing Oo, he was a former political troublemaker who got drunk and went looking for trouble. Both were socially undesirable. If they wound up dead somehow, it was no loss.

Compare this with the language and mentality of the authorities in Thailand. When the government there organised the killing of thousands of alleged drug dealers in 2002, it set out by categorising them as people who deserved to die, who had nothing to contribute to the country. Likewise, over one thousand young men who were arrested outside Tak Bai District Police Station in Narathiwat Province during October 2004 were also described as drug users and hooligans, although these allegations were later shown to be baseless. And to the present day, reports on deaths in custody invariably dwell on the alleged wrongdoing of the deceased in order to distract attention from the actual issues. One way or another, the population of Thailand is reminded incessantly that bad people deserve bad things, and therefore, if something bad happens to someone, they must be bad.

Secondly, the authorities portray their own personnel as disciplined and following regulations. It is then understood that whatever happened, it was not the fault of the police or other state officers. The policeman discovering Wai Phyo Naung is described as springing to his aid and calling for others to help. Although they rushed him to hospital, it was too late. An autopsy was carried out which absolved the police of wrongdoing, and the matter was reported to the magistrate. Correct procedure was fulfilled. Thet Naing Oo too, it is said, was immediately sent to hospital but could not be saved. Special inquiries into the case have followed, as required by law and circumstances.

Compare this too with the case of Mousumi Ari in West Bengal, India. Mousumi was murdered by her in-laws in October 2003. However, because one of them had connections to the local police, the crime was made to appear as a suicide. The police, judicial magistrate and autopsy doctor all performed in the charade. The supposed separation of powers was reduced to farce. Only through the heroic efforts of the victim's family and local human rights defenders was the struggle against lies won, and it was finally revealed through a later independent autopsy that the death was a murder. The perpetrators were charged, although none of the authorities responsible for the cover-up have ever been punished.

Not even these few avenues exist in Burma. There are, as Brig-Gen. Khin Yi puts it, "lots of rules and regulations" with which the police are expected to comply. In fact, they are practically the same rules and regulations as in West Bengal, as a consequence of a shared colonial legacy. But lots of rules and regulations mean nothing without functioning, independent institutions to enforce them and provide redress to persons who suffer abuse. In Thailand, India and most other parts of Asia, these are few and far between. Those that exist, struggle to survive. In Burma, they are simply non-existent. There is no legislature. There is no competent judiciary. There are no independent government bodies. There are no international agencies with credible mandates to assist in reform. Nor is there any commitment to any of these.

"If a row takes place involving a police member, he faces action under the police code of conduct, civil laws, and administrative action," Brig-Gen. Khin Yi said. Were it so, Burma would be a dramatically different country from what it is today. While exceptional cases give cause for hope, such as the conviction of two police officers for rape, under existing arrangements they will remain exceptional. The norm will continue to be

extrajudicial killings, torture and other gross abuses practiced by the police, army, local government officers and other officials with impunity.

### **Violent crime by state officers**

The growing numbers of bloody assaults and killings of ordinary people by police and other state officers in the cities and towns of Burma are in fact exposing the myth of “state stability” that the military government there uses to justify its prolonged existence.

The AHRC on July 7 issued an appeal on the alleged assault and subsequent death in police custody of Maung Ne Zaw, whose mother had fled to Thailand. Her son, she complained to the regional army commander, was stopped, illegally detained and beaten on the side of the road in Kachin State by Special Anti-drug Squad police on March 14. He died in detention on May 2, she said, after failing to obtain proper medical treatment. Even a post mortem examination was not possible. When she asked a doctor about cause of death he gave a range of implausible answers, from cerebral malaria to HIV, either out of fear or due to some tacit agreement with the police.

News of Maung Ne Zaw’s death followed reliable reports that police in Yetashe Township in Pegu Division also murdered a young mother in their custody on June 19. Ma Nyo Kyi a 23-year-old who was living in Shwemyaing ward in Myohla town was reportedly arrested earlier by Police Deputy Superintendent Zaw Lwin and another officer while on her way home from a shopping trip. Her eight-month-old baby was taken into custody with her for a night, but sent back to the family in the morning. When the family brought the baby for feeding the police on duty said that Nyo Kyi had been sent to hospital after being found hanging in her cell. However, doctors who declared her dead reportedly found severe injuries on her head and back. According to local sources, the same township police also tortured a young man to death at the end of 2005 but had warned the family against taking any action.

Soldiers taking responsibility for railway line security in the same township also allegedly beat a young man to death at the start of June. Twenty-three-year-old Maung Soe Lin Aung was the second person to be assaulted by the soldiers within a few weeks. In May, another young man was hospitalised after encountering the drunken troops on the wrong side of the tracks.

Similarly, a 24-year-old woman reportedly suffered life-threatening injuries after being assaulted by a police chief in Kyimyintaing Township, Rangoon on June 8. Ma Khin Mar Lwin, a washerwoman living in Ohbo ward, was arrested after a housewife alleged that she stole some belongings. Having arrested her, Police Station Officer Ne Myo is alleged to have beaten Khin Mar Lwin so severely that her eardrums broke and her body was covered with bruises. She was also allegedly sexually abused by a family member of the accusing person. Upon her release, Khin Mar Lwin was purportedly offered money by the family member and local officials in order to stay silent about her ordeal. However,



she is said to have refused the money and insisted that she would complain to higher authorities.

Elsewhere in Rangoon Division a man was feared dead after disappearing from police custody. U Maung Maung, a 40-year-old from Dawpon Township, was taken for questioning on June 27 after his father died in an apparent accident at home. But when family members went to see him at the police station, they were reportedly told that Maung Maung had been taken to hospital, and then on July 3 that he had escaped from the hospital. The next day, Maung Maung's son was summoned and threatened not to talk about his father's disappearance or risk arrest also.

Earlier in the year, Ko Aung Myint Oo suffered grievous injuries due to assault at time of arrest in Meikhtila, Mandalay, over a gambling case. Deputy Superintendent Aung Than Htay and around 13 other officers are reported to have savagely assaulted the young man on January 18 with various objects that they could find lying around the roadside, including sticks, rakes and bricks, until he fell unconscious. They later claimed that the victim had been brandishing a weapon; however, Aung Myint Oo had suffered from a stroke some three months earlier and was in no condition to pick a fight with the police.

The extent of Aung Myint Oo's injuries shocked the judge in the local court, who having read a prison sentence ordered the police to take the assault victim to the hospital, rather than to jail. However, the police allegedly disregarded the judge's instruction and took Aung Myint Oo to prison. But when the prison wardens saw his condition, they also refused to accept him into their custody and also insisted that he should be sent to hospital. Still the police resisted taking Aung Myint Oo to hospital. Instead they took him to a local outpatient clinic. There too the staff said that they couldn't treat his severe injuries and said to take him to hospital. Finally he was registered in the township hospital that night, with two broken ribs and severe injuries to his face and body. A week later the police came and forcibly removed him in shackles and handcuffs, despite protests from staff.

After the AHRC issued an appeal on the case and it was reported on shortwave radio, a team of four police investigators headed by township Deputy Police Commander Ko Than Htun came and searched Ko Aung Myint Oo's house and asked questions of his mother. She and his wife were subsequently called for questioning and repeatedly harassed and coerced, until they acquiesced to drop their complaints.

Not only the police, soldiers and security units but also local council officials and other state officers have been implicated in bloody assaults ending in serious injury and oftentimes death. Ko Than Htike was reportedly beaten to death in a local council office by five officials on the eve of the new year. Than Htike had had a number of personal disputes with the Myothit ward chairman and his men in Ngathaing Chaung, part of the delta region, and they had called him in over his failure to pay dues for the upkeep of a local paramilitary unit. Elsewhere, Ma Aye Aye Aung and her husband were repeatedly set upon by local council members and their relatives in Meikhtila, Mandalay over a

dispute about her parking her betel nut cart at the front of a restaurant owned by the council chairman.

Together these cases--which are just a tiny handful of the total number occurring in Burma today--reveal a society not where authoritarian rule is successfully maintaining “the stability of the state”, as promised by its military regime, but rather a country where the rule of law is non-existent and government officers are increasingly running out of control. The characteristics of violent crime by these state officers include the following:

**1. The victims are ordinary people targetted in common criminal inquiries:** In Burma today it is unsurprising to hear that someone has been assaulted or killed over the alleged possession of a small quantity of drugs; supposed suspicion of petty theft; urinating in a public place, or otherwise doing anything that may cause offence to local officials. None of these are the sort of celebrated political cases for which Burma usually obtains attention. But they are the sort that affects the overwhelmingly large number of people in the country.

**2. The victims are mostly innocent:** It is a feature of violence and other criminal or illegal actions committed by state officers against victims in Burma that the victims have nothing to do with the alleged wrongdoing, may only be tangentially related to the case or may themselves be the aggrieved parties who are being targetted as a counterattack to thwart their earnest attempts at obtaining some limited form of redress.

**3. The victims are often targetted due to personal grievances or out of favours to others:** The victims of assaults or other illegal acts by the concerned authorities very often know their targets, or know someone who knows them and are doing that person a favour. A person may be assaulted because of connections between the police and a local family who believe that the person has wronged them, and the party to the case may even become involved in the assault. Khin Mar Lwin was assaulted by the police on behalf of a local family; a member of which was also allegedly allowed to get involved and sexually abuse her. Ma Aye Aye Aung was beaten up because she parked her betel nut cart at the front of a restaurant owned by the local council head. Deaths occur as a result of petty disputes between local officials and persons in their jurisdiction who have refused to follow some instruction or pay some amount of money.

**4. Ordinary criminal and judicial procedures are completely ignored:** Where police are involved in the case from the start--as perpetrators or accomplices--or where they are brought into the case as investigators, they invariably ignore ordinary criminal procedures. Illegal arrest and detention, failure to inform of reasons for arrest or to inform family members of arrest, detention of minors and similar breaches of criminal procedure and police regulations are the norm. Maung Ne Zaw and his friends were illegally detained from the start. Ma Nyo Kyi’s family were not informed that she was taken into custody. Ko Aung Myint Oo was attacked because when he was first instructed by a police officer to go to the local station with him he was not given a reason and declined to follow. The Kyimyintaing police reportedly locked up a baby. Orders given by judges

also show flagrant disregard for--or ignorance of--the domestic law and are determined strictly on the basis of instructions given from the executive.

**5. There is no concept of--or interest in--investigation methods:** The only techniques known to the police and other authorities who take people into their custody are to detain and beat up. If they know the person and have a particular objective, this is the method to obtain that objective. If they are not sure who they have in their hands, this is the method to find out. They learn when their family members or others come who they are and how much they can get from them. They can decide whether it is more worthwhile to let the person go in exchange for cash or proceed with a case.

**6. The victims have no possibility of complaint and are instead made the targets of counter-complaints:** Attempts to have a case opened are usually thwarted at early stages through a range of techniques, including open harassment and intimidation of the victim or family and counter-complaints by the authorities. Maung Ne Zaw's mother repeatedly attempted to have a case opened against the police who killed her son. As a result, she was constantly harassed, she says, and finally fled to Thailand near the end of June. The vigorous efforts to get justice by Thet Naing Oo's mother instead led to the arrest of some bystanders to her son's killing: also poor and innocent civilians. Aung Myint Oo's mother reportedly gave up attempts to register complaints against the police who assaulted her son and has since figured that if you can't beat them, join them: in her case, by working an illegal lottery syndicate with the police sergeant who instigated the violence. And whereas there is a persistent interest in security and emergency laws in Burma to deal with dissent, it must be noted that in fact the common criminal law has within it a small arsenal of provisions that enable officials to counteract private complaints, including Penal Code sections 182/189 (false information with intent to cause public servant to use his lawful power to the injury of another person; threat of injury to public servant); 211 (false charge of offence made with intent to injure); 499/503 (defamation; criminal defamation); and 504/505 (intentional insult with intent to provoke breach of the peace; statements conducing to public mischief).

All of this is to say nothing of the very severe and violent conditions for internally displaced persons, refugees and others in remote areas and border regions of the country, who continue to be subject to some of the worst human rights abuses in the whole of Asia, mostly at the hands of the military. In October the Bangkok-based Thailand Burma Border Consortium reported that over a million people are now displaced in eastern Burma alone, with 82,000 forced from their homes in the last year, through the systematic destruction or forced abandonment of over 200 villages in the same period. Out of the million persons, over half are believed to be living in the jungles and hills due to "systematic human rights abuses and humanitarian atrocities".

### **Degraded & compromised judiciary & a system of injustice**

In September, the UN Special Rapporteur on human rights in Myanmar (Burma) reported to the new UN Human Rights Council on the country that

“The capacity of law enforcement institutions and the independence and impartiality of the judiciary have been hampered by sustained practices of impunity. I am also very concerned by the continued misuse of the legal system, which denies the rule of law and represents a major obstacle for securing the effective and meaningful exercise of fundamental freedoms by citizens.

“Grave human rights violations are indulged not only with impunity but authorized by the sanction of laws. In that respect, I consider especially as a matter of grave concern the criminalization of the exercise of fundamental freedoms by political opponents, human rights defenders and victims of human rights abuses.”

Apart from the cases of violent crime documented by the AHRC that speak to the degraded and complicit nature of the judicial system in Burma, there are numerous other persons who have attempted to complain or assert basic economic or civil rights and have instead found themselves on the receiving end of sanctions.

Among them, one of the most celebrated is Ma Su Su Nwe, who was the first person to succeed in a complaint that government officers had forced her and fellow villagers to labour on a government project without pay. She was subsequently herself charged and jailed for defamation. Predictably, her appeals for release--including to the Supreme Court--were rejected. However, she was freed on “health grounds” in June after strong interventions by the International Labour Organisation (ILO), which threatened legal action against the government and its removal from the world body if she and a number of other prisoners jailed for complaining about forced labour were not released. She has since continued to struggle to defend human rights, and in September was rightly given the 2006 John Humphrey Freedom Award, named after the Canadian drafter of the Universal Declaration of Human Rights.



*Ma Su Su Nwe*  
(Source: PDC)



*U Aye Myint*

Another person released after the same heavy intervention of the ILO was human rights lawyer U Aye Myint. The lawyer was released in July after the ILO had given until the end of the month before proceeding with international legal action against the government. His appeal was pending in the Supreme Court at the time of his release. Aye Myint had served 11 months of a seven year sentence for helping a group of farmers to lodge a complaint with the ILO in June 2005 over unfair allocation of

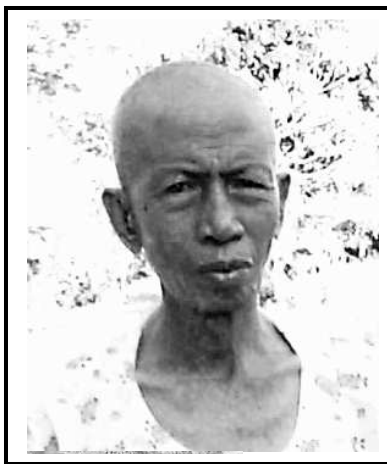
pastureland for their cattle. Upon his release, he said that he would continue to take up rights-related cases, but his legal capacity to appear in court remained clouded as his licence to practice law had been revoked.

However, there are many other lesser-known cases that speak to the same level of bravery and determination by villagers and local persons who have suffered needlessly as a result of making legitimate complaints about arbitrary and illegal state actions. They include the following.

1. U Tin Nyein has been imprisoned throughout 2006 for having complained that local authorities negligently destroyed his crops in August 2005. He was jailed through the familiar tactic of a counter-complaint from the concerned authorities, to the effect that they had been defamed. A petition against that complaint from Tin Nyein was thrown out of the Bogalay Sub-township Court without a hearing. In a second petition to the divisional court a lawyer successfully argued that the case against Tin Nyein was procedurally invalid; however, instead of ordering his release, that court instructed the township authorities to devise a new case under different provisions: an instruction without any legal validity. Notwithstanding, Tin Nyein was convicted on the grounds of causing a breach of the peace and upsetting public tranquility. Again, the conviction under these provisions was without any basis whatsoever in domestic law. The fact that Tin Nyein had seven other farmers back his claims that his land was damaged and that the authorities never contested this argument, did not make an impression upon the judge.



*U Tin Nyein*  
(Source: Yoma 3)



*U Tin Kyi*  
(Source: Yoma 3)

2. U Aye Min and U Win Nyunt also remain imprisoned for having made a complaint in 2005 about illegal money collections by the village authorities, which was validated by the township administrative authorities but overturned by the district administrative authorities. They too were convicted for defamation. The fact both that they were supported in their allegations by affidavits from some 28 other farmers and that local officials spoke in their defence was apparently irrelevant to the judge.

3. Farmer U Tin Kyi was sentenced to four months' jail in August for having allegedly resisted efforts to turn land neighbouring his property into a plantation under a government scheme. Sixty-five-year-old Tin Kyi, of Kyaung Gone in the western delta region, had supposedly

threatened and abused a group of workers on the site. He was sued by the council chairman and found guilty despite the admission by the chairman in court that the allegation was mere hearsay and there was no evidence against the farmer. The trial was completed and verdict read within the same day, suggesting that the judgment was prepared in advance. The land is reportedly being taken over by the son of a senior military officer, and further charges are being prepared against Tin Kyi and other farmers in the area.



*Ko Win Ko*  
(Source: Yoma 3)



*Phyoe Zaw Latt*  
(Source: Yoma 3)

4. Ko Win Ko and Phyoe Zaw Latt were arrested at a train station in October after they were found in possession of signatures for a nationwide petition calling for the release of five former student leaders arrested and kept incommunicado since September. The campaign was launched by colleagues of the arrested persons, and reportedly had attracted over half a million signatures from around the country: the two men had collected around 400 signatures from villagers in their area. None of the arrest, detention or trial procedures used against them

were legal under either domestic or international law. The two were falsely charged and imprisoned for 14 years: Ko Win Ko for allegedly having an illegal lottery stub in his possession; and later both he and Phyoe Zaw Latt on ordinary criminal offences of deceit and forgery, after Phyoe Zaw Latt had already been released on a good behaviour bond. The date of Ko Win Ko's hearing was changed suddenly, apparently in order to deny him an opportunity to be represented by a lawyer. The two were moved to at least five different places of detention in the first month, apparently also to deny them access to lawyers and family members. Phyoe Zaw Latt's 58-year-old mother died from grief after hearing of her son's incarceration.

Unfortunately, none of these persons are able to be visited in prison by the International Committee of the Red Cross as the group has been blocked from visiting prisoners since December 2005. In October the government also ordered five of its field offices to close, apparently without explanation.

While it is widely accepted that Burma's courts are subject to the dictates of its armed forces in cases freighted with political importance, what has not yet been studied properly is the extent of their compliance in virtually all cases where a private citizen stands against a state agent, of whatever rank, in whatever matter, and the consequences of this. Tin Nyein was first sued by a lowly member of the local waterworks team. When his case failed, it was taken up by the neighbourhood police chief. In the same township, in December 2005 U Aye Win and U Win Nyunt were jailed for reporting extortion by

junior administrators. Although the local authorities disciplined the accused, a higher office ordered that the villagers be prosecuted, again for giving false information. Last August, U Aung Pe was handed three years jail by a court ostensibly for giving “illegal tuition”, due to grudges held against him by local officials. His subsequent appeals have been thrown out without hearing. All of these cases, among many others, speak to the disgraceful condition of Burma’s judiciary.

The effective and independent functioning of Burma’s courts has been steadily eroded for decades. The assumption of power by General Ne Win in 1962 inevitably ended the possibility of the courts operating impartially. In 1974 they were dealt a death blow, when the new constitution literally merged the country’s judicial and legislative arms. Under its article 95, the senior-most judges were chosen from among the members of parliament. They in turn appointed other judges down through the hierarchy: most were handpicked from the socialist party. The first and foremost principle upon which they worked was “to protect and safeguard the Socialist system”. Their powers and duties were dictated by the government, and at each level they were answerable to local councils, just as the entire system was ultimately answerable to the executive, itself answerable to Ne Win.

The regime that brought in the 1974 constitution--together with the constitution itself--is long gone, but its mutilated legal system remains. In fact, Burma’s judiciary is today a far more degraded creature than it was a decade or two ago. Like other state agencies, the courts and law offices are staffed by persons who at best are untalented and disinterested, and at worst incompetent and ignorant. Constant meddling and interference from authorities, coupled with rampant corruption, have ruined judicial institutions and personnel. To win a private dispute is a matter of paying enough money. To win a dispute with the state is all but impossible.

However, the government of Burma seeks to maintain the pretence of legality, which can mislead observers into thinking that a partly-functioning system still exists. Detained political opponents and parties have cases constructed against them. Bizarre stories of complicated conspiracies are told in press conferences to incredulous but obliging journalists as a means to justify their detention.

In a speech during April, a retired UK lord of appeal, Lord Steyn, offered pertinent examples of how authoritarian governments consistently seek to maintain a veneer of legality:

“In Nazi Germany defendants sentenced to periods of imprisonment before the Second World War were left alone during the terms of their sentences. Only when their sentences expired did the Gestapo wait for them at the gates of the prisons and transport them to the death camps. So even in Nazi Germany an impoverished concept of legality played some role...

“In the apartheid era millions of black people in South Africa were subjected to institutionalised tyranny and cruelty in the richest and most developed country in Africa.

What is not always sufficiently appreciated is that by and large the Nationalist Government achieved its oppressive purposes by a scrupulous observance of legality. If the judges applied the oppressive laws, the Nationalist Government attained all it set out to do. That is, however, not the whole picture. In the 1980s during successive emergencies, under Chief Justice Rabie, almost every case before the highest court was heard by a so called 'emergency team' which in the result decided nearly every case in favour of the government. Safe hands were the motto. In the result the highest court determinedly recast South African jurisprudence so as to grant the greatest possible latitude to the executive to act outside conventional legal controls.

“Another example is Chile. Following the coup d’etat in September 1973, thousands were arrested, tortured and murdered on the orders of General Pinochet. The civilised and constitutionally based legal system of that country had not been formally altered. It was not necessary to do so. The police state created by General Pinochet intimidated and compromised the judiciary and deprived citizens and residents of all meaningful redress to law...

“Here I pause to summarise why I regard these examples of some of the great tyrannies of the twentieth century as containing important lessons. They demonstrate that majority rule by itself, and legality on its own, are insufficient to guarantee a civil and just society. Even totalitarian states mostly act according to the laws of their countries. They demonstrate the dangers of uncontrolled executive power. They also show how it is impossible to maintain true judicial independence in the contaminated moral environment of an authoritarian state.”

Steyn’s insightful comments are equally applicable to Burma, as they are to Cambodia, Singapore and other jurisdictions in Asia. In each of these too, safe hands is the motto. And the demoralising effect on society of courts willing to do the bidding of these authoritarian governments is far worse than that caused by other institutions. The police or military may breed resentment and spread fear when they assault an innocent person, but it comes as little surprise that police and soldiers are violent. The courts and related institutions exist to monitor and punish their excesses and abuses. They are essential weapons in the struggle against brutality and oppression. If the courts instead serve as tools for the agents of brutality and oppression, then this has a terrible draining effect on national spirit. Over a prolonged period--in Burma’s case, some four decades--the effects may be all but irreversible. They feed into and deepen the contaminated environment to which Steyn rightly refers.

The government in Burma routinely iterates its intentions to build a modern and developed state, but without functioning courts where persons with legitimate grievances can bring complaints, this is an absurd notion. It is a commercial impossibility, as investors will not commit to a place where the courts are the playthings of executive councils, which are in turn the playthings of military officers. It is also, most importantly, a psychological impossibility, as the lack of positive thinking among people in Burma is directly linked to its debased courts. If a farmer cannot make a complaint that his crops are awash because of incompetent local officials without risking jail, irrespective of other



factors, how can any progress be expected? Who will wish to repeat his experiences? Where else can they turn? What else can be done? When even natural disasters--such as the cyclone that ripped through the country's central coastline at the end of April--can be denied or diminished, how can a society properly address anything other than the most trivial and juvenile concerns? How can its courts do any more?

Burma's judges are as culpable as its generals for the demoralised state of the country today. But while no one looks to the latter for relief, even in their perverted and reduced form, the former are still sought out by persons with some hope for redress. Rarely do they give any cause for hope. Yet rarely too are they the subject of sustained criticism or sanction by persons and institutions concerned with human rights in Burma.

## **Conclusion**

While it is attractive to describe and reduce the situation in Burma in terms of some romantic notions about democracy advocates versus military autocrats, the day-to-day lives of most people in the country are not touched either by political activists or army personnel. For most people, the state in Burma exists in the form of petty bureaucrats (at the lowest level, ten-household heads), police, teachers and others who depend upon the state apparatus for their livelihoods. As this state apparatus offers them little directly, they use its institutions and their positions in it for their own purposes. In fact, this is a description not only of localised state institutions in Burma but of the bureaucracies and law enforcement agencies in most countries throughout Asia. Whether or not there exists the appearance of a functional democracy or otherwise, at the local level most continue to operate according to historical systems of patronage and authority. It is therefore necessary to understand and critique the obstacles to human rights and the rule of law in Burma in these terms.

It is also necessary to pay special attention to the judiciary. It is easy to sum-up the judiciary in Burma by saying that it is not independent; it is under state control. This is not enough. It does not get us any closer to an understanding of what is going on in that judiciary. Compromised or not, the judiciary occupies a special place in any system of government as, in principle, a defender of rights. Despite the decrepit condition of the courts in Burma, still there are victims and lawyers arguing human rights cases before them; there are still persons with some hope of a favourable decision in such cases. These demand our continued attention and scrutiny.



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### **CAMBODIA: The Situation of Human Rights in 2006**

2006 is the 15<sup>th</sup> anniversary of the Paris Peace Accords of 1991, which ended a protracted war in Cambodia. This report begins with a brief reference to these accords, as they constituted the basis and framework within which subsequent developments took place in Cambodia, before looking at some specific developments that characterise the situation of human rights in the country in 2006. These specific developments are:

- the emergence of a single dominant party;
- the increasing executive control of the judiciary;
- the rise of rule by decree;
- land grabbing;
- restrictions on the freedom of expression and related human rights;
- and, torture and abuses by security forces.

#### **1. Background to Cambodia's Human Rights Obligations**

Cambodia has experienced several important regime changes and wars since 1970, when it was engulfed in the neighbouring Vietnam War. The country fell under communist Khmer Rouge rule during the second half of the 1970s. Under this rule, the Cambodian people suffered from one of the world's worst and most extensive cases of mass human rights violations, resulting in the death of one and half million people. In 1979 the Khmer Rouge were ousted. This change plunged Cambodia into yet another war.

The settlement of the latter war was reached in 1991 at an international conference in Paris, France. The State participants in that conference took serious note of the recent tragic history of Cambodia and “committed themselves to promote and encourage respect for and observance of human rights and fundamental freedoms in Cambodia, as embodied in the relevant international instruments to which they are party.” They also recognised that this “tragic recent history requires special measures to assure protection of human rights, and the non-return to the policies and practices of the past.” Towards this end Cambodia committed itself, among other things, to ensure respect for and observance of human rights and fundamental freedoms and adhere to relevant international human rights instruments.

Under the peace accords Cambodia was placed under the administration of the United Nations, whose main tasks were to maintain peace and organise the election of a new

government. Cambodia began in earnest to honour its obligations when, soon after the signing of the Peace Accords, it acceded to all relevant international human rights instruments, and enshrined the guarantee and protection of these rights in a new constitution in 1993. This constitution turned Cambodia into a liberal democracy governed by the rule of law and respecting human rights, and enshrined the principle of separation of powers and an independent judiciary. The judiciary has the constitutional duty to protect the rights and freedoms of the Cambodian people.

Fifteen years on there has been progress in human rights and democracy, with the emergence of a civil society and political parties, the holding of regular elections, the abandonment of the state monopoly of the media, and the establishment of a market economy. Violence against members of the opposition, journalists and other government critics has decreased. But the mindset and practices of the communist days have not disappeared and adjusted to the change in regime.

At the beginning of 2006, the human rights situation in Cambodia appeared to have changed for the better compared with the previous year. However, some negative developments again clouded the situation, which required more efforts and a better strategy to again bring about change for the better.

## **2. The Emergence of a Single, Dominant Party Rule**

In 1979, Vietnam sent troops to oust the pro-Chinese Khmer Rouge regime from power and replace it with a Vietnamese/Soviet-backed communist regime, with Hun Sen as the latest premier of the latter regime. Under the Paris Peace Accords, this new regime turned into a political party named the Cambodia People's Party or CPP, with Hun Sen as its vice-president and de facto leader. The CPP lost the 1993 UN-organised elections to the royalist FUNCINPEC party, but remained in the new government through its control of all the security and administrative apparatus of the country. Thanks to its control over the latter, as well as the media, the election committee, a coup that broke FUNCINPEC's back in 1997, threats, intimidation and vote buying, the CPP emerged victorious from the 1998 Cambodian-run elections. However, the CPP had to enter into a coalition with FUNCINPEC in order to meet the two-thirds majority required to form a government. In the following elections in 2003, relying on more or less the same strategy, the CPP became victorious again with an increased majority, but yet again, had to enter into a coalition with the much weakened FUNCINPEC to secure the required two-thirds majority. The Sam Rainsy Party (SRP) - named after its founder and leader Sam Rainsy - entered the two latest elections and became the single opposition party.

### **Opposition Cowed**

In 2005, Hun Sen sued Sam Rainsy for defamation. Sam Rainsy went into exile. As had been widely expected, at a flawed trial in August of that year, Sam Rainsy was sentenced in absentia to 18 months in jail. In early 2006, Sam Rainsy made a deal with Hun Sen in

which he acknowledged his wrongdoing, promised to restrict his own and his party's criticism of Hun Sen and the government, and made a proposal to reduce the two-thirds majority to an absolute majority for the parliament's appointment of the government and its other decisions. In exchange, Hun Sen arranged for a royal pardon for Sam Rainsy and his fellow jailed parliamentarian Cheam Channy, and allocated the chairmanship of two parliamentary committees to the SRP.

This deal was widely seen as the SRP's surrender to Hun Sen and the CPP. The parliament lost its opposition and the Cambodian political system has since lost the small checks and balances it had created. It did not take long for the government to amend the constitution to reduce the two-thirds majority issue. The CPP, which had already such a majority, could now form a government by itself and enact any law without requiring any support from other parties.

### **Coalition Partner in Limbo**

Soon after the above, Hun Sen went on to expose in public FUNCINPEC leader Norodom Ranariddh's love affair and the corrupt role of the latter's mistress in the appointment of senior FUNCINPEC officials in the government. This public shame forced Ranariddh to resign from his chairmanship of the National Assembly. Hun Sen then began to sack FUNCINPEC officials from the government and replace them with CPP officials, before turning on other FUNCINPEC officials loyal to Ranariddh, who he replaced with those loyal to FUNCINPEC Secretary General Nhiek Bun Chhay whom Hun Sen now preferred to work with.

In October, Ranariddh was ousted from the leadership of his party and some senior officials loyal to him were expelled from the party and from government jobs. Hun Sen and other CPP leaders immediately recognised the new leadership of FUNCINPEC, while Ranariddh and his followers challenged the legality of the ousting. FUNCINPEC, which had already lost much of its popular support, has become very weak and powerless.

With the SPR cowed and FUNCINPEC in limbo, the CPP has become the single dominant ruling party, with its members occupying virtually all positions of responsibility in the government, the judiciary, the civil service, the army and the security forces from top to bottom across the country. It has an overwhelming majority in both houses of parliament. Furthermore, it has enjoyed the support of all tycoons in Cambodia, some of whom have now sit in the parliament itself.

### **Political Killing and Election Manipulation**

There will be communal elections in 2007 and general elections in 2008. As had happened during the period leading to such elections in the past, there have already been activities to prevent parties other than the CPP from freely carrying out their activities. In

October, in Pohnea Krek district in Kompong Cham province, an SRP activist was shot dead by an assailant who is the brother of the governor of the district. In November, two other SRP members in Prey Veng province were killed, one in Kanh Chrieck district and the other in Prey Veng district. It is widely believed that the murders were politically motivated, but the police, as usual, promptly denied these allegations although the culprits were still at large. Later in the same month in O Raing Ov district in the same province, an SRP commune councillor was assaulted by two police officers with their rifle butts, causing open wounds to the head and bruises all over the body. The two assailants have not been brought to justice since the assault.

The National Election Committee (NEC), the majority of which's members are CCP appointees, proceeded to register voters for the forthcoming elections. Local commune authorities are responsible for this registration across the country, and the CPP controls almost all communes across the country. In August, the NEC distributed voter information leaflets to the public. It has been claimed that only four million out of the estimated 6.7 million voters had received the leaflets.

Some eligible people have faced discrimination in this registration process. It has been widely reported that CPP-commune officials had made efforts to get pro-CPP voters to register and neglected all others. In some communes officials have coerced voters to take oaths to vote for the CPP. In certain areas commune officials have created obstacles for people to register on the allegations that they did not have proper identity documentation. The SRP has reported that some 30,000 people in Rokar Keouk commune, Dangkor district in Phnom Penh, in Ampil Pram Doeun, Bovel district in Battambang province, and in Treng Troyoeung commune in Kompong Speu province, had been refused registration. Over 3,600 people that had been evicted from Phnom Penh and resettled on its outskirts have also not been able to register.

However, thanks to external monitoring and pressure, the NEC addressed these complaints and extended the registration period so that those people could register.

### **3. Increasing Executive Control of the Judiciary**

Both the Paris Peace Accords and the Cambodian Constitution have spelt out clearly that the judiciary is an independent branch of government. The judiciary comprises two separate and independent organs: the prosecution and the courts. It is, amongst other things, charged with the task of protecting the rights and freedoms of the Cambodian people. However, 15 years after the Paris Peace Accords, the practices of the communist days have remained very much entrenched. The police have maintained their superiority over the judiciary. The police are under firm government control, the government under party control, and both the government and the ruling party, the CPP, are under Prime Minister Hun Sen's control. In May and June, in public debates on the status of judges and prosecutors on the Khmer Rouge tribunal, government officials and some judges themselves inadvertently confirmed that judges and prosecutors were members of the ruling CPP party. The chief justice of the Supreme Court is a member of both the

standing and central committees of that party; the respective presidents of the Appeal Court and the Military Court are members of the central committee.

In December 1999, Hun Sen ordered the re-arrest of people released by courts, in defiance of the principle of *res judicata*. In March 2004, he introduced an "iron fist" policy allegedly aimed at ridding the judiciary of corruption. Many have welcomed this policy, but it turned out to be nothing more than an initiative designed to please international donors, when the three judges, two deputy prosecutors, and two court clerks who had at first been sentenced for taking bribes from suspected armed robbers were acquitted at their retrial in April for lack of evidence. The "iron fist" policy nevertheless had the effect of consolidating government control over the courts. It has frightened judges and prosecutors, and further eroded their ability to do their jobs impartially, for fear of being accused of corruption.

Some widely publicised cases have illustrated this executive control. In August 2005, the Phnom Penh Court convicted and sentenced Born Samnang and Sok Sam Oeun to 20 years in jail for their alleged murder of labour union leader Chea Vichea. During the trial, evidence was submitted to prove that they had not been near the scene on the day of the murder and the prosecution witnesses were not present for cross-examination.

Born Samnang and Sok Sam Oeun lodged an appeal against their conviction. This appeal case was to be heard in October 2006. But earlier, in August, the sole eyewitness to the crime, Var Sothy, while in asylum in Thailand, confirmed in a notarised testimony what had been strongly believed all along, that is, that the two men were innocent. The police had arrested and the court had sentenced the wrong men. The Appeal Court has shown no hurry to officially get the testimony from that eyewitness, as is prescribed by law, and to fix the date of the appeal hearing.

The case is politically sensitive in several ways. Firstly, Chea Vichea was one of the most prominent government critics. His murder was horrific and was widely condemned. It has since been widely viewed as having been politically motivated. Born Samnang and Sok Sam Oeun are also been widely believed to be being used as scapegoats. Secondly, Hing Thirith, the first judge assigned to conduct investigations into this case, dismissed it for lack of sufficient evidence and irregularities in the police procedures concerning the recording of the statement admitting the crime from the two men. The Supreme Council of the Magistracy punished and moved Hing Thirith to a remote province for his dismissal of the case. Thirdly, the Phnom Penh Police Commissioner, Heng Pov, who had handled the case and who has been dismissed from his job and charged with a number of crimes, has made a statement in exile in which he has expressed doubts over the culpability of the two men. Heng Pov has linked the murder to his superior, Hok Lundy, who is the National Police Commissioner and who is very close to Hun Sen.

There is now overwhelming evidence proving that Born Samnang and Sok Sam Oeun had not committed the murder in question. Any dismissal of their conviction would confirm that the murder was in fact politically motivated, that the SCM was simply an instrument of power politics, and that the political leadership was behind the murder of

Chea Vichea. The Born Samnang and Sok Sam Oeun case would then become a huge miscarriage of justice, which would jolt not only the judicial but also the political system in Cambodia, the outcome of which would likely not be favourable to the current leadership.

Back in August 2005, the military court refused to hear the defence witnesses and relied on flimsy evidence to convict and sentence opposition parliamentarian Cheam Channy to seven years imprisonment for his alleged organisation of an illegal army. In December, the Phnom Penh Court sentenced opposition leader Sam Rainsy in absentia for criminal defamation, after he had criticised Hun Sen. Yet earlier in October the same court, when receiving a criminal defamation complaint from the SRP against three pro-CPP academics who had organised a public campaign calling Sam Rainsy a traitor, dismissed that complaint claiming that there was no case against the academics.

The same court willingly accepted charges of incitement or disinformation, which carry higher sentences than defamation, against government critics so as to have the legal basis to refuse them bail and throw them in jail after their arrests. Such multiple charges were laid against broadcaster Mam Sonando (arrested in October), teachers' union leader Rong Chhun (arrested in October), and human rights activists Kem Sokha (arrested in December) and Pa Nguon Teang (arrested in January 2006), who all were put in jail and refused bail.

In 2006, the laying of charges that carry jail sentences in order to lock up government critics and refuse them bail, became a practice now that defamation no longer carries a jail sentence. In September, Hek Samnang, Thach Ngock Suern and Try Non, all ethnic Cambodians from Vietnam, were arrested and charged with disinformation and defamation for having disseminated leaflets critical of Hun Sen. Similarly, in August, Teang Narith, a law and politics lecturer at Sihanouk Raj Buddhist University in Phnom Penh, was dismissed and was arrested in September and charged with disinformation, for writing a book critical of government policy. All the accused were refused bail. In September, the municipal court of Phnom Penh convicted Dum Sith, editor-in-chief of Moneaksekar Khmer newspaper, in absentia for disinformation and defamation, following his publication of an article exposing Deputy Prime Minister Sok An's involvement in corruption. The same trial judge convicted Julio Jeldres, the retired King's official biographer and an Australian citizen, for defamation. (All of these cases will be described in detail below in section 5: Restrictions on Freedom of Expression).

The courts themselves have violated the rights of the accused. During their investigations neither the police, nor prosecutors, nor investigating judges informed the accused of their rights. Prosecutors, investigating judges and trial judges do not verify whether the accused have been subjected to torture when they are brought before them or seriously consider any complaint of torture. Furthermore, courts detain the accused beyond the maximum legal limit of six months for pre-trial detention. According to a court monitoring organisation, the court of Phnom Penh and the court of Kandal province held almost half of detainees beyond this period.

The executive control of the judiciary has now been increasingly institutionalised. In March 2006, the Prime Minister decided to place the secretariat of the supreme judicial body, the Supreme Council of the Magistracy (SCM), under the direct control of the Minister of Justice. The SCM is chaired by the King and has eight members. The Minister of Justice, the Chief Justice and the Prosecutor General of the Supreme Court, the President and the Prosecutor of the Appeal Court are ex-officio members. The three other members are magistrates who are elected by their peers. Currently seven of these members are members of the ruling party, the CPP, and three of them are members of its central committee. The eighth member belongs to FUNCINPEC. The SCM is charged with the task of assisting the King in ensuring the independence of the judiciary. It nominates judges and prosecutors for appointment by him and is responsible for their discipline. With seven members from the ruling party and a secretariat run by the Minister of Justice, the SCM is effectively under the CPP and ultimately the government.

Furthermore, it is provided in the new draft code of criminal procedure (article L.211-3), which is now before the parliament for adoption, that the Minister of Justice has the power to inform any prosecutor of any crime that has come to his knowledge and instruct him or her to take action against the offender(s) whom he has knowledge of, although he has no power to stop any prosecution.

It should be added that the executive control of the judiciary starts right from the training stage of judges and prosecutors. The school of the magistracy, called the judicial academy, is placed under the direct control of the government. It is also widely known that executive control has been extended to the legal profession, which is supposed to be independent. This profession ran into a prolonged crisis for two years when the incumbent chair of the Bar Association, Ky Tech, refused to hand over the chairmanship to the newly elected chair in 2004 and took legal action including an allegation of fraud against the latter. The government is widely believed to have a hand in this crisis, as Ky Tech is very close to it and under his chairmanship some senior government officials with dubious qualifications, including Hun Sen, were made lawyers without passing any examinations. In 2006, the Bar organised a new election and Ky Tech was re-elected as chair of the Bar.

The increasing executive control of the judiciary has hindered progress in the legal and judicial reform programme. This progress has continuously fallen short of the benchmarks the government had agreed upon with donors. Beginning some ten years ago, this reform just passed its planning stage in 2006. The government has repeatedly promised the enactment of a set of key laws such as the penal code, the code of criminal procedures, the civil code and the civil procedures code, the judges act, the court organisation act, the anti-corruption law, and the amendment to the law on the Supreme Council of the Magistracy. Up to November 2006, only one of the laws, the civil procedure code, had been enacted. Yet the government and the parliament have had time to enact a host of other laws. In just two months in 2006 the parliament passed the law on members of parliament (31 August), the adultery law (1 September) and the military conscription law (25 October).



Under such control, courts have failed in their constitutional obligations to protect the rights and freedoms of the Cambodian people. People whose rights courts have failed to protect have two other venues: they may have recourse to the King, who is the constitutional guarantor of rights and freedoms, but so far he has not been able to do much to help. They may also have recourse to the Constitutional Council to rule on the constitutionality of the act that has violated their rights. However, the procedure is so complicated that this council is virtually inaccessible. The recourse to the Human Rights Committee of the International Covenant on Civil and Political Rights has not been made available to them yet, as the Covenant's First Optional Protocol, which has been signed by the government, has not yet been submitted to the parliament for ratification. It should be added that the Optional Protocol to the Convention Against Torture has also been signed but has also not yet been ratified.

Some have pinned their hopes on the Khmer Rouge tribunal as a way to bring about positive change concerning the judiciary. This tribunal was officially formed when its judges were appointed in May and were sworn in July. International judges nominated by the UN are in the minority, however. But their participation has generated more international scrutiny of the Cambodian criminal justice system under which the trial will be conducted. This scrutiny has led to the discovery of numerous flaws and shortcomings of this system and generated pressure to have the trial attain international standards, which it could not attain under the existing system. This has led to the speeding up of the enactment of a code of criminal procedures by the end of the year, in time for the opening of the trial to be conducted by this tribunal.

Others are not so optimistic, as Cambodian judges, who are in the majority on both the lower and higher courts of that tribunal, lack independence, competence and impartiality. These shortcomings of Cambodian judges are well known to all observers of the Cambodian justice system, not least to the UN High Commissioner for Human Rights, Louise Arbour, who urged the Cambodian authorities to address this issue in a press conference during her visit to Cambodia in May.

#### **4. Rule By Decree**

Since its emergence from communist rule in 1993, Cambodia has enacted altogether over two hundred laws but, as mentioned earlier, these do not include the laws that are fundamental to the functioning of the judiciary. The government has enacted laws that suit its interests most or that are requested by donors. Again, its own interests or pressure by donors have determined the effectiveness of the enforcement these laws. Otherwise, the enforcement of these laws is very lax, if present at all. For instance, as referred to above, there was a rush to enact the law on members of parliament, the adultery law and the military conscription law, but there have been delays upon delays with regard to the enactment of key laws that had been promised. There was strict enforcement of the communist-era law on public demonstration to ban demonstrations, of the defamation and disinformation law, and, as a result of pressure exerted by donors, of the anti-human trafficking law. In contrast, there was no strict enforcement of the immigration law and

the land law. As will be seen below, in land grabbing cases, the public authorities have not made use of article 36 of the land law in order to suspend evictions when these evictions can cause unrests or have grave social consequences.

In parallel with the executive control of the judiciary and the laxity of law enforcement, the government has continued to rely on decrees to rule the country. When facing mounting pressure to address land disputes that had reached crisis levels nationally, in February 2006 the government created a National Authority for Land Dispute Resolution (NALDR) by a royal decree. The NALDR's membership comprises 12 government ministers, many high-ranking officials and representatives of political parties that have seats in the parliament. The NALDR in effect undermines, and even completely supersedes the National Cadastral Committee and its provincial and district branches, which were created by the 2001 Land Law. It also further undermines the jurisdiction of the courts of law, which have yet to win public confidence.

The NALDR began strongly, when, soon after its creation, it claimed to have seized and returned to the public domain by the end of June over 170,000 out of 200,000 hectares of woodlands that had been illegally cleared for possession by rich and powerful people. This well-publicised success has soothed criticism but has begun to ring hollow as the government has not brought those unlawful possessors to court and when, through quiet and secretive deals, some of those rich and powerful people have now got their land back. However, the NALDR has not met with much success in resolving land disputes between the poor and the rich and powerful. Questions have been raised concerning whether its decisions are legally binding, since its power and conflict resolution procedure have no legal basis. A piece of legislation has been considered to make up for these shortcomings, but instead of having to form an entity that has to start from scratch, that has yet to become an independent and impartial institution and that has yet to set up branches to cope with so many cases across the country, would it not be better to instead strengthen the National Cadastral Committee (NCC) and its branches, whose creation and procedures have a legal basis? Would it also not be better to strengthen the courts of law? Would it not be better to endow the courts and the NCC adequate resources and skilled personnel in order to resolve all of these disputes? Basically, the composition of the NCC and that of the NALDR are more or less the same. It is simply a matter of old wine in a new bottle.

Another regulation that has raised a few eyebrows is the creation in August, 2006 of an Anti-Corruption Unit (ACU) at the Council of Ministers by a prime ministerial sub-decree, while the drafting of anti-corruption law was being finalised separately. This law will create an anti-corruption body. This ACU has been created to supersede the old one created in 1999. Both the old and the new unit are simply government units run by political appointees. The new unit is headed by Om Yien Tieng, a senior advisor to the prime minister. Om Yien Tieng is also the chairman of the government human rights commission.

The provincial and municipal authorities, the police and the military, have all paid little attention to the law when addressing issues in which the interests of the rich and the

powerful are at stake. In 2006, the Municipality of Phnom Penh issued eviction orders and sent armed policemen to enforce them, altogether bypassing any necessity to secure eviction judgments from court.

## **5. Land Grabbing**

In recent years, land grabbing and land disputes have been on the rise and have become more violent across the country. Invariably, the rich and the powerful have connived to forcibly evict the poor from their land. According to Human Rights Watch, as of August 2006, in Phnom Penh 1000 families had been forcibly evicted during the year and 1600 more were facing the same forced evictions and resettlement. In ten provinces alone, based on publicly known cases, another 1231 families were known to be also facing forced evictions. As mentioned earlier, invariably there were no eviction judgments from courts, or if there were, these judgments had been secured through the political pressure and/or financial influence on the courts. The authorities simply issued eviction orders and sent armed police forces to execute them.

### **Forced Evictions in Phnom Penh**

The forced evictions in question contained numerous incidents of inhuman treatment. In early May 2006, the Cambodian government began to evict over 1000 families from a village on a bank of the Bassac River, near the compound of the Russian Embassy in Phnom Penh. Workers hired from outside demolished houses in the area, beginning with rented houses. A strong police force with riot shields and electric batons protected this demolition work and subdued resistance from the residents.

This eviction immediately made many poor tenants homeless. These homeless people had to sleep in the open during the night. Local officials pressurized them to leave and denied humanitarian agencies access to distribute tents. They even smashed cooking pots and pans. Most of the evictees were poor people.

This village was cleared to hand the land over to Sour Srun Enterprises Co. Ltd., reportedly for the construction of a shopping mall. The company offered land and houses with a school, a health centre and public utilities, in a relocation package to the villagers. The owners of rented houses were the first to accept the relocation offer, as they were not living in the village anyway. However, residents found that the relocation site was actually 25 km away and had none of the promised amenities. Therefore they refused to move.

When the entire village had been demolished, the site became a desolate place where hundreds of families of poor tenants were camping for days and nights in the open with little shelter from the hot sun and the monsoon rains. The Cambodian authorities prevented these poor tenants from building any form of shelter. They blocked off humanitarian groups' access to the site, when they tried to provide tents or any others

assistance. They also cut off running water and electricity for evictees and also banned the sale of water within the site. Furthermore, they put up a wall to block off the "unattractive" sight to the public.

This denial of basic necessities took a toll on the tenants, especially the children and the elderly. This cruel treatment was meant to make life so unbearable for these tenants that they would be forced to move out of the village on their own or to accept meagre compensation to move elsewhere.

At the end of the month, over 700 armed police officers moved in to flush out all squatters from the village. They cordoned off the whole village and barred entry to all reporters and human rights workers. Furthermore, a security guard physically assaulted a pregnant woman and the authorities pulled down a home, at which point the timber fell onto a 12-year-old girl knocking her unconscious. These excessively forceful acts sparked off a riot against the authorities. Hundreds of poor tenants armed with metal bars and farm tools attacked and chased away the security guard who had beaten the pregnant woman. The rioters also torched several buildings, including an administrative office, and tore down the corrugated metal fence. The police later overcame the protest and arrested six of the tenants.

In June, over 200 officers armed with assault guns, tear gas and electric shock batons were sent to forcibly evict 168 families from an area near the Monivong Hospital, in Phnom Penh, and moved them to a resettlement area some 30 km from the city. Three women were injured during this forced eviction. The area together with the hospital compound, which is a prime real estate, was transferred to the Royal Group. This group is financed by major international companies such as ANZ Bank and Millicom International Cellular S.A. It should be added that the Royal Group was instrumental in arranging a State-visit to Australia in October for Prime Minister Hun Sen, the first ever official visit he had made to a western democracy.

After the two evictions, 146 families in Group 78 in the Bassac Commune, next to Village 14, also faced eviction. The Municipality of Phnom Penh ignored the official title to the land that the families own. The police became active in the area in order to put pressure on these families to accept compensation at well below the market price of their land.

### **Forced Evictions in Provinces**

In the provinces, evictions were no less brutal. Below are only a few of the many cases of such evictions.

In June, Mr. Som Taing, vice-director of Kirirom National Park in Kompong Speu province and Mrs. Seng Vouch Leang, a business woman living in Phnom Penh, employed Royal Air Force personnel equipped with assault rifles and more than ten gangsters, also equipped with knives and sticks, to expel 18 families living in Ampil

Choam Klaing village in Treng Trayeung commune, Phnom Srouch district, Kompong, from their land - about ten hectares, including plantation fields of mango and jackfruits. The armed men came into the village and intimidated the families using physical force, in order to force them to leave from the land. When the villagers refused to leave their land, the Royal Air Force members and gangsters started to burn the villagers' houses down one after another. A total of eight homes were destroyed. The armed men also used tractors and bulldozed the families' mango and jackfruit plantations, estimated to be worth US\$ 10,000.

The perpetrators beat up the villagers and injured a local journalist who went to the site to report on the expulsion. All 18 families have now been expelled from their land.

In the same month Colonel Neou Ol, the Deputy Director of the Development Centre of the Royal Cambodian Armed Forces located in Kompong Speu province, sent some 40 fully-armed soldiers to evict over 40 families from their land in Tuk Chenh village, Treng Tro-Yoeung commune, Phnom Srouch district in Kompong Speu province. The soldiers pointed their rifles at the villagers, threatening to shoot at them, and forced them to leave their lands. They doused the houses with petrol and set fire to them. They also used hacking knives and axes to destroy them. In defiance, the villagers succeeded in restraining the soldiers before they could complete the destruction. Nevertheless, four houses were burnt down and four others were destroyed by knives and axes, but none of the villagers were injured.

In the same month, the Municipality of Sihanoukville, Cambodia's seaport town and seaside resort, sent a mixed police force of 100 men armed with rifles and electric batons, 80 workers, three bulldozers and 10 trucks to evict 32 families from the beach of O Cheuteal in Commune no. 4 in Sihanoukville. The police officers and workers tore down 70 wooden food stalls and homes belonging to the families and transported their belongings to another location. The victims resisted against the demolition of their stalls and homes in vain. In the afternoon a warehouse caught fire. The police succeeded in completing the demolition of the stalls and huts in this section of the beach. They were also ordered to demolish similar stalls and huts located in the next section of the beach, but were met with stiff resistance from groups of youths who barricaded themselves in. They burned car tyres and threw rocks, petrol bombs and acid bottles at the police, forcing them to retreat and withdraw from the area.

The first beach area was cleared so that it could be leased out to Sokimex, a giant petroleum company and supporter of the ruling party, which was to invest between US\$70 and US\$80 million in the construction of a 500-room hotel, with a 1000-person conference room, a nine-hole golf course, diving facilities and a parking lot.

On September 12, families in village 6, commune 4, Mitapheap district, Sihanouk Ville, were illegally evicted from their 16 hectares of land by 60 men and 2 military policemen hired by a tycoon senator named Mr. Sy Kong Trive. During the forced eviction, at least one villager was reportedly shot twice in the legs. The two military policemen were Mr. Taing Kimheng, a national military policeman in Phnom Penh, and Mr. Keo Tha, a

military policeman in Sihanouk Ville. They were equipped with pistols and assault rifles during the eviction.

During the same month, Ly Yong Phat, a tycoon senator, forcibly evicted 250 families with the support of the police from their 5000 hectares of land in Chi Khor Leu commune, Sre Ambel district, Koh Kong province. Six agents from the military police and three from the national police, who were all equipped with assault rifles, were present while Mr. Ly's men were destroying crops and property using tractors and bulldozer. Despite the villagers' desperate pleadings to halt the clearance, the police officers ignored the pleas and launched an attack on the villagers in order to disperse them. They fired live ammunition in the air and towards the ground to threaten the villagers, and physically assaulted them with sticks and rifle butts. During this time, one of the toes of a woman named Pet Nim was cut off and Mr. Em Chourng was shot in the right arm. Five other villagers were also reportedly injured during the police assault. The police then attempted to arrest the five villagers, but they all escaped. This clearance was conducted without an evicting order from the court and the families were forced from their land without compensation. Thanks to pressure, in November, Ly Yong Phat agreed to return the land to the villagers.

Also during the same month, in Battambang province, three villagers - Chea Ny, Mol Sab and Hem Lak - who had asked the local authorities and the prime minister to divide 20,000 hectares of land located in Boeung Pram village, Bavel district, whose ownership had yet to be clarified, among 3,170 poor families, were arrested and put in jail after they had led these families to live there. A campaign has been mounted to free the three men and to call for a thorough investigation into these events.

In November, 20 army officers led by a commander of ACO headquarters' protection unit named Thourk Mao, clashed with villagers in a land dispute in Onlung Thleung village, Mahasang commune, Phnom Srouch district in Kompong Speu province. In this clash three villagers were beaten and seriously injured, including: a 53-year-old woman named Nhem Phorn, who was beaten by a wooden stick on her right arm; a 28-year-old man named Chey Chom Reourn, who was beaten on his right eyebrow and suffered a dark bruise; as well as 26-year-old Un Ly, who was nine months pregnant and was pushed to the ground. Un Ly was unable to move immediately after she was assaulted due to the pain she felt and had to be brought to the emergency ward at the Kompong Speu provincial hospital. Several days later she had an abortion.

There has been persistent criticism of the Cambodian government's land concession policy, notably concerning its lack of transparency and the development and beautification of Phnom Penh at the expenses of the livelihood of people. There has also been criticism of its violation of the right to housing and shelter of the victims of land grabbing, and of the use of force during evictions, as well as the government's refusal to give adequate compensation to the victims in question. The dumping of Phnom Penh evictees in resettlement areas that are far away from their work and which lack social infrastructure, such as schools, health centres and public utilities, have also been harshly criticised. To many people, all the forced evictions of Phnom Penh people cited above are

reminiscent of the forced evacuation of Phnom Pen in April 1975, when the Khmer Rouge forced all townsfolk at gun point to leave the city and to live in hovels in the countryside.

## **6. Restrictions on Freedom of Expression and other Rights**

Restrictions on freedom of expression have remained a long-standing policy of the Cambodian government ever since the creation of a new government at the end of the UN administration of the country in 1993. These restrictions reached a new height in 2005, starting off with the lifting of the immunity of three parliamentarians from the opposition Sam Rainsy Party: Cheam Channy (for organising an illegal army), Sam Rainsy (for defamation) and Chea Poch (for defamation). Cheam Channy was arrested in February and tried in August 2005. Sam Rainsy and Chea Poch fled the country. Sam Rainsy was tried in absentia in December 2005.

The silencing of critics intensified in October 2005, with the arrest of Mam Sonando, broadcaster and owner of Beehive radio station, and Rong Chhun, the leader of the Independent Teacher's Association. The restrictions reached a climax at the end of the year with the successive arrests for defamation of: Kem Sokha, the director of the Cambodian Centre for Human Rights (CCHR); Yeng Virak, the director of the Community legal Education Centre (CLEC); and Pa Nguon Tieng, a broadcaster and deputy director of CCHR. During this wave of arrests, a number of other government critics were also facing arrests for defamation, but they succeeded in escaping them by going into exile abroad.

### **Silencing of Critics**

This repression appeared to ease off a couple of weeks after the latest arrest when, under mounting pressure from public opinion and from donor countries, Prime Minister Hun Sen, whom critics had targeted the most, dropped his defamation lawsuits against the afore-mentioned human rights activists. This was done just before donors were set to meet to decide on new aid pledges, and after the Prime Minister had secured the recognition of their wrongdoings and a pledge to stop criticising him from the human rights activists. They were released on bail. In February, after securing the same pledges from Cheam Channy and Sam Rainsy, Hun Sen proceeded to grant pardons to both of them and let them return to their parliamentary seats. Chea Poch, who had been accused of defaming Norodom Ranariddh, the then-president of the National Assembly, also secured the dropping of the lawsuit against him and returned to his seat in the National Assembly. Those in exile returned one after another undisturbed. Under pressure from inside and outside the country to decriminalise defamation, Hun Sen agreed to remove the jail sentence from this law, but still maintained the criminal nature of this offence.

There has, however, been no let up concerning the restrictions on freedom of expression since that time. The court proceedings against the human rights activists in question were

left pending, which had the effect of muzzling them until the expiry of the statute of limitations for defamation. While yielding to pressure, Hun Sen still continued to lash out at critics of the arrests of these politicians and human rights activists with vitriolic verbal attacks, calling them “animals”. He insisted that the arrests were legal and accused the critics of not knowing the law of the country.

In March 2006, he attacked Prof. Yash Ghai, Special Representative of the UN Secretary-General for Human Rights in Cambodia, after the UN official presented a report that was critical of the human rights situation in Cambodia. At a press conference at the end of his second mission to Cambodia in late March, Yash Ghai said that he did not see “any great improvement”. He was “struck by the enormous centralization of power, not only in the government but in one individual. I have talked to judges, politicians and all sorts of people and everyone is so scared. Everything depends on one individual and that is not really a precondition under which human rights can flourish.”

Hun Sen did not wait long to react to Yash Ghai, by making disparaging remarks referring to Yash Ghai's poor homeland (Kenya). Hun Sen accused him of knowing nothing about Cambodia. Hun Sen then urged UN Secretary-General Kofi Annan to sack Yash Ghai. He also threatened to shut the office of the High Commissioner for Human Rights in Cambodia (OHCHR-Cambodia), created under the Paris Peace Accords of 1991, and accused the staff of this office of being “long-term tourists”.

Both Kofi Annan and Louise Arbour, UN High Commissioner for Human Rights, urged Hun Sen to continue his cooperation with both Yash Ghai and the OHCHR-Cambodia. Hun Sen calmed down, but his vitriolic attacks and his actions intended to silence critics continued. In May, he lashed out at critics of the appointment of judges to serve on the Khmer Rouge tribunal that were widely known as being affiliated with the ruling party. He branded these critics as being “perverted sex-crazed animals.” In early August, he again lashed out at the director of the Economic Institute of Cambodia, Sok Hach, calling him “ignorant scholar” after the institute had issued a report concerning a survey of 1200 businessmen showing corruption in tax collection. Because of this corruption, the report said, the government could only collect 25 per cent of the taxes and lost about US\$400 million in revenue in 2005.

Hun Sen has continued to silence political opponents with death threats and arrests. In September, he publicly told an emerging politician, Prince Sisowath Thomico, to “prepare his coffin” for calling for the return of power to retired King Norodom Sihanouk. Thomico had actually elaborated on an idea of then-FUNCINPEC party leader Prince Norodom Ranariddh, and urged the minority parties to combine and seek a majority in parliament with which to return power to Sihanouk. Thomico's new party, the Sangkum Jatiyium Front or SJF (Community for the Nation Front), was then denied any permission to hold public meetings, and also ran into difficulties in its registration as a legal political party. In November, Hun Sen, in what was widely believed to be further efforts to target Thomico, said publicly that he “could send tanks to arrest” those who “had suggested a change of government,” which he called “divisive” and “unpardonable”.



A number of critics became the victims of such arrests. In August, Teang Narith, a law and politics lecturer at Sihanouk Raj Buddhist University in Phnom Penh, was dismissed and in September was arrested and charged with disinformation for writing a book critical of government policy. He faces a possible three-year jail term and a fine of up to ten million Riel. In September, Hek Samnang, Thach Ngock Suern, and Try Non - all ethnic Cambodians from Vietnam - were arrested and charged with disinformation and defamation for having disseminated leaflets critical of Hun Sen, accusing him of involvement in corruption and land-grabbing. These leaflets were scattered in rural areas and in Phnom Penh. One held him responsible for the July 2006 death of Ta Mok, one of the two senior Khmer Rouge leaders who had been detained while awaiting trial on charges of genocide.

Hun Sen's branding of his critics as "animals" is very much reminiscent of the branding of some races as "sub-humans" in Nazi Germany and the branding of dissidents as being "mentally ill" and needing to be condemned to "lunatic asylums" in the Soviet Union.

### **Ban on Public Demonstrations**

In 2006, the government continued to impose the 2003 ban on public demonstrations and use excessive police force to enforce it for the fourth consecutive years. In March 2006, the Kampuchea Krom community was denied permission to demonstrate against the arrival of Vietnamese Prime Minister Phan Van Khai in Cambodia. The community is an association of indigenous people of South Vietnam now living in Cambodia.

In June, Touch Naruth, the police commissioner of Phnom Penh, and Kuoch Chamroeun, the governor of Meanchey district, led a mixed police force of 200 men armed with riot shields, truncheons and electric batons, some of whom were armed with AK-47 rifles, to break up a march of up to 1500 workers. The workers, from two garment factories in Meanchey district on the outskirts of Phnom Penh, were about two kilometres away from the factories and were marching towards the National Assembly in the city centre when they were intercepted. They were marching to request that the government oblige the company that owns the factories to comply with an order from the Labour Arbitration Council to reinstate a sacked trade union official, Heang Ren. The police beat the workers with truncheons and stunned them with electric batons, reportedly causing serious injuries four persons. Another 15 sustained minor injuries. The police also banned journalists from the operation area and attempted in vain to confiscate a camera from one journalist who succeeded in getting through and taking pictures.

In August, around 100 riot police officers armed with assault rifles, electric batons, tear gas and riot shields blocked the entry into Phnom Penh of seven trucks transporting altogether more than 200 villagers from Ang Snuol district, Kandal province. The villagers were attempting to travel to the National Assembly and then to the provincial court of Kandal to demand the release of one of their fellow villagers, who had been arrested in a land dispute. At the police road block the villagers got off the trucks and attempted to get past the police officers. The police repelled them by shooting in the air

above their heads, firing tear gas, and kicking and beating them with batons and rifle butts. The violence was instigated by the police, who used disproportionate force on the villagers. The villagers fought back with pieces of wood from a nearby construction site and by throwing stones. The police forcibly herded them back to their trucks and led them back to their villages.

In September, a large number of police officers equipped with assault rifles and electric batons blocked and banned a procession organised by the Cambodian Centre for Human Rights (CCHR). The CCHR was attempting to make a public announcement concerning the installation of anti-corruption black boxes at different localities throughout Phnom Penh, in which people could post complaints or reports on cases of corruption they had encountered or had knowledge of. Early in the morning, police officers were dispatched to surround the CCHR offices in Toul Kork district in Phnom Penh. They also put up road blocks to cordon off the offices. They then stopped and confiscated a truck containing streamers, a 1m x 1m black box and a set of audio equipment, as it left the CCHR office. The truck was meant to travel along various streets in the capital to make the public announcement. The police also detained the driver of the truck, Peng Sam Ang.

In October, a week-long strike by workers at the Bright Sky garment factory in the Dangkor district of Phnom Penh, led to an open confrontation with the factory's management. When the strikers went to request that over ten of their peers be allowed to leave the factory, hundreds of heavily-armed police suddenly arrived on the scene. Around 50 policemen descended from trucks in the middle of the factory compound and immediately began shooting, beating with rifle butts and electrocuting the workers with electric batons. Three workers were hit by bullets, one in the lower back and abdomen. Around ten workers were wounded in total; some 40 others lost consciousness during the melee. Three were arrested and released days later without charge.

In November, in Battambang province, 40 police officers blocked 200 human rights workers and villagers from staging a demonstration in front of the provincial prison where three villagers, Chea Ny, Mol Sab and Hem Lak, were being held in connection with a land dispute in Bavel district in the same province (see section 5. Land Grabbing). Provincial governor Prach Chan cited “security reasons” for blocking the demonstration.

### **No Justification of the Ban**

To be able to organise public demonstrations, organisers must apply for permission from the local authorities, which invariably refer these to the Ministry of Interior. Applications are consistently rejected on the grounds that such demonstrations would disrupt public order and the traffic or, as in the case in Battambang above, for security reasons. However, over the last fifteen years no public demonstration has ever significantly disrupted public order and the traffic, and it is very rare for demonstrations to turn violent and for demonstrators to damage property. The International Labour Day demonstration in 2006 in Phnom Penh, which was organised by three labour unions, has proven that the

reasons cited by the authorities to support their ban on public demonstrations are completely unjustified.

In April, the Cambodian Independent Teachers' Association (CITA), the Free Trade Union Workers (FTU) and the Cambodia Confederation of Apparel Worker Democratic Unions (CCAWDU) applied for permission to organise a peaceful demonstration to celebrate International Labour Day and voice their demands for higher wages and lower petrol price. The Municipality of Phnom Penh and the Ministry of Interior refused them permission to stage the demonstration. The three unions defied this ban and went ahead with the demonstration on 1 May. The government deployed a massive police force armed with assault rifles and electric shock batons to block off all entrances to Phnom Penh and to cordon off the National Assembly Square, where the workers were to assemble for the rally. Thousands of workers managed to evade police blockades and assemble, forcing the authorities to lift the ban and withdraw the police force. As it turned out, the demonstration was very peaceful and orderly, causing minimal disruption to traffic. There were no complaints by members of the public against the demonstration. The claim by the authorities that the demonstration would lead to clashes and disturbances to stability, security and public order were shown to be utterly baseless.

### **Control of Media and Self-Censorship**

The Cambodian government has allowed some degree of press freedom, but this is more a show-case without much substance. There are many newspapers and magazines in Cambodia, but their circulation is very limited and is mostly confined to urban centres, where the illiteracy rate is high, and literate people either do not habitually read or cannot afford to buy them as their income is too low. Furthermore, almost all the printed media are either supportive of the government and its policies or exercise self-censorship. Only two newspapers, *Moneaksekar Khmer* (Khmer Conscience) and *Srolanh Khmer* (Love Khmers) are known to be supportive of the opposition and critical of the government and its policies.

The press that has been critical of the government or members of the ruling elites in the past has now effectively been muzzled. In July, You Saravuth, editor of *Srolanh Khmer* newspaper, received a death threat by fax, was sued, and had to seek asylum abroad after exposing land grabbing by Hun To, a nephew of Prime Minister Hun Sen. In September, the municipal court of Phnom Penh convicted Dum Sith in absentia for disinformation and defamation following his publication of an article exposing Deputy Prime Minister Sok An's involvement in corruption. The court fined Dum Sith eight million Riel (USD 2000) and ordered him to pay ten million Riel (USD 2500) in damages to the government or go to jail.

The government continues its tight control over the electronic media. As with the print media, all TV channels and radios stations, except one small radio station named Beehive, are either supportive of the government and its policies or have to exercise self-censorship. They have all been more subdued after the arrest in 2005 of Beehive radio

owner, Mam Sonando, following his criticism of the government. Despite support for the government and self-censorship, journalists still continue to face threats and intimidation. In September 2006, Soy Sopheap, a news analyst for CTN TV, still received a death threat, apparently from an army general that had been the subject of negative press reports, which Soy Sopheap analyzed and discussed on television.

### **Legalisation of the Restrictions on Freedom of Expression and other Rights**

A development that is of serious concern is the government's efforts to legalise its restrictions on these rights. In 2006, it started to draft a law on public demonstrations. According to the draft, all demonstrations are subject to prior approval. A notification is required concerning demonstrations comprising 50-200 participants, which may be held in designated 'freedom parks' for four hours at most, while bigger demonstrations require a permit. Article 13 of the draft law requires such a notification to be made to competent authorities four hours before the demonstration is to be held on any working day or 24 hours before on any holiday.

Under the draft law, the provincial or municipal authorities are required to designate "at least one" freedom park within their territorial jurisdiction. These parks are to be within visible or hearing distances of the public. Considering current restrictions on public demonstrations as well as the scarcity of open spaces in urban centres, particularly following the indiscriminate sale of public lands, it is likely for only one such park to be designated within any territorial jurisdiction. It is just as likely that this park will be located far away from the majority of residents. All of these factors will inevitably discourage people from exercising their rights to freedom of assembly and expression. Furthermore, groups of less than 50 persons will be deprived of their right to demonstrate.

In its meeting with NGOs on April 6, 2006 to discuss the draft law on demonstrations, the Ministry of Interior announced a ban on any demonstration protesting against the prime minister. Citing political instability, the ministry's Secretary of State, Nuth Sa An, said that any demonstration calling for the prime minister's resignation would be banned.

The government also set out to restrict the political activities of NGOs and associations. The government has with vigour revived the idea of a law governing local associations and non-governmental organisations (NGO law) that it had shelved for 10 years, and has planned to enact this law by the end of the year. The motive behind this rush is simply to rein in NGOs, restrict their constitutional rights and control their activities. In June, Heng Samrin, the President of the National Assembly and Honorary President of the ruling party, the Cambodian People's Party (CPP), said: "Today, so many NGOs are speaking too freely and do things without a framework. When we have a law, we will direct them." Sar Kheng, Deputy-Prime Minister and Minister of the Interior, said the bill would be ready for enactment by the parliament by the end of the year.

The statements of these two top leaders reflect the law's objective of restricting the

activities of NGOs as summed up by Seng Limnov, Secretary of State at the Council of Ministers, who said: “NGOs practice outside their duties, such as NGOs getting involved in politics by leading demonstrations.” This restriction is already stipulated in the draft law, which forbids NGOs to “conduct activities for any political interests” or “provide non-material, material, financial, means and human resources in support of any political party, or act against their statute.”

Already in 2005, the Ministry of the Interior issued guidelines to all commune authorities to instruct them, 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, members of which have to travel potentially long distances to the offices of provincial or municipal governors and get through lengthy bureaucracies to get such approvals. Furthermore, certain provincial and commune officials have already forced ordinary citizens to seek their approval before being allowed to attend meetings outside the jurisdiction of those officials. In July, Por Le, a member of an ethnic minority and a forest protection community in Mondulkiri province, was summoned for questioning to the commune police station for having attended a seminar in Phnom Penh. The police dragged her and her two colleagues out of their taxi, in order to check on which organisation had invited them. Nori, the director of a local NGO in the same province, also said that it was difficult for people to participate in her NGO's activities because of police control.

In November, commune officials in Takeo province stopped a meeting in a private house organised by the Cambodian Centre for Human Rights on the grounds that this NGO had not received permission to hold the meeting. During the same month, the Ponhea Leu district authorities banned a public forum on democracy and Buddhist moral values organised by a development NGO, and scared off villagers from attending the forum with threats and intimidation. District governor Tep Sothy cited possible clashes between villagers with different partisan views and “fears of ensuing riots” as reasons for this ban.

The legislation of the restrictions on freedom of expression has already started with the speedy enactment in August of a Law on Members of Parliament. This law has the effect of abolishing immunity from prosecution, arrest or detention for opinions expressed in the exercise of parliamentary duties, contrary to article 80 of the Constitution of Cambodia. It restricts the freedom of expression of members of parliament. Article 5 of the new law says that, "Members of the Parliament may not abuse this parliamentary immunity to harm the dignity of others, the good customs of the society, law and order, and national security." The effect of this provision is to make parliamentarians no different from ordinary citizens. It is not hard to imagine that under almost any circumstances one could be accused of harming undefined "good customs" or "national security". Under the law, an MP could well be accused of abusing parliamentary immunity and, when taking the floor in the National Assembly, be prevented from expressing opinions, if the speaker or other parliamentarians deem that anything that is

said contravenes this section. The member of parliament could also be arrested if the police draw such conclusions concerning opinions expressed outside the parliament. In other words, arrest now depends upon the subjective judgments of law enforcement officers, the speaker and one's political opponents.

Many have claimed that at least the provision of article 5 of the law is unconstitutional, but the ruling party-dominated Constitutional Council ruled in November that the law “is not unconstitutional,” a ruling which was not surprising.

## **7. Police Torture and Abuses by Security Forces**

### **Police Torture**

The brutality of the security forces has been evident not only against demonstrators, protesters or evictees but also against suspected criminals and prisoners. In court, some suspects have complained that they had been forced to make confessions under torture. However, their claims have not been investigated and evidence of such torture on their bodies has frequently disappeared by the time they are tried. Interviews with pre-trial detainees and convicts in a large number of prisons in the first half of 2006 by human rights NGO, LICADHO, revealed 96 cases of torture. The following testimonies made respectively by a former pre-trial detainee and a lawyer detail some aspects of the torture that is used by the police on suspects.

Pa Nguon Teang, a broadcaster and Deputy-Director of the Cambodian Centre for Human Rights, was arrested in January 2006 and detained for 12 days at Prey Sar Prison, located over 20 km from Phnom Penh, before being released on bail. He said that 10 inmates were detained in a room measuring 5.00 x 3.50 meters. Some of these persons were in pre-trial detention, while others were serving sentences, which is a violation of the right of pre-trial detainees to be segregated from convicts.

While in detention with those inmates, Pa Nguon Teang learned that new-comers were beaten up and bullied in different ways by long-term inmates. He also learned that inmates were also beaten up on the eve of their release. New-comers or inmates about to be released would not meet with such treatment if they had given bribes to the prison police to get long-term inmates to behave and welcome new-comers peacefully, or to withhold news about their release.

A young inmate named Huy, an undergraduate student whose parents were running a clothes shop in a Phnom Penh market, told Pa Nguon Teang of his torture by the police during interrogation, while in custody. Huy said the police had used a black plastic bag to cover his head down to his neck and tightened its end to suffocate him, and they had also beaten him. He was suffocated until he made the confessions they wanted. Huy said that in the “torture” room there were two slogans on the wall. One was “No answer, beat up to get answers out “. The other was “One answer out, beat up to get out five more”. Pa

Nguon Teang saw another inmate whose chest had caved-in on the left hand side. The inmate said that the police had broken his ribs.

In the first half of 2006, a lawyer in Kompong Cham province came across a victim of torture among his clients. In one case, a man named Pok Mao, living at Chambak village, Thmar Pich commune, Thbaung Khmum district, Kompong Cham province, was arrested for murder in December 2005. The police beat and kicked him, breaking his jaw on the right-hand side in the process. Pok Mao told his lawyer he would not lodge any complaint against the police out of fear that his safety would be in jeopardy. He feared that he would be beaten up when he was taken to the provincial prison. His broken jaw still showed when he was brought to trial.

The police have denied they condone torture and have urged those who have claimed having been subjected to torture to come forth with evidence. As the above case shows, it is rare that victims or their relatives have lodged complaints of torture against the police. In 2004, a poor man named Thon Tho filed a lawsuit against a police officer in Kompong province for having tortured him during his arrest in 2001. In mid-2006, Thon Tho was still awaiting the trial of the police officer in question. However, a complaint against a number of police officers for the death of a woman suspect named Duong Sopheap while in their custody at the Phnom Penh Municipal Police's Minor Crimes Office in June 2005 was successful. In July 2006, the Phnom Penh court sentenced six police officers to 12 years in prison for her death. This sentencing and its support by National Police Commissioner Hok Lundy were very encouraging, though one swallow may not make a spring yet. To this positive development was added, in November 2006, the National Assembly's approval for ratification by the king of the Optional Protocol to the Convention Against Torture.

### **Abuses by Security Forces**

It should be added that early in the year, members of various Cambodian security forces have abused their power and have used violence against ordinary people, especially against women, and that they have invariably managed to get away with their crimes. The following are several such cases that illustrate this.

In February, a 24-year-old woman named Krem Sinal, living at Da Lech village, Memot commune, Memot district, Kompong Cham province, was kicked twice by Oum Sam Ath, the chief of the Treak commune police, located in the same district. Oum Sam Ath then snatched her gold necklace and bracelet. Oum Sam Ath then used a glass to hit her on the head causing her to immediately lose consciousness. She lodged a complaint against her attacker.

In April, a beer promotion girl named Kruey May was shot and injured by members of the B-70 Unit of the Royal Cambodian Armed Forces at Ruk Kha II Beer Garden in Phnom Penh, for being slow to bring ice for their drinks. Kruey May, who was injured in the foot, was taken to hospital. The military police arrested two army officers, Major Phat Skphal

and Captain Sim Ry, but both were released two hours later. The two were reportedly demoted and had their heads shaved as punishment; however, no criminal charges have been filed against them.

In the same month a karaoke singer, Sovann Thida, was shot in the hand at the X2 Club in Phnom Penh. According to Phnom Penh Municipal Police Commissioner Touch Naruth, an armed forces officer was spinning a handgun on his finger and it accidentally fired when a police officer that was with him attempted to stop him from playing with it. The victim was given USD 3500, but no criminal charges have been filed against the army officer or the police officer. Meanwhile, Sovann Thida was said to have disappeared. The owner and staff of the club, as well as other karaoke singers and members of the local police have all refused to cooperate with inquiries. There are rumours that the shooting was not an accident, but that Sovann Thida might have turned down sexual advances, and that she might have been shot in her genitals as a result.

These shootings follow two earlier similar incidents in February in the same city. In one, an army colonel at a bar shot a young woman in the thigh and wrist. He was arrested but released later. He claimed that he had dropped his handgun, causing it to go off. The victim also has not been found since. In the other incident, a soldier shot his handgun into the ground and the bullet ricocheted before hitting a beer promotion girl. Again, no criminal charges have been filed in either case.

Arbitrary violence and impunity are also part of life in the provinces. In April, in Kompong Cham province, a member of a militia unit at Chamcar Andaung Rubber Plantation shot a villager dead as he rode past on the back of a motorcycle. The victim, Chlich Sinol, was carrying five kilograms of rubber which he wanted to sell to another merchant at almost four times the price offered by the plantation, which has a monopoly on purchases of all rubber produced in the area. Apparently one of the tasks of the militia is to prevent the sale of rubber to other merchants. Between 200 and 300 fellow villagers retaliated by burning down the militia post, together with the houses of the monopolising merchant and furniture in the houses of militia personnel. The police have confiscated weapons and ammunition from the militia and have prepared a file to send to the court of the province, but the murderer is still at large.

In March in the same province, a car transporting four customs officers hit a motorcycle being used to smuggle five jerry cans of diesel. The motorcyclist, Phy Phong, was killed after being pulled some 60 metres underneath the vehicle. The chief of the customs post acknowledged the killing and offered Phy Phong's father USD 1000 in exchange for dropping legal proceedings. This offer was turned down, but when the amount was increased to USD 3000 he accepted and withdrew the complaint.

## **8. Conclusion**

This report is not exhaustive. It has nevertheless shown that Cambodia's performance regarding human rights in 2006 was not any nearer the international norms and standards



it had adhered to as its obligation under the Paris Peace Accords of 1991, 15 years after these accords were reached. Cambodia's rule of law institutions, especially the judiciary, remained underdeveloped and under executive control. This control became stronger when the ruling party, the CPP, to which almost all judges and prosecutors belong, became the overwhelming dominant party in the country in 2006. The country has lost all checks and balances. These institutions remain instruments of repression in the hands of the government and its powerful prime minister, instead of striving to become protectors of the rights and freedoms of the Cambodian people, as provided for in the country's constitution. The judiciary failed to gain any public trust and people continued to look elsewhere for justice, including through protests, although they have to brave brutal crackdowns by the police force in such cases.

The abuses that are highlighted in this report derived mainly from malfunctions within these institutions. The main task required in order to ensure the observance of and respect for human rights therefore remains the establishment of an independent, competent and impartial judiciary, as provided for in the Paris Peace Accords, the international human rights instruments Cambodia has adhered to, and the country's constitution. This task lies with Cambodia on the one hand, and State-signatories to those accords, UN agencies and international aid agencies on the other. In this regard, the ratification of the First Optional Protocol to the ICCPR and the Optional Protocol to CAT that the Cambodian government has already signed, could be a catalyst to speed up this process. Victims of violations could then resort to the respective committees of these international legal instruments in order to seek redress, thereby opening up much-needed channels for these committees to bring about changes in these institutions.

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## INDIA: The Human Rights Situation in 2006

### I. Introduction

Any reference to India often includes superlatives, such as the world's largest democracy, the second fastest growing economy and the second most populated country. India has managed to convince the world's diplomatic community of its status and has become one of the leading voices in the United Nations, which was reflected in the UN Human Rights Council elections. India secured the maximum number of votes among the Asian countries in the election to the Council.

Based on this, the government of India projects the country as being a model to several other countries concerning the rule of law and human rights standards.<sup>1</sup> This, however, only applies if the comparison is limited to India's immediate neighbours, such as Nepal, Burma, Bhutan, Pakistan, Bangladesh, Sri Lanka and Afghanistan. Regarding economic development, the fact is that India has charted a 9.2% annual growth rate for the final quarter of 2006, and is expected to continue with such growth next year too. This growth is, however, not an indicator of the improvement of the rule of law and human rights standards in India, even though the government claims otherwise.

If economic growth is an indicator of the improvement in the standards of the rule of law and human rights, then the question to be asked is how many of the 1.2 billion Indians benefit from this development? Of the 1.2 billion Indians, an estimated 74% are living in the country's rural villages.<sup>2</sup> The improvement in the living standards and quality of services available to this 74% of the population, guaranteeing them the basic minimum rights, would be better proof of the improvement of human rights and the rule of law *vis a vis* economic development in India.

For the past twelve months, the Asian Human Rights Commission (AHRC) has been receiving reports from various parts of India that paint a dismal picture about the human rights situation found there. Most of these cases are from the villages in India. These cases are posted as urgent appeals by the AHRC calling for urgent intervention. In most cases the victims are poor and from financially marginalised communities.

It is presumed that the justice dispensation system in India does not discriminate between the poor and the rich. However, if it can be shown that the justice dispensation system does not serve the poor and it is out of reach to them, one can safely argue that the system

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<sup>1</sup> Press Information Bureau - India, *Management of Globalisation Process*: Pranab Mukherjee [Union Cabinet Minister – Defense]; 10 November 2006

<sup>2</sup> *India at a Glance – Rural Urban Distribution*: The Registrar General and Census Commissioner of India, 2005 report

is not catering to the promotion, protection and fulfilment of human rights and fails to ensure the rule of law. The cases dealt with by the AHRC indicate that the justice dispensation system in India is on the brink of collapse, particularly the criminal justice dispensation mechanism. The issues covered are diverse and include custodial torture, corruption and the right to food.

This report highlights the areas of concern that play contribute to the possible downward spiral of the rule of law that is diminishing the scope of human rights in India. The report will analyse each issue using cases taken up by the AHRC to show that the views expressed by the AHRC are not based on abstract terms, but rather on its own experience in dealing with these cases.

## **II. Areas of concern**

- a) Judiciary – especially the lower judiciary, which is plagued by a lack of sensitivity and enormous delays. The discussion also covers the human rights commissions in India.
- b) Policing which is reeling under ineptitude and corruption, and in which the practice of custodial torture is prevalent.
- c) Discriminatory approaches by the government towards certain regions within the country – for example the north-east.
- d) Caste-based discrimination – often leading to starvation deaths

## **III. Judiciary**

A magistrate court is often the first place to lodge a complaint in many cases of human rights violations in India. The magistrate court also functions as a first instance court for anyone who wishes to lodge a complaint against atrocities committed against the person, particularly if it is related to custodial torture.

Under Section 190 of the Criminal Procedure Code, 1973, a person can file a complaint at the magistrate's court requesting the court to take action upon the complaint. However, such a complaint will eventually be directed to the local police for their inquiry, and, if necessary, for investigation. This is because under the existing legal framework in India, there is no possibility for the court or an agency other than the local police to investigate such complaints. This process often proves to be a futile attempt, since the local police do not investigate the complaint impartially.

A person can also complain to the court when he/she is brought before the court by the police. The law mandates the presiding officer with making arrangements if a person produced before him complains about an incident of assault and requests a medical

check-up.<sup>3</sup> These procedures are in addition to the mandatory provision that any person arrested must be produced before a magistrate with jurisdiction over the area within 24 hours of arrest.<sup>4</sup>

However, many magistrates do not follow these procedural rules and in some cases even remand the detainee for further periods in police custody without even seeing the detainee. In the worst case scenario the magistrate court is literally run by police constables, as reported from West Bengal in the case of Mr. Vijay Kumar Jaiswal and Mr. Mohhamad Siraj.<sup>5</sup> In this case even though the victims were arrested several days before the date recorded in the arrest memo, the magistrate did not take any action. It was later discovered that the order, allegedly made by the magistrate, was in fact prepared by the police constables and merely signed by the magistrate.

In yet another case, in spite of a specific complaint by the detainee, the magistrate refused to order a medical inspection.<sup>6</sup> Mr. Yengkokpam Langamba Meitei and Mr. Leitangthem Umakanta Meitei were produced before the Imphal [Manipur state] magistrate in a pitiable state of health after being brutally tortured by the security forces and the police. They complained to the magistrate that they were illegally arrested and then tortured while in custody. The magistrate failed to take any action and remanded them in custody for investigation. Of the two victims, who were released later, after immense pressure from civil society groups and the general public, Umakanta is a human rights lawyer practicing in the very same bar.

Enormous delay in dealing with cases is yet another issue which haunts the judiciary in India.<sup>7</sup> Criminal trials take years to complete or even to record evidence. Delays occur due to several reasons. Basic requirements, like office equipment, are often denied to the courts. For example many courts lack even a telephone. Months of waiting to get copies of documents and a lack of prosecutors and other court staff including the judge are also regular phenomena.

However for Ms. Hasna Mondal, a victim of rape, none of these were the reasons for her case to be delayed for about 11 years before the court to deliver a judgment.<sup>8</sup> The court continued adjourning her case from month to month in spite of the fact that the witnesses were present in the court. After 11 years, when the court finally delivered the sentence, many police officers who were also accomplices in the crime were acquitted, while one officer died during the trial. In the meantime Hasna had to face threats and intimidation from the accused in the case, including the police officers.

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<sup>3</sup> Please see Section 54 of the Criminal Procedure Code, 1973

<sup>4</sup> Please see Section 57 of the Criminal Procedure Code, 1973

<sup>5</sup> Please see urgent appeal UA – 040 – 2006 issued by the AHRC on 27 January 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/1494/>

<sup>6</sup> Please see UA – 278 – 2006 issued by the AHRC on 25 August 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/1928/>

<sup>7</sup> About 20 million cases are pending before the lower courts and another 3.2 million before the high courts. This estimate is prepared by Data Net India Private Limited [www.indiastat.com](http://www.indiastat.com)

<sup>8</sup> Please see UP – 136 – 2005 issued by the AHRC on 30 June 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/1816/>

Delays in deciding cases are not limited to the lower judiciary. Even the Supreme Court of India, which cannot complain about a lack of infrastructure, also takes similarly long periods to decide cases.<sup>9</sup> A recent example of such a case is *Prakash Singh & Others v. Union of India and Others* which took ten years for the court to decide.<sup>10</sup> However, the Supreme Court often pressures the lower courts to speed up the hearing of cases and often sets targets for monthly disposal. Pressured by the directives from the Supreme Court, the lower courts dismiss cases in order to meet the statistical requirement. Such dismissals often concern cases where the parties find it difficult to appoint a lawyer. Most human rights cases belong to this category. Being the Apex Court in the country, which also enjoys the privilege of monitoring powers over the lower courts, the Supreme Court of India is not morally justified in asking other courts to speed up the time they take to decide cases. The end result is that most cases of human rights violations are dismissed and those which remain take decades to be decided.

It is just not delay and lack of professionalism that renders the judiciary in India a paper tiger concerning rule of law issues. There is no specific legal framework in India with which the judiciary can take action against, for example, an erring police officer. In a case of custodial torture, if a person complains to the judge, the judge can only record the statement and refer it to the local police to investigate. The impartiality of the local police in investigating such charges is obviously far below being satisfactory. This probably is the reason why the Supreme Court has not taken any action in a single case, even though its orders regarding arrest and detention issued in the D.K. Basu case are being openly violated in India.

In addition to the judicial magistrates, another category of officers responsible for protection and promotion of human rights are the executive magistrates. Even though these officers are not conventional judicial officers, the Criminal Procedure Code has conferred wide powers to these officers – both judicial and executive.<sup>11</sup> The AHRC has come across several instances where these officers use their powers arbitrarily and in violation of the law.

Mr. Santhosh Patel, a human rights activist based in Belwa village, Varanasi district, Uttar Pradesh, was arrested twice on the order of the District Magistrate of Varanasi. He was arrested because he was trying to file complaints against government officers and the food distribution agent in Belwa village. Patel is fighting corruption and caste-based discrimination in Belwa. Several cases from Belwa were taken up by the AHRC and in some cases the UN Special Rapporteurs have called upon the government of India to take action.<sup>12</sup>

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<sup>9</sup> The expense for the Supreme Court is managed through a consolidated fund sanctioned to the court, periodically, by the Union Government, on request from the court.

<sup>10</sup> *Prakash Singh & Others V Union of India and Others* was decided by the court on 22 September 2006 giving directions to the governments to constitute mechanisms for monitoring the state police and its functioning. The case was filed in 1996.

<sup>11</sup> Please see chapter X of the Criminal Procedure Code (1973)

<sup>12</sup> Please see UP – 122 – 2006 issued by the AHRC on 14 June 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/1778/>

The magistrate felt that such complaints will cause damage to the image of the country, which he publicly stated in a meeting in Varanasi. The magistrate thought that detaining Patel was the solution to solve the problem, without addressing the real issue. As the arrest and re-arrest took place, one more child died in his jurisdiction from acute starvation.<sup>13</sup>

There are other bodies in India that are empowered to promote and protect human rights - the national and state human rights commissions. However, these commissions also lack a legal framework to independently inquire into cases, resulting in such inquiries being deputed to the very same officer who is the respondent in the case or his immediate superior. The regular practice adopted by the commissions is to depute the inquiry upon a complaint to the head of the state police or to the department in which the respondent officer serves. However, such deputations, in practice, trickle down to the immediate superior and in some cases even to a subordinate of the officer against whom a complaint is made at the commission.

In the case referred to above, the complaint regarding the arrest of Mr. Patel was inquired into by a subordinate officer. The very nature of the inquiry was to pressure the complainants to compromise the case, a practice that was the subject of a further AHRC appeal.<sup>14</sup> On the receipt of a watered down report by the inquiring officer, the Uttar Pradesh state human rights commission dismissed the case against the district magistrate.

In addition to the above infirmities there are other practical issues for which there are no solutions whatsoever that are available to the average Indian, if he chooses to approach the courts to seek redress. To find a lawyer to represent a case is almost impossible for a poor person. There is no properly functioning public legal-aid system in India. The only available recourse is to approach the State Legal Services Authority. This body is constituted to provide legal help to those who cannot afford a lawyer.<sup>15</sup>

In theory, even though the State Legal Services Authority is meant to have an office in every district, often the functioning of the authority is limited to the respective high court. In several states, such a body is yet to be constituted. Where they are constituted and functioning, its function is limited to holding settlement seminars where both parties are called upon to settle their dispute. This has been found to be effective in marital and civil disputes. A case of human rights abuse, which most often emanates from a criminal act, is yet to find a place within the practical definition of the functioning of the State Legal Services Authority. The result is that in most cases of human rights abuse a complainant will find it practically impossible to find a lawyer to represent him in court.

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<sup>13</sup> Please see HA – 07 – 2006 issued by the AHRC on 28 July 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/1884/>

<sup>14</sup> Please see UP – 209 – 2006 issued by the AHRC on 15 November 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/2075/>

<sup>15</sup> Please see the Legal Services Authorities Act (1987)

All the cases cited above, and many more concerning which the AHRC has intervened in 2006, are cases of human rights violations meted out against the poor. It is the poor that find it difficult to make use of the existing legal framework in India, in order to redress their grievances. To summarise, the problems affecting the judiciary in India can be listed as follows:

- 1) A lack of a proper legal framework to address human rights violations
- 2) Enormous delays in deciding cases
- 3) A lack of basic infrastructure that prevent the courts from functioning
- 4) The absence of a compassionate attitude and proper understanding about human rights by the presiding officers, particularly in the lower judiciary
- 5) Limitations in finding *pro bono* legal assistance

#### **IV. Policing**

The state of policing in India remains deplorable and is worsening year after year. Most cases of human rights abuse taken up by the AHRC in 2006 are directly attributable to the local police. In several cases, the police are the abusers, and in a few others the police failed to take action against a perpetrator. Most often, discussions about the issues in policing in India are limited to corruption. Indeed, corruption is an issue. However, the policing system in India suffers from severe problems in addition to wide-spread corruption.<sup>16</sup> The very concept of police investigation is itself wrongly construed in India.

The investigation of a case begins with a confession statement and ends with it. The police force is grossly neglected and it lacks all the facilities required to conduct a scientific investigation. The ground rule frequently used is that, if forced, the suspects will tell the truth. This approach has resulted in gross abuse of authority and custodial violence continuing unabated. In cases where police officers have been known to break the law, no action is taken either by the higher police officers or by any other organ of the state. Often, the approach adopted by the higher police officers is to defend their subordinate officers. This is also because of faults in the policing policies of various state governments.<sup>17</sup> Additionally, the law governing policing in India, the Police Act, dates back to the British era in India.<sup>18</sup> There is, however, a move to enact a new Police Act. The new law is in the pre-natal stage of consultation and drafting.

Under existing circumstances, policing suffers badly from the practice of custodial torture. This practice, along with issues like corruption, ineptitude and political interference, has resulted in the local police being feared by the ordinary people. The impression about the local police is often worse than that of a criminal. In common conversations the image of police is such that a police officer is often referred to as the criminal's associate or the uniformed criminal. Ordinary people avoid going to police

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<sup>16</sup> *Bringing Democratic Policing to Rural India*: Devika Prasad & Monica Saroha; 2006 - The Commonwealth Human Rights Initiative

<sup>17</sup> Policing and law and order in a state is a state government prerogative according to the Constitution of India

<sup>18</sup> *Ibid.* 16

stations even to file a complaint. Violence against women committed by the police keeps the women away from approaching the police, even when faced with extreme situations. The number of women police officers is also fairly low. The national average of women police officers in the Indian Police Service is a pitiful minimum of 3.5% which has not improved much in the past few years.<sup>19</sup> The existing women officers also complain about harassment by male colleagues. In a study conducted by the British High Commission of India a woman police officer said *'being a woman police officer in India is a punishment'*.

Policing suffers the worst from the brutal force used by the police against the ordinary people. There is no specific law that prevents the police from using such force against suspects and innocent persons. There is also a complete absence of a credible mechanism by which a complaint against a police officer can be investigated and the erring officer brought to justice. The following cases illustrate how policing in India suffers from excessive brutality used by the police against individuals, with the officers enjoying impunity.

Mr. Wilson, a welder by profession was asked to come to the police station by the officers attached to the Mannuthy police station in Thrissur district, Kerala state, as part of an inquiry into a case of the murder of a boy. At the police station Wilson was abused and tortured in order to force him to confess to the crime. Later it was found that Wilson had nothing to do with the murder and another person was arrested as the murderer. The AHRC had previously issued an appeal calling for immediate intervention. Later it was also revealed that Wilson was tortured under instructions from the Superintendent of Police, who had instructed his subordinates to use force to make the suspect confess to the crime.<sup>20</sup>

An internal inquiry was initiated, based on a complaint filed by Wilson. However the inquiring officer, a Deputy Superintendent of Police, informed Wilson that such practices, including torture, are allowed in the police and are also permitted by law. Surprised, Wilson sought help from a local human rights activist who talked with the senior police officer who justified his subordinates' action. The officer also threatened the activist and said that the practice of reporting cases of police abuse to external human rights organisations is wrong and must be discontinued. To date, Wilson is trying to get his complaint registered in court and take action against the police officers who assaulted him.

The practice of using violence is not limited to the investigation of a crime. Maintenance of law and order is carried out through the use of violence and by terrorising the people. Mr. Mohanan from Thrissur district, Kerala state, was taken into custody by police officers from the Pazhayanoor police station. Mohanan was taken into custody when he objected to the flashing of a torch in his face by one police officer, while the officer was on patrol duty. The officers who took Wilson into custody after an initial assault, threw

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<sup>19</sup> *State of Women in Urban Local Government*: The United Nations Economic and Social Commission for Asia and the Pacific – India Report 2000, p. 11

<sup>20</sup> Please see UA – 349 – 2006 issued by the AHRC on 25 October 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/2043/>



him into the police jeep. Wilson was severely beaten inside the police jeep and, as a result, he defecated inside the vehicle. He also lost his consciousness. The officers waited and when Wilson regained his consciousness, he was asked to clean the vehicle. Later a case was registered against him implicating him as a suspect in a theft case.<sup>21</sup>

Police officers also use their power and impunity to work for private financial companies as repossession and recovery agents. Mr. Sadiq, a travel agent from Kunnankulam was taken into custody by police officers from Kunnankulam police station as the result of mistaken identity.<sup>22</sup> The officers, who came in a private vehicle, stopped in front of Sadiq while he was waiting for a bus and asked for his name. He said his name is Sadiq. The officers shouted at him saying that changing his name will not help him to avoid repayment of a loan and assaulted him and took him to the Kunnankulam police station in the vehicle. Later, at the police station, the officers realised that they had picked up the wrong person. Sadiq's friend, who also came to the police station, was detained. Both persons were released later. However, when Sadiq tried to lodge a complaint with the Deputy Superintendent of Police of Kunnankulam, the officer threatened Sadiq, saying that he would personally initiate a case against him if he dared to complain against his subordinates. The officer also informed Sadiq that the officers who assaulted him were probationary officers undergoing training under him and that he did not want any complaints registered against them.

In an inquiry conducted by the AHRC, it was later revealed that the officers who assaulted Sadiq were also working for a private money lender who had paid them to assault persons who defaulted on payments. Even probationary officers enjoy impunity, and their superior officers allow this to continue. These officers will be in regular service in a year's time and one can easily imagine how they will behave once they have been inducted into regular service.

Thirteen cases of death under suspicious circumstances involving the state police have been reported from Kerala state in the past few months. In response to a media outcry the state government responded by constituting an inquiry commission to look into the circumstances of these cases and to advise the government. The commission is probing the custodial deaths and other atrocities that were reported from various police stations and jails in Kerala between April 1 and September 16 this year. It is expected that the state government will take action at least upon those cases which the commission inquired into and will punish the police officers responsible for the death of innocent persons. Kerala is considered to be a far better state in comparison with the other states in the country in terms of public response to issues like the state police.<sup>23</sup> If this is what is

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<sup>21</sup> Please see UA – 69 – 2006 issued by the AHRC on 23 February 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/1546/>

<sup>22</sup> Please see UA – 236 -2006 issued by the AHRC on 18 July 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/1854/>

<sup>23</sup> *Power to the (Malayalee) People*: Richard W. Franke and Barbara H. Chasin; Critical Asian Studies : Vol:38, No.3, September 2006

happening in Kerala, the situation in the other parts of the country, where the public is under the grip of fear against the police is beyond comprehension.

There are specific procedures in law to be followed by the police or any other law enforcement agencies at the time of arrest, questioning and detention of a person. This can be found in the Criminal Procedure Code and also in case law in the D. K. Basu case.<sup>24</sup> However, the implementation of the law and the Supreme Court's judgment is limited to pasting the court's order in a police station. In all the cases dealt with by the AHRC this year, these procedural requirements were found to be being violated by the police.

A discussion about policing in India is not complete without referring to the Jalangi police station in Murshidabad district, West Bengal state. In 2006, the AHRC has received more than two dozen cases involving this police station, where police officers are either engaged in violence against innocent people or aiding the paramilitary forces [the Border Security Force (BSF)], in carrying out unabated violence against the people. The case of Mr. Bajlur Rahman is a typical example which illustrates how the police are engaged in such acts in Murshidabad district.<sup>25</sup>

On August 28, 2006, at about 3 am, six officers led by Mr. Tuhin Biswas, Sub Inspector of Police from the Jalangi police station, raided the house of Bajlur. The officers who raided the house did not inform the family who or what they were looking for. After arresting Bajlur, the officers tortured him in front of his mother. He was later taken to the Jalangi police station in a police jeep. It is alleged that Bajlur was also tortured at the police station.

Bajlur's mother Mrs. Anesa Bewa tried to contact Mr. Somnath Banerjee, the officer in charge of Jalangi police station to find out why her son was tortured and what the reason for his arrest was. However, she was not provided with any details by the officer. Subsequently, she contacted MASUM, a local human rights organisation, on August 30, 2006. On receipt of a complaint by Anesa, MASUM contacted the District Magistrate and the Superintendent of Police of Murshidabad. However, both officers failed to provide any help or information regarding the case. Bajlur was produced in the Court of the Chief Judicial Magistrate, Murshidabad on August 31, 2006. The police also produced false charges against Bajlur to justify the arrest.

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<sup>24</sup> The Criminal Procedure Code of India only provides for the minimal basics regarding how an arrest is to be made and the time limit [24 hours] within which a person is to be produced before a judicial officer. It was the Supreme Court of India, in the decision rendered in the D. K. Basu case, which stipulated the modalities to be followed by the law enforcement agency at the time of arrest, detention and questioning of suspects. The court ruled that the person arrested must be informed about the reason for arrest, the place where the person will be detained and also for medical examination of the detainee. The court also ordered that the guidelines of the court must be implemented by the government without failure and that it must be pasted in all police stations in the country for the police officers to follow and the general public to be aware of.

<sup>25</sup> Please see UA – 283 – 2006 issued by the AHRC on 31 August 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/1937/>

Once MASUM had intervened and on receipt of a complaint from the mother of the victim, the Jalangi police then doctored a statement by one Ms. Khusi Bibi of Pune, Maharashtra state, who is allegedly involved in a case of female trafficking, to also frame Bajrul in this case. The allegedly doctored statement by Khusi Bibi was made by her while she was in the custody of Jalangi police. The police have also created a false arrest memo, which has now been produced in court, in which Khusi Bibi has been made a witness to the arrest. This contradicts the purpose of the arrest memo. According to the rules framed by the Supreme Court, the witness to the arrest memo must either be a family member of the arrested person or a respectable person in the locality, as which Khusi Bibi does not qualify, given the current circumstances. Bajrul alleges that the reason why he was arrested, framed in a case and tortured was because he was voicing his protest against the police officers at Jalangi police station, having questioned why the officers take bribes, when he went to the police station on a previous occasion. At that time he had declared that he would report the criminal activities of the officers to the higher authorities. The officers had warned him that they would take him to the station next time as a criminal and then they would let him know why the people pay the officers and what happens if they do not pay.

On production of Bajlur at about 3 pm in court, the Chief Judicial Magistrate, Ms. Subrata Hazra Nee Saha, judicially remanded Bajlur until September 14, 2006. Even though the Magistrate had received a written complaint regarding the manner in which Bajlur was arrested and tortured in custody without being produced before the court within the stipulated time of twenty four hours, the Magistrate did not ask Bajlur whether he was arrested in the manner mentioned in the complaint or whether he was tortured by the police. The Magistrate also did not appear to care whether Bajlur require any medical attention.

The Criminal Procedure Code, 1973 of India requires the law enforcement agencies to follow certain procedures at the time of conducting a house raid. Section 47 (1) of the Code requires the police officers to inform the occupants of the house whom they are looking for and seek their prior permission before entering the house. It is only when the occupants refuse permission to the police to enter and the officers believe that the refusal is in order to facilitate the escape of a person that they are seeking to arrest, that officers can use force to enter the house. However, in this case, the officers barged into the house without complying with any formalities. Section 47 (2) also requires the officers entering a house where a woman resides to allow the woman to step outside the house before the search, which was also violated in this case.

Section 49 of the Code prohibits the use of unnecessary force during arrest. Section 50 requires the officer to inform the person arrested of the reason for the arrest, including the alleged offence for which the person is being taken into custody.

The statutory requirements have been reiterated by the Supreme Court of India, when it ruled that at the time of arrest, a memo must be prepared by the arresting officer. This memo must contain the alleged crime, the place, date and time of arrest, and also the place to which the person will be taken for detention prior to being produced before a

Magistrate. The rules framed by the Supreme Court also require the officers to ask a person to witness the arrest memo.<sup>26</sup>

Bajlur was arrested on August 28, but he was produced before a Magistrate only on August 31. Section 57 of the Criminal Procedure Code requires the police to produce the detainee before a local Magistrate within twenty four hours. In Bajlur's case this law was not observed. Bajlur's mother has also filed complaints with the Chief Judicial Magistrate Murshidabad alleging illegal detention, torture in custody and non-compliance with the law and the directives of the Supreme Court.

While Bajlur's case shows how the police victimise innocent persons to meet their corrupt ends, the following case depicts how the police aids the Border Security Force [BSF] in smuggling.

On November 10, 2006, Mr. Mohammad Sayab Ali Mondal, an agricultural labourer, was going to his property to attend to his crops in Murshidabad District, West Bengal. While he was approaching his property, he witnessed some officials from the BSF - 'C' Company of Battalion Number 90, posted at Out Post Number 6, unloading some goods from a vehicle. Without any reason the officers approached Sayab and started beating him with bamboo sticks. Sayab suffered serious injuries in the assault and soon became unconscious. The BSF officers left him to die. The alleged reason why the BSF officers assaulted him was because they were dealing with smuggled goods from or to Bangladesh.

Once Sayab regained consciousness, he managed to get to the nearby hospital at Sagarpara, where he received treatment for his injuries. An X-Ray revealed that he had suffered compound fractures of his wrist.

On November 15, Sayab visited the Jalangi police station to lodge a complaint. The complaint was prepared by Mr. Gopan Sharma, a local human rights activist associated with MASUM. However, the Officer-in-Charge [OIC] of the Jalangi police station, Mr. Somnath Banerjee, insulted and intimidated them and threw away the written complaint. The officer said that he cannot entertain any complaints against the BSF. The officer also shouted at Sayab saying that it is better not to do anything after hearing advices from human rights activists and also said that these activists are creating problems in the locality by taking up issues against the police, BSF and other government agents.

Dejected by the attitude of the local police, but determined to act, Sayab contacted the Additional Superintendent of Police [ASP] of Murshidabad district, West Bengal with the help of Gopen. On receipt of the complaint, the ASP directed the Jalangi police to accept the complaint without any further delay. However, the OIC still refused to accept Sayab's complaint.

According to the latest information, the Jalangi police is harassing Sayab because he has involved human rights activists in helping him with his case. The police have also

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<sup>26</sup> Please refer to D. K. Basu v. State of West Bengal 1997 (1) Supreme Court Cases p. 416

threatened Gopen, stating that he would face serious consequences if he continued with his work. There are further allegations that the Jalangi police failed to arrest Mintu Siek's killers in spite of an order from the court. Mintu Siek was allegedly killed by cross-border smugglers on March 12, 2003. It is alleged that the police are refusing to arrest the criminals since they are paid off by the smugglers.

Sayab's case is not the only case the AHRC has been informed about that depicts a clear nexus between the smugglers, local police and the BSF. Throughout the past three years, the AHRC has issued a series of urgent appeals calling for immediate intervention to curb the violence perpetrated by the BSF against the local villagers. In all these cases, the facts suggest that the violence against the local villagers had a direct connection with the BSF handling smuggled goods and the local police supporting them.

Cross border smuggling is rampant along the Indo-Bangladesh border. The BSF, a paramilitary wing, is posted along the border to prevent infiltration, smuggling and illegal cross-border activities. Being a para-military unit, the BSF enjoys absolute command of operational issues over the local police in the areas where they are deployed. The domestic legislation provides certain impunities to the officers for acts committed during an operation. However, the offences committed by the BSF officers, like smuggling and beating people, are not covered under this law. The local police have every legal right and duty to take actions against these officers.

The first step in such an action is to register a First Information Report and also to report the matter to the Commanding Officer of the Battalion. The police must also investigate and file the charge sheet at the local court which entertains jurisdiction over the case. However, many police officers, the officers from Jalangi police station in particular, fail to initiate any action against the BSF and the local people allege that this is because they receive kickbacks from the BSF for not registering cases.

Police corruption not only has a say in the poor law and order situation in the area, but also facilitate other malpractices in various welfare programmes. This keeps the poor in a state of helplessness, making them easy prey for smuggling and other criminal racketeering operations in the area.

Murshidabad district in West Bengal state, is one of the poorest in the state. Natural calamities such as massive erosion of land by the river Padma and the lack of other alternatives to find jobs for the predominantly agricultural community have resulted in several deaths from acute starvation in the district. The government of India has various schemes to distribute free and subsidised food among the poor regions in the country and Murshidabad is one among them. However, owing to corruption in the distribution of this food and the lack of police action, food is being smuggled across the border to Bangladesh. The local people to whom this food is supposed to be distributed free or at subsidised rates are forced to work as smugglers to smuggle food across the border to Bangladesh for a pittance. The complete irony of this situation is obvious. This situation is controlled by local police officers. The officers at the Jalangi police station are notorious for this.

The AHRC has repeatedly complained to the authorities in India about the situation in Murshidabad. Not a single case has been investigated by the authorities and no action has been taken against any police officers. This lack of action by the authorities has resulted in providing near to complete impunity to the police. A similar attitude by the authorities in the rest of the country shows how far the government is interested in taking action against erring police officers or members of other government forces. One of the alleged reasons for government inaction is that even the state government considers people in this border district as being illegal migrants from Bangladesh.

The situation is further worsened in the militarized north-eastern states of India, for example in Manipur.

18 year-old Mr. Longjam Surjit is a resident of Samurou Makha Leikai, within the jurisdiction of Wangoi police station in Imphal West District, Manipur. He was shot dead by troops from the 22 Maratha Light Infantry posted at Mayang Imphal on August 31, 2006. It is alleged that Surjit was shot dead by the army when he went out looking for his missing horse by the banks of the river Nambul with his friend, Mr. Naorem Brajamani from Samurou Naorem Chaprou. Brajamani heard ten shots from the direction Surjit had been walking in, and ran home scared.

In the morning Surjit was found shot dead and the army claimed responsibility for the killing, claiming that they had to shoot Surjit since he had tried to fire at the army officers. The army also claimed that they had recovered arms and ammunition from Surjit, the possibility of which his family has denied. Brajamani has made a statement to the local media concerning these events, which was recorded on September 1 and was published in local newspapers.

A meeting by the residents of the area was held at Samurou Bazar (a local market) on September 1 and 3 to protest against the killing. In the public meeting it was decided that Surjit's family will not claim his body from the RIMS mortuary, where the body was kept. Surjit's family asserted that unless there is an independent investigation into this case, the army officers responsible for the murder of Surjit are punished, and the Armed Forces (Special Powers) Act, 1958 is withdrawn from the state they will not claim the body from the mortuary.

The meeting also expressed strong resentment about the paramilitary forces and the state police's practice of pronouncing an innocent person guilty after killing him, including the planting of arms to make the person appear as being as a cadre of a secessionist group. There is no mechanism to regulate the weapons seized by the police and the military from arrested cadres of secessionists groups and, as such, the repeated use of weapons and ammunitions seized from such persons are often reported. There is no independent authority to verify the claims of both the armed forces and the police.<sup>27</sup> In accordance

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<sup>27</sup> *The Committee to Review the Armed Forces Special Powers Act, 1958*: Government of India, Ministry of Home Affairs [The Committee submitted its report in 2005. The Committee was chaired by Justice B. P.

with the decisions to launch agitation until their demands are met, the residents of Samurou and other adjoining villages blocked the Mayai Lambi Road which connects Mayang and Samurou with other districts in Manipur.

Extra-judicial executions and custodial deaths by both the army and the police are a regular feature in Manipur. The killings are abetted by draconian laws that empower the army to operate with impunity there. This is done under the pretext of aiding civilian law enforcing agencies to combat secessionist groups in Manipur. Statutory impunity is provided to the armed forces of India by virtue of the Armed Forces (Special Powers) Act, 1958 which permits them to suspend the right to life, to kill a person on mere suspicion with full legal immunity.<sup>28</sup>

Manipur was an independent country for centuries but, after being defeated in the Anglo-Manipuri War in 1891, became a British protectorate until August 15, 1947. After independence, a constitutional monarchy was established, but the Indian government annexed Manipur on October 15, 1949. Since then, Manipur, a small border province in the remote north eastern region of India, with a population of 2.3 million, has been the centre of an armed conflict. In order to control the active armed opposition groups, the Indian armed forces were deployed under the Armed Forces (Special Powers) Act, 1958, commencing the full scale deployment of Indian Military forces in Manipur.

Often, people are killed after being arrested from their homes. The armed forces repeatedly claim that they were killed when they tried to escape from army custody. However, the explanation given by the 17th Assam Rifles (a paramilitary unit in India) in the case of rape and murder of Miss Thangjam Manorama on July 11, 2004, after arresting her from her residence at Bamon Kampu, Imphal, that she was killed while attempting to flee from the army's custody, led to disbelief and an outpouring of anger among the people of Manipur, leading to massive agitations. This compelled the Union Government of India to institute a Review Commission of the Armed Forces (Special Powers) Act, 1958, although to date nothing has happened concerning the process of repealing the Act, due to the lack of interest in this by the government.

In the past few months, demonstrations to have the Armed Forces (Special Powers) Act, 1958, repealed have taken place in New Delhi. The demonstrations were spearheaded by Ms. Sharmila, who is on a hunger strike to the death until the Act is repealed. The agitation that continued in New Delhi forced the government to reconsider the pace of repealing the Act. However, despite this, the Act is still in operation to date. There is no discussion about what should be done concerning the past cases in which innocent people were killed by the armed forces in Manipur.

Before parting with the discussion about policing in India, one more case is worth mentioning. Very often in cases of police atrocity, the blame is put on low-ranking police

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Jeewan Reddy, a retired judge of the Supreme Court of India and included Lt. General V. R. Raghavan, Dr. S. B. Nakade, Mr. P. P. Srivastav and Mr. Sanjoy Hazarika as its members]

<sup>28</sup> *An Analysis of The Armed Forces Special Powers Act, 1958*: The Asian Centre for Human Rights; PUCL Bulletin, March 2005

officers. The case of Mr. Deepak Sanyasi shows how high-ranking police officers make use of their subordinates to settle personal rivalries and even family disputes.<sup>29</sup>

On August 23, 2006, Deepak and his father Sanyasi were arrested by Mr. Rabin Das, the Inspector in Charge of Bantra police station. It is alleged that they were arrested by the officer under the directions of Mr. Niraj Kumar Singh, the District Superintendent of Police in Howrah, as a favour to his superior officer, Mr. Sadan Mondal. Mondal is the Inspector General of Police [Intelligence Branch] of the West Bengal State Police.

It is alleged that after the arrest, Deepak and Sanyasi were taken to Bantra police station where they were tortured. Even though they were released by about midnight on the same day, a false charge under Section 290 of the Indian Penal Code was registered against them. This is the provision in the penal law of India concerning the causing of a public nuisance, which is a petty offence.

Deepak is a businessman running a lathe machine. It is alleged that Mondal was not on good terms with Deepak due to some personal feud between the two. It is also alleged that while in custody, the police officers intentionally damaged the SIM card of Deepak's mobile telephone to destroy any possible evidence of communications between Deepak and Mondal's family members.

The AHRC has been raising the alarm regarding the deteriorating law and order situation in India. Often the government of India and its state governments blame low-ranking police officers for breaches of the law and the use of violence against ordinary people. However, as is evident from Deepak's case, in many cases such violence emanates from either dereliction of duty or willful misuse of authority by police officers. In this case, Mondal is the Chief of the Intelligence Branch of the West Bengal State Police.

As the head of the intelligence branch, this officer is responsible for inquiring into allegations against police officers. His office is also responsible for investigations of crimes against national security. If the allegations are true, and if the state's highest-ranking police officer has not only misused his office but also ordered others to commit a crime of torture, to pacify his personal vendetta, the fate of ordinary people who face brutality on a daily basis from the police can be understood. Incidents of this nature also throw light into why many cases of police atrocities are not investigated in India.

The fatal cancer affecting the policing system in India has several roots. The complete lack of a sensible and strict procedural and legal framework that makes the police accountable for its action is foremost among these. Almost 99% of crimes committed by the law enforcement agencies, such as the local police, are not investigated. When high-ranking police officers, like the chief of the intelligence branch, order a crime to be carried out, the chance of having internal inquiries and the possibility of disciplinary action being taken against a subordinate police officer by this senior officer are virtually zero. Under the current legislative framework, the only law that provides for action to be

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<sup>29</sup> Please see UA – 279 – 2006 issued by the AHRC on 25 August 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/1929/>



initiated against a police officer for having committed a crime is the Criminal Procedure Code. The aggrieved person will have to approach a court by filing a complaint against the officer in question.<sup>30</sup> The court, devoid of any authority to conduct its own inquiry, can only forward the complaint to be investigated by a senior police officer. Such an inquiry is completely at the disposal of the officer to whom the court has directed the case.

In general, this officer will at a later stage return the file to the court without having conducted a proper inquiry, with a note 'no case to be registered, complaint found to be false'. The only option then left to the court is to record an objection statement by the complainant and then decide whether there is a cognizable offence. If the court feels that a crime is to be registered, the court could then direct the police officer to register a crime and further investigate the case. The officer that receives such an order from the court can easily ensure that his colleague avoids being framed, by registering a case against his colleague but not properly recording the statements of the witnesses.

The case file will later be returned to the court, for the court to try the case. In the meantime, the complainant and the witnesses are completely open to the bullying of the investigating officer, as well as the officer under accusation, since there is no witness protection mechanism in India. Additionally, issues like the absence of a medico-legal examination, the lack of any scientific investigation, and the delays of often ten years or more in court, leaves the case open to multiple types of malpractice. The end result of such a prosecution will typically be that the police officer suspected of committing the crime continues in the service, and after ten or more years, the case gets dismissed from court.

Throughout this process, the complainant will have to run from pillar to post in court to get everything sorted out. The complainant will have to depend upon the public prosecutor to conduct his case. It is an acknowledged fact that the state of public prosecution is no better than that of the police.<sup>31</sup> Even to get a copy of the case file, the complainant, now treated as a witness, will have to bribe the court clerk and the record keeper and probably other staff in the court. Instances where the presiding officers also ask for bribes are also not rare.<sup>32</sup> According to the Criminal Procedure Code, only the accused is entitled to a free copy of the case records. After all these hurdles, the chance for the complainant to get justice, and this within a reasonable time, is remote.<sup>33</sup>

In addition to the absence of a legal framework, the policing system suffers from ineptitude. In India, recruitment into most of the civil service jobs is stained by corruption.<sup>34</sup> As much as 62% of Indians have direct experience in dealing with corruption, either being asked to pay bribes or having actually paid them to various

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<sup>30</sup> Please see Section 190 and 202 of the Code of Criminal Procedure

<sup>31</sup> *Public Prosecution – In Need of Reform*: Bikram Jeet Batra; India Together, 3 December 2006

<sup>32</sup> *Judicial Corruption*: Rajeev Dhavan; The Hindu; 22 February 2002

<sup>33</sup> *Broken down-prosecutors, thrown-out victims*: Bijo Francis; Article2: Vol.2 No.5, October 2003

<sup>34</sup> *Public Office, Private Interest: Bureaucracy and Corruption in India*: S. K. Das; Journal of Asian Studies, Vol. 61, No. 3 (Aug., 2002), pp. 1085-1087

government services.<sup>35</sup> The current rate, which varies from state to state, to get a job as a police constable, is between two hundred to three hundred thousand Indian rupees. In states like Kerala, it has reached the level of five to six hundred thousand rupees, and this is the state of affairs in the least corrupt state in India.<sup>36</sup>

Beyond corruption, the lack of training of police officers is yet another issue that the police in India struggle with.<sup>37</sup> The AHRC has come across instances where the police often use forced confessions obtained through torture as the only means of criminal investigation. This has been acknowledged by the Supreme Court of India several times.<sup>38</sup> The practice of torture is not only unscientific, but has been shown to fundamentally corrupt the nature of policing the world over. However, in India it is still widely used. This prevalent practice not only isolates people from the police, but caters to the impunity the police enjoys and creates fear in people's minds.<sup>39</sup>

The lack of accountability, the absence of a proper legal framework to take actions against police officers, corruption, the lack of scientific investigation facilities and political influence all contribute to undermine the policing system in India to a critical level. This reflects in the day-to-day functioning of what is an important element of the country's justice dispensation mechanism. Whatever steps are initiated by concerned actors, such as the Supreme Court of India, are often played down by the government. The government of India and its state governments are still to admit that policing in India needs to be changed and that the image of police needs to be improved.

To summarise the problems affecting the policing system in India can be listed as follows:

1. Impunity;
2. The prevalent practice of violence and custodial torture;
3. The lack of a legal framework to ensure accountability and to prevent crimes from being committed by police;
4. Alarming low public confidence in the system, which shows that the police are not protectors, but perpetrators;

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<sup>35</sup> *Satyameva Jayathe! (Is Corruption corroding India?)*: T. M. Menon, Asianet Global; 18 March 2006

<sup>36</sup> *Post Reform Corruption Scenario in India*: N. Vital Central Vigilance Commission, Government of India in a speech delivered on 20 February 2002 at CII Seminar in New Delhi. The Commissioner also noted according to Transparency International India ranks 72 among the 91 countries, worse than Ghana, Brazil, Colombia and Guatemala. According to Transparency International's 2005 report India top the world with 70% index where bribe was demanded for services to be delivered.

<sup>37</sup> *The Indian Police: A Critical Evaluation*: Arvind Verma, Regency Publications, New Delhi 2005

<sup>38</sup> In *Niranjan Singh v. Prabhakar Rajaram* (AIR 1980SC 785) the Supreme Court emphatically observed that, "The police instead of being protector of law, have become engineer of terror and panic putting people into fear." The Supreme Court again expressed its concern in *Kishore Singh v. State of Rajasthan* (AIR 1981 SC 625) and observed that, "Nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts deeper wound on our constitutional culture than a state official running berserk regardless of human rights." Similar observations were made while deciding the D. K. Basu case also. Id. 26

<sup>39</sup> *Policing – A Human Rights Perspective*: Ministry of Home Affair, The Commonwealth Human Rights Initiative and Delhi Police; proceedings of the seminar held at New Delhi, 12 February 2004

5. The lack of awareness about how to engage in better policing;
6. Political influence;
7. Corruption.

## **V. Discrimination based on caste**

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

Caste discrimination is worse than slavery. A person is born into the caste, whereas slavery is slightly different. A person may become a slave due to numerous circumstances. However, a slave may earn his or her freedom, whereas in the caste system there is no escape, because the only defining factor is birth. Once born as an untouchable one remains an untouchable. Ambedkar stated that untouchability based on caste is worse than slavery.<sup>40</sup> 'Neither slavery nor untouchability is a free social order. But if a distinction is made there is no doubt that there is distinction between the two'. 'The test is whether education, virtue, happiness, culture and wealth is possible within slavery or within untouchability. Judged by this test it is beyond controversy that slavery is hundred times better than untouchability. In slavery there is room for education, virtue, happiness, culture or wealth. In untouchability there is none,' he said.

The avenues for those who are born into the lower caste are many in theory, however, in practice, none of these mechanisms work, especially if the person is poor.<sup>41</sup> A direct consequence of this is death from starvation.

In 2006, the AHRC has reported several cases of starvation deaths from India. Of these cases the most striking one is the case of nine-month old Seema Musahar.<sup>42</sup> Seema Musahar died on July 28 in Belwa village, Varanasi, Uttar Pradesh after desperate attempts by her mother, 35-year-old Laxmi Musahar, to get help for her infant at the local health centre and other places. Laxmi had to pawn her two saris to a neighbour to get some money with which to take her child to get treatment, but still this was not enough to save her.

Laxmi and her husband, 40-year-old Chotelal, have been out of work due to the struggle that they had joined against the persistent use of bonded labour in Varanasi. They had been working as labourers at a brick kiln, for which they received only pitiful amounts of

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<sup>40</sup> *Annihilation of Caste*: Dr. B. R. Ambedkar

<sup>41</sup> *Cast Away by Caste*: Bijo Francis, Human Rights Solidarity Vol.14 No.5, September 2004

<sup>42</sup> Please see AS – 180 – 2006 issued by the AHRC on 27 July 2006 available at

<http://www.ahrchk.net/statements/mainfile.php/2006statements/661/>

low-quality grain and chaff as payment. After they had left the work, Seema's parents could get virtually no food, and Laxmi was not able to produce milk for her child.

On June 18, Laxmi's father, Phoolchand, also died of starvation. After that, the family met with the District Magistrate of Varanasi, Rajiv Agarwal - who is the responsible local officer - together with two other local officials, the Block Development Officer and Sub Divisional Magistrate. The parents explained that they had no access to any government welfare schemes. The district magistrate just gave a note to admit them to the district hospital in Varanasi. Seema was admitted to hospital on June 26 but discharged on July 1 without receiving adequate treatment.

On July 11, Laxmi wrote to the District Magistrate requesting 1000 rupees (USD 20) from emergency funds to help her family, but received no reply. So it was that when little Seema was on the verge of death her mother again took her to the primary health centre some 9km from the village in the ultimately vain hope that she could be kept alive.

Similar cases were reported from several parts of India, concerning which the government of India has initiated no actions whatsoever. The Supreme Court of India, however, being concerned about the plight of starving people within the country, has set up a commission to inquire into such cases and also to take action to prevent such cases from recurring.<sup>43</sup> However, the functioning of the commission is limited to reporting to the Supreme Court on the progress of eradication of starvation and the monitoring of the same in India. By the time the court took any action, it was too late to save several other individuals from the same locality who also died from starvation.

Caste prejudice and the failure of the local police and the administration are the factors that lead to most starvation deaths, in addition to complete neglect by the state government. An estimated number of 55 districts in India face problems of acute starvation.<sup>44</sup> In many cases of starvation deaths, the victims are from the untouchable community. For most bureaucrats, such people are not worthy of existence. For example, in Seema's case above, the district magistrate never took a positive step to save Seema, other than referring her to a government hospital.

Many families from the untouchable community face similar conditions to that of Seema's family. They are forced to work for the upper caste, for which they are given near to nothing in return. Wages are below the minimum wage prescribed by the government. In several cases payment is denied even after a day's work. These families are allowed to stay in patches of wasteland away from the village.<sup>45</sup> This is because their presence is considered to be a pollutant for the caste Hindus. A caste Hindu does not always imply Brahmins – the highest in the caste hierarchy. In Uttar Pradesh at least,

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<sup>43</sup> Please visit [www.supremecourtcommissioners.org](http://www.supremecourtcommissioners.org) for more information about the commission and its functions. The site also provides the latest updates on the issue by the Supreme Court of India.

<sup>44</sup> *Starvation death is a slur on society*: Times of India, 11 December 2005

<sup>45</sup> *Contemporary forms of slavery related to and generated by discrimination: Forced and bonded labour in India, Nepal and Pakistan*. United Nations Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights Working Group on Contemporary Forms of Slavery 28th Session Geneva 16 - 20 June 2003.

caste discrimination is being practiced by the Yadav community, which is in fact a lower caste in the caste structure. However, it is the Yadavs who currently enjoy considerable authority and power in Uttar Pradesh. The tribal community to which Seema's family belongs is considered as being untouchable (also called Dalits). Most often, it is these untouchable families that face the brunt of caste-based discrimination.

Scheduled castes (*Dalits* and "low" castes [SC]) and scheduled tribes (indigenous groups [ST]) make up 24% of the Indian population.<sup>46</sup> The government of India has several mechanisms in place to prevent causalities such as seen in Seema's case. The practice and propagation of untouchability is a crime. It is prohibited under the Constitution of India.<sup>47</sup> To give effect to this Article, parliament enacted the Untouchability (Offences) Act, 1955. To make the provisions of this Act more stringent, the Act was amended in 1976 and was also renamed the Protection of Civil Rights Act, 1955 [PCR Act]. Under the Act, the government of India also notified the PCR Rules, 1977, to carry out the provisions of this Act. As cases of atrocities on Scheduled Castes /Scheduled Tribes were not covered under the provisions of PCR Act, 1955, parliament passed another Act in 1989, to take measures to prevent the atrocities committed against them. This act, known as the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, became effective from January 30, 1990. For carrying out the provisions of this Act the government of India notified the SCs and the STs (Prevention of Atrocities) Rules, 1995 on March 31, 1995. Based on the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, caste-based atrocities committed against the members of the Scheduled Caste and the Scheduled tribe is an offence punishable under the law.<sup>48</sup> Starvation deaths are a direct consequence of discrimination based on caste. However, the implementation of these laws, which must prevent starvation deaths among the Dalit population, depends mostly on the local police.

For example, the government has various schemes to distribute subsidised and free food to the poor. For this, the persons below the poverty line are identified and special permits are issued to them to collect free or subsidised food.<sup>49</sup> Food distribution is carried out by licensed shops, which are otherwise known as public distribution shops. For this the government issues licenses under the Rationing Order, a law under the Essential Commodities Act.<sup>50</sup> The licensees of these shops are expected to manage the shop according to the procedure set forth in the Rationing Order. This categorically prohibits the licensees from dealing with rationed articles in any other manner than that prescribed in the license.

However, the licensees, most of them from the upper caste, sell the rationed articles in the black market for a higher profit. Any complaints against such sales are to be registered by

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<sup>46</sup> The latest census data of India - 2001

<sup>47</sup> Please see Article 17 of the Constitution of India

<sup>48</sup> Please see Section 3 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989

<sup>49</sup> According to the National Sample Survey an estimated 22% of Indians are below the poverty line.

<sup>50</sup> Essential Commodities Act, 1955 is a central Act dealing with essential commodities and the procedure for dealing with such commodities. The Act is supplemented by the Rationing Order, which is a state legislation.

the local police. The case is then to be investigated and the accused brought to trial before a special court constituted under the Act.<sup>51</sup> The local administration is also provided with appropriate authority to deal with corruption in dealing with rationed articles.<sup>52</sup> However, the local police, in many cases in connivance with the local administrative authorities, refuse to take any action against these corrupt licensees. The experience of Ms. Neerja Rawat, a local human rights activist and a member of the lower caste, who was threatened by the local administration for complaining against one such licensee, is an example.<sup>53</sup>

Ms. Rawat, representing some 200 villagers from Nindura Block, Barabanki District, Uttar Pradesh state, tried lodging complaints with the local administration to allow more ration cards and also to see to it that the functioning of the existing public distribution shop is according to the law. Rawat also complained that the village administration was collecting bribes for distributing below-poverty-line cards. However, the response to the complaint was threats and intimidation to Rawat by the local administration for working on human rights issues, particularly concerning the Dalit community.

The situation does not even change when the local administration is headed by a member of the Dalit community. The 73rd amendment of the Indian Constitution provides for the decentralisation of the administration in India. The amendment was intended to enable local bodies constituting a 3-tier system of Panchayati Raj (governance through panchayats - for local self governance) for all states that have populations of over 20 million. It also provided that an election to these bodies to be held every five years. To ensure equal participation by the Dalit community and women, a positive reservation was made in favour of the Scheduled Castes, Scheduled Tribes and women. It also ensured that not less than 33% of the total membership in these bodies must be either women or members of the Dalit community.

Mr. Prem Narayan, a resident of Vajidpur village under the Harhuan Block in Varanasi district, Uttar Pradesh state, is one such elected member.<sup>54</sup> He belongs to the Chamar community, who are untouchables. He was elected as village head in September 2005. However, soon after the election he found that getting elected as a member of the local village panchayat means nothing as far as he remained a Dalit. He is discriminated against to such an extent that he is yet to assume his role as village head. Narayan is being denied access to all documents concerning the administration of the panchayat, is not being consulted on any programmes being implemented through the panchayat, and is being refused access to the office building. Once Narayan tried to challenge these discriminatory practices but was assaulted by upper caste members as well as members of the former panchayat committee.

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<sup>51</sup> Please see Section 12 A of the Essential Commodities Act, 1955

<sup>52</sup> Ibid, Section 6 A

<sup>53</sup> Please see HA – 04 – 2006 issued by the AHRC on 9 May 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/1717/>

<sup>54</sup> Please see UA – 377 – 2006 issued by the AHRC on 22 November 2006 available at <http://www.ahrchk.net/ua/mainfile.php/2006/2086/>

Panchayathi Raj is a concept that has been implemented in India since April 1993. The Act also provided the panchayats with the authority to function as institutions of self-governance. To facilitate this, certain powers and responsibilities are delegated to panchayats, to prepare and implement a plan for economic development and social justice. The panchayats are also given authority to levy, collect and appropriate taxes, duties, tolls and fees. In effect, the process was aimed to decentralise governance and also at the same time to promote, through a positive reservation, the empowerment of backward communities, women and the members of the scheduled castes and tribes in India.

With the intention of mainstreaming the lower caste, the Election Commission of India declares which seats are to be reserved for contests between members of the lower caste. Mr. Narayan contested a seat that was reserved for a member of the Dalit community and won the election.

This change tried to upset the discriminatory and inhuman caste hierarchy in rural villages, and Narayan's case is an example of how the upper caste retaliates in such a situation. What Narayan faces in Vajidpur village is a crime under the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. According to Section 3 (x) of the Act, if a person intentionally insults or intimidates with the intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view, the persons shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to five years and be accompanied by a fine. Physical assault is also a crime under the Indian Penal Code, 1860.

This case is an example of how development activities fail to percolate into the rural villages in India. Mr. Narayan, as village head, and also a representative of his community, is not consulted concerning anything in the daily functioning of the village. This also implies that, in the absence of Narayan's authorisation, no development activities can be implemented in the village until Narayan's term is over, which is only due in 2010. The upper caste community, which already has all the amenities that it requires, will not be affected by this stalling of the development programme. However, the lower caste community will not benefit during this period, which is an indirect way of keeping the members of this community in the village under the control of the upper caste. For Narayan, none of the domestic legal framework or the mechanisms that are supposed to rule out caste-based discrimination - even the status of being a democratically elected member in the world's largest democracy - can help him from being discriminated against in his own society.

The only remedy in such a situation is to approach the domestic courts in India. However, as detailed in the section concerning the judiciary earlier in this discussion, such remedies, including constitutional remedies, are often inaccessible to Dalits and members of the lower castes. This literally removes the equality quotient of human rights in terms of implementation. Considering India's vast size, its limited resources and the omnipresence of poverty, the possibility that a victim, who is otherwise deprived of basic standards of living, will be able to approach a court or a constitutional court is remote.

Due to the burden of expenses in litigation and the immense time it takes to reach a final verdict, such legal attempts are seldom resorted to by victims.

To summarise, caste discrimination continues unabated in India. Certain areas that the AHRC has identified as being immediate concerns regarding discrimination based on caste are as follows:

1. Caste based discrimination in India is in certain situations fatal, resulting in starvation deaths;
2. The domestic legal framework, which is designed in theory to prevent discrimination based on caste, fails due to the failure of the judiciary and the police;
3. Even positive reservations made with the intent of mainstreaming the Dalit community does not solve the problem, since justice delivery mechanisms fail to deliver results;
4. The bureaucracy in India is still under the control of the upper caste and thus prevents the lower caste from breaking away from the caste structure.

## **VI. Conclusion**

The above discussion, based on a cross-section of Indian society, paints a dismal picture of human rights in the country. In all of these cases, a common denominator is the local police, which should play a pivotal role in promoting, protecting and fulfilling human rights. However, in India, it appears that the local police are engaged in demeaning, infringing and violating human rights. This situation has been left unanswered ever since 1947, the year India became an independent country. The AHRC does not claim that this report is a comprehensive analysis of the entire human rights situation in India. However, the issues discussed above are from the direct experience of the AHRC's work in the country, during 2006, in which the AHRC has tried to address the four major factors that are hampering the rule of law and fulfilment of human rights values in India.

Any suggested solution to address these problems must begin with making the police in India accountable for their actions and failures. To date, there is no specific mechanism in India to tackle this issue. This has also been noted in the report of the National Human Rights Commission. The commission observed that '*custodial violence and deaths due to it strikes a blow at the rule of law, which demands that the power of the executive should not only be derived from law but also that the same be limited by law*'.<sup>55</sup> The commission has also noted that its directions, issued in 1993, intended to prevent custodial violence are often being violated by the police.<sup>56</sup>

As observed and studied by the AHRC through the cases that it dealt with in India during 2006 and preceding years, unless a credible, transparent and functioning mechanism is put in place to control the police and to bring it into the sphere of a true policing system –

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<sup>55</sup> Please see the 2004-2005 report of the National Human Rights Commission of India, p. 34

<sup>56</sup> Id.



to replace the current undisciplined and barbaric force - the human rights situation in India will remain despicable for a large section of the population.

A well-functioning and orderly police system will bring solutions to various issues considered as being cancers in Indian society. Rooting out corruption, caste-based discrimination and starvation deaths must begin with making the police accountable for their actions and inaction. Dependence on the most unscientific method of investigation – the extraction of confession statements through torture – must be abolished and the rank and file of the police must be instructed not to resort to such practices. Anyone found violating this must be punished in accordance with law. However, it is this law that is lacking in India.

The only hope towards this end is the latest ruling of the Supreme Court of India in *Prakash Singh & Others V Union of India and Others*.<sup>57</sup> However the attempt by the government is to protract the implementation of the court's order.<sup>58</sup> There is, however, faint hope in the declaration made by the prime minister, when he assured that India is preparing to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, it needs to be seen to what extent the government of India will be honest in implementing the convention at the domestic level, following ratification.

India has a lot to improve upon before it can consider itself as being a model for other developing nations. To begin with, India must first acknowledge that it has real problems to sort out within its territory, rather than engaging in white-washing its image in international fora, such as the United Nations. A time-bound and well thought out plan must be immediately be drawn up to address the core issues concerning its policing system. The honest and legitimate participation by civil society in this process must be ensured and welcomed.

Immediate and stringent measures must be taken by the government and by the Supreme Court of India to save its lower judiciary from its current state. Any country or system that forces a person to wait for more than three years to get justice through a legitimate justice dispensation mechanism is making a mockery of justice. In such a case, India is just not making a mockery of justice, but it is asphyxiating the lower courts in to a state of coma. India must learn its lessons from the bad examples of its neighbours, such as Sri Lanka, Bangladesh and Pakistan, where the term justice has no meaning to the ordinary people.

No country can ignore the plight of 22% of its population. The Dalits in India must be considered as equal citizens with equal rights. For this the government of India must recognize that development must be carried out through a bottom-up approach, rather than spending billions in developing satellite cities catering for the neo-rich middle class. Existing legislation to prevent caste-based atrocities must be strictly implemented and

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<sup>57</sup> Ibid 6

<sup>58</sup> Please see AS – 291 – 2006 issued by the AHRC on 22 November 2006 available at <http://www.ahrchk.net/statements/mainfile.php/2006statements/831/>

police officers refusing to implement such laws must be punished. A country like India, which is rich in food reserves, has no excuse to justify a single death from starvation. Each death from starvation in India must be considered as a stain on democracy. A hundred deaths from starvation a year must prove that India is a failed democracy.

A country that has left 74% of its population to suffer from conditions created by corruption, executive brutality and discrimination has no right to claim itself as a functioning state. Peripheral burnishing with statements of economic growth that caters for less than 26% of a 1.2 billion-strong population, is nothing more than a colossal bluff in the face of democracy and good governance. It may generate envy for those in countries with dictatorships and living in statelessness. However, for Indians in general, and for the 74% of the population that remain in rural villages, such economic growth brings nothing more than an increase in the amount of bribes they pay and a hungry stomach to sleep with.



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### **INDONESIA: The Human Rights Situation in 2006**

Asia has hardly been the poster-child for Human Rights; in fact, its track-record of human rights violations has grown progressively worse over recent years. Indonesia is no exception. Government conspiracies and corruption, police brutality, judicial apathy, civil unrest and state-sanctioned torture have become a routine reality in Indonesia.

In this report, we will highlight and explore in-depth some of the key fundamental issues that underlie the current crisis in Indonesia. By examining recent events in the broader context of this institutional crisis, which is holding the country in deadlock, we can begin to make some leeway in understanding the magnitude of the problem at hand, and what can and must be done to rectify it.

#### **MURDER OF A MARTYR: Recent developments in the Munir Murder Case**

The assassination of renowned Indonesian human rights defender, Mr. Munir Said Thalib, and the subsequent highly dubious investigations and paper-thin prosecution offers an opportune analytical starting-point in gauging the current climate of State politics and stability in Indonesia.

The theatrical court prosecution of the case came to a dramatic conclusion, when on October 3, 2006, the Panel of Judges of the Supreme Court in Jakarta returned with a verdict of 'Not Guilty' in the criminal case against prime suspect, Garuda Airways Pilot Pollycarpus Budihari Priyanto on the charge of premeditated murder. Mr. Pollycarpus was however found guilty of falsifying the Garuda Airways work roster, and was sentenced to two years imprisonment.

Although hardly surprising, considering the high political stakes involved in the said criminal trial, the Supreme Court's ruling blatantly overlooked the findings of an evaluational examination conducted by the Central Jakarta District Court and the Jakarta High Court between the 20<sup>th</sup>-23<sup>rd</sup> May 2006, which exposed the shoddy standards of application of domestic legislation and judicial procedure in the criminal investigations into Mr. Munir's murder.

The examination findings also made direct reference to a letter signed by primary witnesses, Ramelgia Anwar (Vice Corporate of Security for Garuda Airways) and Indra Setiawan (Director of Garuda Airways), instructing Mr. Pollycarpus to travel aboard the 974 flight to Amsterdam, in which Mr. Munir would be travelling. Additionally, it was

found that Mr. Pollycarpus had been in almost constant contact with Major-General Muchdi PR (Deputy of the Badan Intelijen Negera (BIN), a State Intelligence Body) prior to travelling aboard the said flight. Records show that Mr. Pollycarpus made over 41 calls to Mr. Muchdi's mobile phone, his home telephone, as well as at his office at BIN.

Despite the documenting of what is undoubtedly damning evidence of a complex and carefully politically-orchestrated conspiracy, the Attorney General and the National Police have shown no intention to conduct further investigative inquiries in light of these findings.

The Supreme Court's ruling was met with moral outrage by the late Mr. Munir's grieving family, colleagues and far-reaching support base. The Committee on Solidarity for Munir, by far the most vocal of political pressure groups in Indonesia, held a press-conference on October 5, 2006, in which they openly challenged the competency of the Indonesian judiciary, police and parliament.

Mr. Munir's family and supporters, who continue to be subjected to threats, intimidation and extreme harassment by police and political agents alike, recently filed a 13 billion Rupiah (US\$1.4 million dollar) lawsuit against Garuda Airways for the death of Mr. Munir.

In a very recent development, Mr. Munir's widow, Mrs. Suciwati, met with Mr. Philip Alston, UN Special Rapporteur on Extra-Judicial, Summary, or Arbitrary Executions in New York, appealing that he lead an official UN intervention and investigative inquiry into Mr. Munir's murder. This was met with outright indignation by Indonesian political and police authorities alike.

Chief of National Police, General Sutanto, vehemently stated that he would under no circumstances allow international (particularly UN) involvement in police investigations; *"This is our sovereignty...we want no foreigners interfering in the process"*, but added that international assistance in the form of technical support (e.g.: loaning their DNA testing services) was preferred.

Defense Minister, Dr. Juwono Sudarsono also stated that while the genuine concern, interest and sincere advice of foreign governments and international humanitarian bodies was welcome, *"...We don't need international intervention...our own legal systems can handle this"*. It is not clear whether this decision could effectively mean that Mr. Alston will be denied entry to Indonesia.

Such a move by the Indonesian Government in the face of mounting international pressure following Mr. Pollycarpus Priyanto's acquittal could seriously undermine the credibility of the Indonesian State, notably with regard to its membership in the UN Human Rights Council.

## **DIAGNOSING THE DISEASE: Breaking down the problem of Indonesia's institutional failure.**

Mr. Munir's murder and the subsequent series of events offer a telling insight into the desperate situation in which the fundamental principles of justice and human rights finds themselves in Indonesia. If this is "justice" for one of Indonesia's most prominent public citizens, one can only imagine what is available to ordinary Indonesian citizens.

The AHRC is of the view that the rule of law is fundamental to the maintenance of a stable society and the fundamental principles of human rights within that society, and that the current and prevailing predicament that has long characterized the highly volatile Asian region can be traced to the near total collapse of the rule of law in many Asian nations.

In the case of Indonesia, we will present this predicament issue by issue, as follows:

### **International Convention vs. Domestic Legislation**

The overarching obstacle to any form of rule of law in Indonesia, and indeed in wider Asia, is the ever-expanding vacuum between the norms and standards embodied in international conventions, and those put into practice at the domestic legislative level.

A recently elected member to the UN Human Rights Council in May of 2006, and a State party to the UN Convention against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESR), Indonesia has often been accused of paying lip service to international institutions and bodies of authority (namely the UN), while simultaneously and systematically failing to fulfil its fundamental obligations to its people.

According to the European Court of Human Rights, the CAT convention is a "*living instrument which must be interpreted in the light of present-day conditions*"; it is here where the underlying root-cause of the problem lies. A major point of contention and heated debate concerns the failure of the Indonesian government to accommodate the fundamental principles of the CAT in domestic legislation, and the establishment of a systematic mechanism through which these principles may be translated into practice - eight years after having ratified the said convention.

Despite its three primary courts of law: the Court of General Jurisdiction; the Military Court; and the more recently established Human Rights Court, the pursuit of justice still remains a distant prospect for many Indonesians.

The existing Indonesian Penal Code (KUHP) and the Law of Criminal Procedure (KUHAP) does not explicitly employ the term 'torture' in its legislative literature, instead opting for the much milder term 'maltreatment'. However close in definition, 'maltreatment' does not equate to torture before a court of law, and therefore cannot be

prosecuted as such. More importantly, it does not take into consideration human rights violations committed by State-agents; a key qualitative aspect of the international definition of torture under the CAT. The UN Committee against Torture stated on this matter that: *“The special nature of torture would be masked by classing torture together with traditional terms such as mistreatment or abuse of authority. And while torture is certainly covered, to a large extent, by national terms, there is one important difference. A substantial characteristic of torture is that the actions are performed by the State. Bringing torture under the traditional national and provisions would damage an important qualitative and distinguishing aspect of torture”*.

The core cause of the current crisis of the rule of law in Indonesia, particularly with regard to torture and other human rights violations, is that the existing laws in Indonesia are not self-executing. They remain abstract concepts on paper, unfulfilled in practice. The responsibility for this largely lies in the hands of Indonesia’s collapsed prosecution system.

Much hope was pinned on the establishment of the Human Rights Court in 2000, initially established - largely due to international pressure - to address the atrocious record of human rights violations committed by the Indonesian government and military in the build-up to East Timor’s independence in 1999.

Seven years on, and all hopes have faded. What was once seen as a monumental step forward has actually proved itself to be two steps back. The definition of a human rights violation according to the Human Rights Court has been stretched so tight, that its current criteria for deciding the eligibility of a case for prosecution is based solely on the fact of whether it is part of an organized and systematic project of mass genocide. As a result, the vast majority of cases of torture and other human rights violations committed by State-agents in Indonesia which do not occur under genocidal circumstances, go unprosecuted and unpunished.

The Military Court has been suggested by some to bear the disturbing characteristics of the highly despotic culture of the New Order Regime, which was overturned in 1998. By virtue of Article 9[a] of Law 31/1997, any military officer charged with a criminal offense has the right to demand to be tried by a military court, which consists of their superiors. The process of prosecution within a military court is a behind-closed-doors affair, and often overrides any and all decisions made by either the Court of General Jurisdiction or the Human Rights Court.

The status of the military in Indonesia could be said to be that of a dictatorship. It has become somewhat of an acknowledged fact of the Indonesian brand of “justice”, that military officers and personnel are able to skirt around the law, and evade any accountability whatsoever for their actions before courts of law, even going so far as to point-blank refuse to cooperate with investigations. In fact, public fear of the military in Indonesia is so great that they very openly intimidate, bribe, blackmail, harass and threaten (often with death) the victims and their families, trial witnesses, independent investigators, human rights activists, and even the prosecution and judges themselves.

It is a well known fact that many public prosecutors are highly reluctant to take on criminal cases involving military officers or personnel, and it has been known for prosecutors to deliberately lose their cases for fear of the repercussions of a victory against Indonesia's ever-powerful military.

Despite the recent passing of a Witness and Victims' Protection Bill by the Indonesian parliament, it will be another year (possibly longer) before the law is officiated and put into practice. However, human rights activists and organizations have expressed their concern over the content of this new law, which prescribes that a person's eligibility for witness/victim protection will be assessed and decided by a State-appointed commissioner. This is a clear violation of the obligations of the Indonesian government under the ICCPR, which identifies equal access to witness/victim protection as a fundamental civil and political right. At present, the lack of an established system of protection and support has left victims and trial witnesses vulnerable to intimidation, harassment, and even violence.

Therefore, given the circumstances, it is hardly surprising that many succumb to accepting bribes, or choose to settle their cases out of the courtroom as opposed to gambling on the evidently collapsed and completely ineffective system of law and order in Indonesia.

### **Police Torture: An Epidemic out of Control**

Torture is at the top of Indonesia's lengthy record of human rights violations, and is fast becoming an epidemic. Ironically enough, it is the law-enforcement authorities who more often than not are responsible for the violation of the very laws and principles that they have been assigned to protect.

The collapse of the rule of law in Indonesia can be directly traced to the collapse of the police as a legitimate law-enforcement authority. The relatively recent separation of the police from under the authority of the military has meant that for the first time, police officers could be held accountable before the Court of General Jurisdiction. This was seen by many as a crucial victory. The high hopes were short-lived, however, as the Criminal Procedure Code was speedily amended to prohibit the prosecution of any criminal case that has not been subject to an official police investigation and inquiry, including in prosecution cases against police officers themselves. The implications of this amendment effectively mean that the police are able to block, stall and even discontinue any and all investigative inquiries and disciplinary actions made against their officers.

The realities of this are that the police and the military in Indonesia currently enjoy privileges of power that even the Government are not privy to. In fact, one could even argue that their level of power is gradually resembling that of a dictatorship, much in the style of former President and despot, General Suharto. Despite their functioning independently from each other, the police nevertheless continue to employ highly

militaristic methods of discipline, whilst the military continue to play a significant role in the maintenance and enforcement of public law and order.

### **Case Study: Mr. Yupiter Manek**

Mr. Yupiter Manek was arrested and kept in detention by officers of the Belu Resort Police on December 18, 2005 on charges of sexual harassment of a young female employee of a local department store. Mr. Manek was subsequently tortured by Belu Police officers, and on December 23, 2005, slipped into a coma. After having been admitted to the nearest hospital, and with his family at his bedside, Mr. Manek succumbed to his injuries at 12:30 pm on the same day.

According to members of his family, Mr. Manek's body was severely bruised and swollen, and inside his trouser pocket, they found a cigarette pack on which was written, *"Uncle, Father, Mother, Minggus, Eta, Jum, Igung, (I) was butchered by the Belu Resort Police"*. When confronted with this, the Deputy Officer in Charge (OIC) of the Belu Police Headquarters denied any responsibility concerning Mr. Manek's death, instead alleging that Mr. Manek was a drug addict, and fell in the bathroom, where he sustained a head injury which induced his coma.

The Belu Police authorities pressured Mr. Manek's family into signing binding documents agreeing not to sue the Belu Police for Mr. Manek's death, and also not to press for a post-mortem examination of Mr. Manek. Mr. Manek's family later appealed to the East Nusa Tenggara Provincial Police to revoke these documents, and requested a formal investigative inquiry into Mr. Manek's death.

On the February 2, 2006, the Chief of the Belu Resort Police passed a disciplinary sentence on four police officers allegedly responsible for Mr. Manek's torture. Officer Muhammad Ramlah - believed to be the "ringleader" in this incident - was sentenced to 21 days imprisonment, while the three other officers were sentenced to 14 days imprisonment. It is important to make mention here, that these disciplinary sentences were made on the basis of "maltreatment" charges, as opposed to torture and indeed murder. Having completed their sentences, the said officers were reinstated in their prior positions, and have not been prosecuted any further.

### **Case Study: Mr. Marino**

Mr. Marino, a 38 year old farmer, was brutally gunned down by officers of the Sukoharjo Mobile Police Unit on October 20, 2006, at his parents-in-law's home in Central Java.

On the date of the said incident, brigadiers Sutrisno, Mulyono and Tupono were conducting raids on well-known local gambling haunts, when they spotted Mr. Marino transporting a diesel machine (which he used to irrigate his farm) by bicycle with his brother Widodo.



A local farmer and resident of the Muningan Village in the Sukoharjo district, Mr. Marino had been irrigating his farm and was travelling to his parents-in-law's home.

The officers in question, for reasons still unexplained, pursued Mr. Marino and his brother, following them to the his parents-in-law's home. There, the officers accused Mr. Marino of being involved in the local underground gambling scene; charges which Mr. Marino vehemently denied. Brigadier officer Sutrisno then fired a warning shot into the air, before shooting Mr. Marino. Mr. Marino was rushed to the nearest hospital, where he succumbed to his injuries a few hours later. To date, no prosecutory action has been taken against the said officers.

These two cases are merely the tip of the iceberg of Indonesia's record of human rights abuses committed by the police. The police are crucial intermediaries between the State and its people. Therefore, the collapse of the police as a legitimate source of law, order and social morality carries both micro- and macro-level repercussions for the stability of society itself.

Torture has become endemic in the existing system of law-enforcement in Indonesia and is the police's "trump-card". Cases of torture of criminal suspects, detainees, witnesses, the homeless and innocent persons hardly raise an eyebrow amongst the local masses, who have long grown accustomed to the Indonesian "method" of policing.

Indonesia's most unconventional methods of detention of criminal suspects have come under heavy criticism from the local and international humanitarian community. Contrary to international standards, the police in Indonesia are able to detain a suspect for an extendable period of 20 days, and additionally, are under no obligation to produce the suspect before a Magistrate. If the suspect is sentenced to imprisonment of under nine years, the police can upon issuing a formal appeal to the Magistrate, detain the suspect for an additional period of 60 days, and 120 days if the suspect is sentenced to more than nine years imprisonment.

The unwarranted accusation and subsequent killing of innocent civilians by police officers who are willing to name and shame a person whom they know to be innocent for the sake of concluding an investigation, has also become part-and-parcel of Indonesia's system of law and order.

One of the most difficult tasks that any judicial system will inevitably be confronted with is the issue of ensuring that State institutions, agencies and actors are not immune to the very laws which they have been assigned to enforce and protect; a task at which Indonesia is failing miserably. Excusing State-actors of accountability seriously undermines public faith in the justice system and in the very legitimacy of the State itself.

The existing system of law and order in Indonesia has created a "trickle-down" culture of corruption, chaos and social anarchy. By indulging in such reckless, lawless and brutish behaviour, officers of the police and the State are setting a poor example for citizens to

follow. This begs the crucial question: if the State cannot adhere to the rule of law, how can one then expect citizens to?

### **Right to Redress: A fundamental, yet systematically denied right for many Indonesians.**

The question of torture is inevitably tied to the question of redress for the unfortunate victims of torture. Under the CAT, the right to redress for victims of torture is clearly enshrined as a fundamental right. It also clearly identifies redress as the sole responsibility of the State and State-systems. Yet again, the Indonesian Government has failed to deliver on this issue.

The problem of the lack of redress for victims of torture and other human rights abuses in Indonesia results from poor State mechanisms for processing, investigating and prosecuting human rights abuse cases. Particularly in cases involving police or military officers, any and all official complaints filed by either the victims or their families more often than not are stalled indefinitely, and rarely reach the courts.

Intimidation of victims, witnesses and their families into withdrawing their complaints currently accompanies many, if not all human rights abuse cases in Indonesia.

### **Case Study: Mr. Rudi Sebastian**

On August 16, 2006, Mr. Sebastian was arrested by officers of the Garut Attorney General Office and detained at the Garut Correctional Institution in the Garut district of West Java, where he was tortured by four correctional officers. Mr. Sebastian was at no point informed of the charges under which he was being arrested or detained.

Mr. Sebastian suffered severe bodily bruising and injuries; sustaining two broken fingers, swelling of the eyes, hands and legs and was unable to walk. The next day, when Mr. Sebastian's wife - Mrs. Imas Tini - visited him at the correctional institution, he identified his torturers as Ahmad Syarif, Nana, Catur and Oki. On August 22, 2006, Mrs. Imas Tini filed a formal complaint against the accused officers, but was threatened by the Chief of the Garut Correctional Institution, who allegedly said; *"You could complain to the police. But we cannot guarantee Rudi's life"*. Undeterred, Mrs. Tini filed a formal complaint with the Resort Police of Garut. To date, despite a formal complaint, there has been no official investigation into Mr. Sebastian's case.

The Truth and Reconciliation Commission Bill is a clear example of the insincerity of the Indonesian State in fulfilling its obligations under the CAT to grant its citizens equal access to avenues of redress in the event of the violation of their human rights. Established in 2004, the Truth and Reconciliation Commission Bill is widely condemned as the State's attempt to whitewash its deplorable record of human rights-related crimes during the 1965-66 massacres. The Bill states that the victim's forgiveness of their

perpetrators is a mandatory condition for claiming State compensation for their physical and psychological grievances. By doing so, the victims are effectively sealing their perpetrators' immunity from prosecution. Despite it being widely condemned by both local and international humanitarian organizations, activists and actors, the Indonesian government has made no amendments to the Bill.

Also at issue here, is the right of the victims (and their families) to be informed of the court verdict. At the present moment, under Indonesia's judicial legislation, the official verdict passed by the court judge is made known only to the prosecutor and the defendant. In many prosecution cases, the victim has often learnt of the outcome of their case at the same time as the public.

### **Marginalization of the Minorities: A Recipe for Disaster**

The UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief clearly identify a person's right to practice their chosen form of religion without fear of reprisal and discrimination, as well as the right of minorities in any given society to participation and representation within the State's democratic process. As a member of the UN Human Rights Council, the Indonesian government should incorporate these fundamental principles in its domestic legislation, and set up mechanisms to oversee the fulfillment of these rights for all its citizens. Although the Indonesian Constitution does acknowledge the rights of its citizens to their freedom to practice their chosen form of religion without fear of persecution, the realities on the ground show a very different picture.

Indonesia's Muslim community comprises over 86% of the total population and enjoy the privileges of power commonly associated with a majority, whilst Islamic norms and values have primacy in Indonesian society. Currently, the Indonesian State only recognizes six major religions: Islam, Christianity, Catholicism, Buddhism, Hinduism and Confucianism. This sidelines the numerous other religious groups that exist in Indonesia. As a result, these groups and their members are marginalised, greatly narrowing the scope of their participation in public life.

Those wishing to marry in Indonesia must first complete a registration form which requires that the couple specify their religion. Those from minority religious groups that are not recognized by the Indonesian government must in many cases list themselves as Muslim and marry according to Islamic custom.

Islamized politics and political parties have seen a steady rise in recent years, and have undoubtedly impacted intra-religious affairs in Indonesia. In 1961, the government, which is heavily backed by Islamic political parties, made a public declaration in which they accused the Ahmadiyyahs, an Islamic minority group, of being heretics and "non-Muslims". Their spreading of anti-Ahmadiyyah sentiments across the cross-section of

orthodox Muslims is believed to have incited a spate of attacks against members of the Ahmadiyyah minority.

### **Case Study: Attacks on Ahmadiyyahs**

Three houses owned by Ahmadiyyahs were attacked and vandalized by frenzied mobs of up to 100 people, and one Ahmadiyyah follower sustained minor facial injuries in a religiously motivated attack in the Ketapang Village of West Lombok on Lombok Island on October 19, 2005.

This was one of a series of intimidation attempts by the local orthodox Muslim community to drive the three resident Ahmadiyyah families out of the village before the commencement of Ramadan, the most important occasion in the Islamic calendar.

In a similar act of religious hatred, a 400-strong mob of villagers attacked, vandalized and plundered a local Ahmadiyyah mosque, over 23 houses owned by Ahmadiyyah followers (11 of which were irreparably damaged), and 1 car owned by an Ahmadiyyah follower in the rural village of Cicakra in the Cianjur region of West Java on September 20, 2005.

Arguably the most extensive attack against Ahmadiyyahs, took place on the 9<sup>th</sup> and 15<sup>th</sup> of July 2005, when a mob numbering in their thousands attacked an Ahmadiyyah settlement, torching it to the ground.

Similar attacks on Ahmadiyyah-owned property, including mosques, homes, schools, shops and vehicles, have been reported across Indonesia, from Kalimantan to Lombok.

Alongside the problem of the attacks themselves, is the apathy and inactivity on the part of the Indonesian government and the police to protect the Ahmadiyyah community and other vulnerable minorities, and to prevent such attacks in the future. To date, the police have taken no action in conducting official investigations into any of the reported cases of discriminatory attacks against the Ahmadiyyah community, nor have they taken any prosecutory action against those persons involved in the attacks. This shows the complete failure on the part of the Indonesian State to protect its citizens, which is one of its most fundamental obligations.

### **Case Study: The Execution of three Catholic prisoners in Poso**

Fabianus Tibo, Domingus Da Silva and Don Marinus Riwu were executed by firing squad at an undisclosed location near Palu Mutiara Airport in the Poso region of Central Sulawesi Province on September 22, 2006. Having been convicted in 2001 on charges of inciting a mass communal riot in Poso in 2000, which left over 200 Muslims dead (charges which the three prisoners vehemently denied up until the day of their death), local and international humanitarians and political commentators believe that their

execution was driven by a heavily political agenda, in order to placate the agitated Muslim majority.

Having been postponed several times due to mounting international pressure, a final decision on the execution date was set following a meeting between Indonesian President Mr. Susilo Bambang Yudhoyono, and Central Sulawesi Police authorities. Despite the uncovering of substantial evidence confirming the prisoners' innocence, the Supreme Court rejected appeals for a judicial review of the criminal case on the basis of the fact that under the Indonesian Constitution, a criminal case may only be reviewed once. During the process of their prosecutory trial, witnesses who could support the innocence of the defendants were barred from testifying before the Supreme Court. President Yudhoyono rejected the prisoners' joint appeal for clemency twice - in November 2005 and later in May 2006.

### **Lessons that need to be Learnt: The way forward for Indonesia**

In conclusion, the AHRC recommends that the Indonesian authorities implement the following recommendations:

1) The Indonesian government must undertake immediate reform to ensure consistency between international norms, standards and procedures and those followed at the domestic level. As a member of the UN Human Rights Council, and as a State-party to the CAT, ICCPR and ICESCR and other such UN conventions, the Indonesian government is bound by obligation to protect, maintain and enforce the fundamental human rights enshrined in these instruments. This can only be achieved by developing domestic legislation that directly corresponds with international human rights laws and standards to which the country is party.

With regard to the rule of law, the key lies with the existing domestic Penal Code (KUHAP) in Indonesia. The AHRC recommends that the Indonesian government make immediate amendments to the existing Penal Code. A key point of reform is the current domestic definition of torture that does not differentiate between torture and maltreatment between undermines a fundamental qualitative aspect of the CAT with regard to torture; that it is a gross human rights violation of the highest order, committed by officers of the State. Therefore, the Indonesian government urgently needs to revise its definition of torture to directly correspond with that stipulated in the CAT. The government must introduce mechanisms under which cases of torture can be speedily and effectively reported, investigated and prosecuted.

In addition, the existing draft of the Witness and Victim's Protection Bill must urgently be revised to provide witness/victim protection to all persons who require it. The existing Bill which prescribes that a person's eligibility for witness/victim protection must be decided by a State-appointed commissioner is in clear violation of the ICCPR, to which the Indonesia is a State-party. Under the ICCPR, equal access to witness/victim protection is clearly identified as a fundamental civil and political right.

2) The unbridled power of the military and the police in Indonesia is a serious cause for concern. It is evident from the case studies included in this report, that the crisis of the rule of law is inextricably linked to the collapse of the police and other institutions of the rule of law as legitimate law-enforcement authorities and sources of communal morality.

There can be no rule of law in Indonesia, or indeed anywhere, when officers of the State routinely abuse and remain immune to the very laws that they have been appointed to enforce and protect. By taking prosecutory action against those police and military officers who have demonstrated a total disregard and indifference to the rule of law through their human rights violations, the Indonesian government will be sending a clear message to both its citizens and its officers alike: let no-one be immune before the law.

A transparent system of justice is crucial to reaffirming the legitimacy of any State. This is a critical requirement for the Indonesian State. The current use of military courts and the pattern of selectively adhering to domestic judicial legislation and procedures is a clear step in the wrong direction. Therefore, the AHRC strongly recommends that the Indonesian government review this matter, and clip the wings of the military by making it mandatory that criminal cases in which military officers have been charged with abuses against civilians be tried in the Court of General Jurisdiction. Moreover, the Indonesian government should take appropriate disciplinary action against military officers who refuse to comply with the State authorities and judicial procedures and official investigations.

3) The right to redress and compensation for grievances inflicted by the State is a fundamental principle of the CAT, to which Indonesia is party. Therefore, the fact that over 90% of torture cases reported in Indonesia do not result in a conviction is simply unacceptable.

In addressing this issue, the Indonesian government must first amend its existing legislative definition of torture (as mentioned previously) to acknowledge the gravity and nature of the crime, and also introduce effective and efficient mechanisms for processing, investigating and prosecuting human rights abuse cases.

This also relates to the issue of adequate victim and/or witness protection, as intimidation of victims, witnesses and their families into withdrawing their complaint and/or testimony accompanies many, if not all human rights abuse cases in Indonesia. The Indonesian government must take immediate measures to create a supportive and protective environment for victims of torture and other human rights-related abuses. This is a necessary step towards ensuring redress.

In the event that a torture case is taken to court, it is the fundamental right of the victim to be informed of the case verdict when and as it is decided. Under the present Indonesian Constitution, the official verdict passed by the court judge is made known only to the prosecutor and the defendant. This is in urgent need of reform.

The Truth and Reconciliation Commission Bill of 2004 is a mockery of justice, and must be abolished without further ado. That a victim must first forgive the perpetrator, and by doing so, effectively grant them prosecutory immunity before being able to claim compensation is farcical. As a member of the UN Human Rights Council, the Indonesian government is under strict obligation to address the issue of human rights violations committed under its jurisdiction, and more importantly, to take appropriate disciplinary action against State-agents found to have committed these violations. By continuing to neglect the issue of the human rights atrocities committed during the 1965-66 massacres, the Indonesian State risks losing its international credibility.

4) Indonesia's religious minorities have long been neglected by the government. By failing to acknowledge these religious minorities, the Indonesian government is effectively actively participating in their social marginalization and vulnerability. The AHRC strongly urges President Yudoyono to immediately publicly condemn the recent and ongoing spate of attacks against members of the Ahmadiyyah minority, and bring the perpetrators of these attacks to justice.

The AHRC strongly urges the Indonesian government to acknowledge the Ahmadiyyahs and other religious minorities as legitimate religions of Indonesia, so that they too may participate in public life and civil society as equal citizens.

5) The AHRC strongly urges President Yudoyono and his government to press for an official judicial review of the recent acquittal of prime suspect Mr. Pollycarpus Budihari Priyanto in the murder trial of the late Mr. Munir Said Thalib. Despite the recent uncovering of new and conclusive evidence showing a complex and carefully orchestrated political conspiracy of murder, the Attorney General and the Chief of National Police have shown no intention to conduct further investigative inquiries, which, in light of the recent findings, is the only appropriate course of action.

Therefore, the AHRC requests that further investigations be conducted into Mr. Munir's murder in light of these recent findings. That more than one person was responsible for orchestrating Mr. Munir's murder is evident, therefore, the refusal to comply and cooperate with official criminal investigative procedure on the part of officers of the State Intelligentsia (BIN) must not be tolerated.

In addition, the AHRC is concerned by the Indonesian government's response to UN Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions, Mr. Philip Alston's attempts at international intervention in the matter. Chief of National Police, General Sutanto's statement that he would under no circumstances allow international (particularly UN) involvement in police investigations into Mr. Munir's murder severely undermines the international credibility of the Indonesian State. It is the strong opinion of the AHRC that the international community should be included in ongoing investigations, due to the State's obvious failure to carry out an impartial investigation and prosecution in this case.



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### **MALDIVES: The Human Rights Situation in 2006**

#### **Introduction<sup>♦</sup>**

Pro-democracy protests in the Maldives and consequent government oppression of dissenters<sup>59</sup> have been intense in recent years. Particular incidents stand out by reason of their importance in the reform process. In September 2003, protests occurred as a consequence to the killing of four prisoners; it was here that Jennifer Latheef<sup>60</sup> was arrested and detained. She was later charged with treason and has since then, become a spokesperson for urging committed reform of the Maldivian political and legal system.

Similar demonstrations during August 2004, called for the release of four reformists who had been arrested previously and led to the proclamation of a state of emergency by President Maumoon Abdul Gayoom on 13 August 2004. As a consequence of this a number of arrests were made and many persons were detained without charge.

A clear pattern during these arrests and detentions was the bypassing of basic guarantees of due process, such as the right to be told of the reasons for the arrest, the right to have charges served upon the arrestee and the right to trial without undue delay. A striking feature of this is that while some detainees are released following international and domestic protests, others who are charged are imprisoned and then released without formal notification of the charges being dropped against them. The manner in which

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<sup>♦</sup> This report follows from a preliminary fact finding mission to the Maldives by public interest lawyer/writer/legal consultant Kishali Pinto-Jayawardena, President's Counsel/senior law academic Dr J. de Almeida Guneratne on behalf of the Hong Kong based Asian Human Rights Commission and the Colombo based Law and Society Trust in November 2006. Attorneys-at-law Preethi Fernando and Sasanka Alwis provided resource support during the mission. The visit was on invitation of Minivan Daily, a newspaper publishing house and NOOR (Native Operators on Rights) a Maldivian based non-governmental organisation, both of which requested an objective and rigorous scrutiny of the Maldivian legal system, its laws and procedures as well as prevalent practices in respect of the protection of the rule of law.

<sup>59</sup> The Maldives comprise some two hundred inhabited islands out of 1, 190 islands altogether. The population numbers approximately 285, 066 people out of which 75,000 Maldivians reside in the capital Male. The current President, Maumoon Abdul Gayoom, has ruled the Maldivian islands since 1979

<sup>60</sup> The daughter of spokesman of the Maldivian Democratic Party, Mohammed Latheef, she was charged with terrorism and was sentenced to ten years imprisonment, becoming therein an Amnesty International 'prisoner of conscience.' She was recently pardoned by President Gayoom in what is widely believed to be a concession to international pressure.



charges are left pending will be discussed in this report as evidencing a common tactic of harassment and intimidation.

Consequent to the oppression and intimidation of political opposition as well as any form of dissent, increased pressure by domestic pressure groups, political parties, as well as the international community resulted in the Government announcing a range of proposals towards constitutional reform<sup>61</sup> and proclaiming its intention of holding multi party elections in 2008. These reform proposals include a draft Constitution, the redrawing of electoral boundaries and the introduction of a voter education programme.

However, though the promised reforms appear to be generally praiseworthy, the current continuation of practices of extreme oppression towards political activists and journalists in particular, does not bode well for the commitment of the government towards actual implementation of these reforms, as will be discussed further in this report.

In early November 2006, there were a number of opposition politicians as well as political activists arrested. Some cases are dealt with in detail in the annexure to this report.

### **An Omnipotent Presidency**

The omnipotent presence of the office of the Presidency<sup>62</sup> governs every aspect of Maldivian political life. The President is elected not by the people but by a majority of the People's Majlis (Parliament).

Article 4(2) of the current (1997) Constitution of the Maldives, (hereinafter, the Constitution), states that the executive power shall be vested in the President and the legislative power vested in the People's Majlis (Parliament) as well as the People's Special Majlis, (the Constituent Assembly called into existence by the President at any point that amendments are called for to the Constitution).

However, this perfunctory separation between the legislative and executive sphere is undercut by other constitutional provisions that effectively vests all powers in the office of the presidency. The President is not answerable to Parliament in any manner whatsoever. On the contrary, the power of intervention which the President is

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<sup>61</sup> On November 11, 2003, President Gayoom proclaimed that he would spearhead a process towards improvements in the protection of human rights. Thirty one proposals were presented in that respect on June 9, 2004 with a Roadmap for the Reform Agenda being released to the public on March 27, 2006. These include the creation of the post of Prime Minister, clear separation of the positions of Head of State and Head of Government, the separation of powers between the executive, legislature and the judiciary and the limitation of the number of presidential terms.

<sup>62</sup> Among the qualifications prescribed by Article 34 of the Constitution for election as president, it is a foremost condition that only males can qualify for election. There has been some dissatisfaction expressed regarding this condition, which is seen to be gender discriminatory by Maldivian activists. In contrast, women can contest parliamentary seats and there are, in fact, highly vocal and articulate women members in parliament.

constitutionally vested with, in the affairs of Parliament, is contrary to all modern norms of constitutionalism and separation of power.

Firstly, the manner in which the legislative bodies are constituted is basically problematic. The Majlis comprises forty two elected members and eight members appointed by the President.<sup>63</sup> Its Speaker as well as its Deputy Speaker are appointed if they are found 'in the opinion of the President' to have the requisite competence to discharge the duties of the offices. Equally problematically, these officials can be removed from office by the President without reason assigned.<sup>64</sup>

The People's Special Majlis (Constituent Assembly) comprise the fifty members of the Majlis as well as a further duplicate forty two seats from each of the elected constituencies together with a further duplicate eight members appointed by the President. In addition, the Constituent Assembly also comprises members of the Cabinet, who are not necessarily from the Parliament but are appointed by the President. The Constitution does not prescribe any limitation on the number of Ministers.<sup>65</sup> The Constituent Assembly itself is without any limitation on the number of its members.

Effectively therefore, the possibilities of the Assembly predominating or 'being packed' with those who have political affiliations to the office of the Presidency, deprives the body of any substantial independence.

Further, all bills passed by the Parliament and the Constituent Assembly need to be assented to by the President before they are passed into law. Article 79 (1) and (2) of the Constitution state that upon a Bill being referred back by the President to the Parliament for reconsideration, it shall be passed only by two thirds of the members of the Parliament. Given the political composition of the Parliament in which, the government members predominate, the likelihood of achieving such a two thirds majority is remote.

The President also has extensive powers in regard to the declaration of a state of emergency which powers have been used effectively to stifle pro-democracy protests.<sup>66</sup> The President has the overriding power to issue pardons. Practice has demonstrated that on many occasions, these powers are used without conformity to basic norms of fairness. Thus as activists put it, "we are arrested, the cases are kept pending against us and then some of us are pardoned while others are not."<sup>67</sup> Generally, Presidential control over the

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<sup>63</sup> The elected forty two seats comprise two members elected from Male and two members elected from each atoll of the Maldives. The members hold office for five years.

<sup>64</sup> Articles 68 and 70 of the Constitution. The Speaker is not a member of the Parliament though somewhat inexplicably, the Deputy Speaker is stipulated to be a member (Articles 68(3) and 70(3) of the Constitution).

<sup>65</sup> Articles 54 and 5 of the Constitution state only that there shall be a Cabinet of Ministers appointed by the President and that the Cabinet shall be presided over by the President. It shall consist the Vice President, if any, Ministers charged with responsibility for Ministries and the Attorney General.

<sup>66</sup> Article 144 of the Constitution. See the Introduction to the Report for one occasion where these powers were used against pro-democracy protests.

<sup>67</sup> For example, due to tremendous international pressure, the government has been forced to back down as demonstrated in the recent presidential 'pardon' of Jennifer Latheef, an Amnesty International Prisoner of

legislature, the judiciary and indeed, all processes of governance in the Maldives as would be discussed further, has been likened by some critics as the foremost obstacle to genuine constitutional reform in the Maldives.<sup>68</sup>

### **The Laws, Legal System and Judicial Structures**

The frightening omnipresence of the office of the Presidency reinforces the equally frightening ad hoc nature of laws, practices and regulations. Consequently, there is an almost complete lack of legal accountability. The current laws and existing legal structures applicable to both the civil and criminal aspects of the law are deficient. The primary focus of this report however will be on the laws and systems applicable to the protection of the rights of life and liberty.

#### *No Justiciable Constitutional Safeguards*

The Constitution has a generally impressive chapter on rights, all of which are not justiciable and the courts have declined constitutional jurisdiction in that respect. This chapter, to all intents and purposes, is a dead letter.

#### *Deficient Criminal Laws and Lack of Due Process*

As a former Attorney General of the islands put it, the current Penal Code, which was put together in a haphazard manner from extracts of the Sri Lankan Penal Code, is long since outmoded.<sup>69</sup> Systematic laws of criminal procedure and evidence are non-existent.<sup>70</sup>

Though the Government has been developing an agenda of reforms of the penal laws, one complaint of activists is that this reform process has been ongoing for several years with no perceptible improvements in the patterns of arbitrary arrests and detentions, as well as the impunity which surrounds government officers when they violate rights.<sup>71</sup>

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Conscience. Here, other prisoners who were charged along with her for similar offences were not pardoned resulting in Latheef insisting that they be treated in the same manner.

<sup>68</sup>Interviews with Mariya Ahmed Didi, (former Director of Public Prosecutions, currently member of Parliament for the Maldivian Democratic Party and Shadow Minister of Law and Justice) and independent member of Parliament for Dhall Atoll, Mr Ahmed Nashid

<sup>69</sup> Interview with Dr M Munawwer former Attorney General of the Maldives.

<sup>70</sup> Astonishingly, in 2002-2003 for example, 97% of cases were confession based and involved instances where the defendant was able to see his or her own confession according to a Report by the United Kingdom Conservative Party Human Rights Committee which was consequent to a fact finding mission to the Maldives in June 2006. Though the government insists that the numbers of confession based cases have reduced considerably now, this still remains a significant problem.

<sup>71</sup> A draft Penal Code and Criminal Procedure Code has been pending for some years. In December 2004, a National Criminal Justice Plan was announced which took into account lacunae in the criminal justice system and expressed commitment to rectify such lacunae by 2008.

The issuance of Presidential decrees<sup>72</sup> in areas of criminal justice and the law has further restricted basic rights in this regard. Act No 5/78 (11/3/1978) stipulates that all those arrested can be held after a period of seven days after obtaining approval from a three member committee appointed by the President. Further extension of the detention period can extend up to 15 days. At the end of the fifteen days, the detainee should be brought before a judge who has discretion to extend detention to a further period of thirty days. Then again, the detainee can be kept in detention till the end of the case depending on the discretion of the judge in the circumstances of the case.

This law which confers powers on such an unidentified three-member committee appointed by the President to decide whether detention should be extended beyond the legal limit of seven days has been heavily criticised. Activists monitoring the functioning of this Committee do not know its composition and fear that the very government officials responsible for arbitrary arrests and detentions serve on this body. Moreover, in a situation where the judiciary itself is not independent from the executive as discussed below, the safeguard of further detention being contingent upon the discretion of a judge is inadequate protection against abuse.

Lawyers representing many of those who had been arrested complain that they are not allowed ready access to their clients to advise them on their rights. There is no right and hence no practice of habeas corpus applications. Even where cases are lodged in court, many drag on for interminable lengths of time. The applicable burden of proof in criminal trials is not proof beyond reasonable doubt but rather as the court seems satisfied. Defence lawyers are sometimes not allowed to cross-examine witnesses. All these provisions and practices violate the cardinal international law principle of a right to a fair trial.

The above law also has a peculiar provision, whereby, if the Ministry of Defence and national Security regards that a person may be arrested in the context of a case relating to private debts and finance, the Ministry has the discretion of detaining and arresting such a person and the detention of whom shall be in accordance with permission granted by the aforesaid unidentified committee of three persons. The possibility of abuse implicit in such a provision is horrendous.

Further, it infringes the international human rights principle that no one shall be imprisoned merely on the grounds of inability to fulfil a contractual obligation.

#### *A non-independent Judiciary*

The basic lack of an independent judiciary is one of the most disturbing factors in the current functioning of the legal system. The courts system is rudimentary with no Supreme Court but a High Court exercising appellate power which comes under the

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<sup>72</sup> In terms of Article 42(e) of the Constitution, the President has the power to promulgate decrees, directives and regulations 'as may be required from time to time for the purposes of ensuring propriety of the affairs of the government and compliance with the provisions of the Constitution and law.'

President's office and from which appeals lie thereon to the President. In addition, there are any number of courts at such places 'as may be determined by the President'.<sup>73</sup> The Chief Justice and all judges of the High Court as well as judges of the other courts are appointed by the President and do not have the basic security of tenure. There is no separation between the executive and the judiciary both in substance and in form. Practically, lawyers state that judges tend to be openly partial towards the Government

The lack of independence of a body titled the Judicial Services Commission is conspicuous. This body was created on November 11, 2005<sup>74</sup> and consists of the Minister of Justice, the Attorney General, four members of the judiciary appointed by the President, two members from the legal profession and two members of the general public.

The Attorney General is wholly a political position and does not even claim to possess independence of office. He is appointed by the President and can be removed from office at the discretion of the President. Retribution is swift if the holder of the post is seen to be acting against the office of the President or departing from government policy. Interference of the President's Office in his functioning is not uncommon.<sup>75</sup> The previous Attorney General, Dr Mohammed Munawwer was detained without charge some months after he was dismissed from office. The detention was after the declaration of a state of emergency on 13<sup>th</sup> August 2004.

In addition, there appears to be an incongruous situation where most of the judges possess Middle Eastern legal training and a Sharia law background while many practicing lawyers come from the common law traditions of the Commonwealth, thus resulting in fundamental discrepancies in the manner in which the purpose and the nature of the law is viewed. Use of formal legal precedent is not evidenced as a matter of common practice and there does not appear to be any system of law reporting.

### *Police Structures*

The Maldivian police earlier came under the National Security Service but were later constituted as a separate force. Activists detained in police cells and stations state that while many police officers are decent and attempt to help detainees, they too are constrained by systematic practices of ill treatment of detainees since they fear that they would lose their jobs if they protest.

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<sup>73</sup> Article 118 of the Constitution

<sup>74</sup> apparently by Presidential decree

<sup>75</sup> In interviews, former Attorney General of the Maldives Dr Munawwer outlined instances where the office of the Presidency had intervened in instances where he had attempted to use his authority as Attorney General to implement the law. One direct instance where the President had countermanded his order was in relation to his asking the Commissioner of Elections to inquire into allegations of political tampering with votes at an election where the President himself was one of the candidates.

However, the Maldivian Riot Police, known as Star Force, are infamous throughout the islands for their abuses of human rights and inhuman treatment of detainees. They are usually helmeted and uniformed, armed with batons, shields and pepper gas. Documented instances of their attacks on peaceful demonstrators and in peoples' homes whilst arresting people have been recorded

### **Repression of Activists and Journalists**

As deficient as the laws are, the manner in which they are used to intimidate and harass the people is correspondingly worse.

One current case involves Ahmed Abbas, a well-known artist and political cartoonist who had critiqued the dreaded Maldivian secret police for using excessive force, observing that they would understand the negative consequences of such force only if they were given a dose of the same treatment. Abbas was then asked to give a statement to the police, taking responsibility for this assertion.

On 1<sup>st</sup> November 2006, a pro-government website published a court order claiming that Abbas has been sentenced in absentia to 6 months in jail for 'disobedience to order'.

This loosely framed charge under Section 88 of the archaic Maldivian Penal Code is made punishable by imprisonment ranging up to six months or up to one/two years in aggravated contexts. Activists complain that this is a clause frequently used by the government to intimidate and threaten persons who exercise the right to criticize. While the charge itself was highly debatable in terms of its legal applicability, the complete absence of procedural justice thereafter was even worse.

Upon being informed of this 'sentencing' in absentia, Abbas had questioned from the Attorney General's office over the telephone as to whether this was, in fact, true and had been answered in the positive. Two days later, after his frantic requests for political asylum were unsuccessful, he was detained by riot police and is currently being held in the infamous Maafushi Prisons in Male.

Meanwhile, the editor and the sub editor of 'Minivan Daily', in which his statement was published, were also charged for 'disobedience to order.' These charges have been left pending against them, demonstrating the arbitrariness of the procedures. Indeed, persons similarly arrested and detained (whose cases are painstakingly documented by activists), point out that cases are intentionally left pending in order to use the charges as easy weapons of intimidation.

Shahindha Ismail, head of one well known non-governmental organisation (NGO) working with detainees called the Detainee Network stated categorically that they had documented numerous reports of beatings and torture of detainees. In certain cases, mass arrests are made after pro democracy protests during which even bystanders are arrested and kept in custody without formal charges being filed. They are not allowed access to

the detainees and their letters to the police go unanswered. In some instances, activists monitoring cases are not allowed access to courts hearing cases of detainees

### **Freedom of Assembly/Association and Labour Rights**

The same restraints apply in other areas. Labour rights are minimal and freedoms of association and assembly, not much better. Registration of non-governmental organisations is denied on the flimsiest of excuses. Aminath Najeeb, the editor of “Minivan Daily” had been persevering for some years to get a non-governmental organisation (NGO) registered under her name along with another activist. The involvement of the latter had been objected to on the basis that he had a criminal record as he had been found driving a motor cycle without a license. While no specific objection had apparently been raised to Najeeb herself, her application for the registration of her NGO, remains pending.

Registration of the Detainee Network had been delayed for over a year following amendments being repeatedly called for in regard to the Articles of Association. However, when after repeated attempts this NGO was, in fact, registered, it was the initial version of the Articles that were accepted for registration (excepting amendment of one clause only) rather than the much revised version.<sup>76</sup> These incidents fuel the suspicion of activists that the delays on the registration process imposed by government authorities amount to deliberate attempts to harass them.

### **Repression of Opposition Political Parties**

Political rallies are routinely attended by mass arrests and detentions, sometimes of mere bystanders who were watching the processions go by. Political repression practiced against members of the opposition Maldivian Democratic Party (of which some eighty five members are currently detained) is predictably severe.

Charges of treason and high treason currently served on MDP leaders such as Mohamed Nasheed and Ibrahim Hussein Zaki are rife with procedural irregularities. The former (who was a previous Minister of Tourism in the Maldives) had been charged after exhorting the islanders of one atoll to practice “peaceful revolution.” Their high profile trials are being closely monitored by international observers.

Some cases of political activists who have been currently charged are found in annex one to this report.

### **Democratic Checks on Abuse of Power – the National Human Rights Commission**

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<sup>76</sup> interview with Shahindha Ismail, head of the Detainees Network

Other checks on abuses are also deficient. Though the Maldives has had a National Human Rights Commission, (NHRC) its lack of institutional independence has resulted in it being denied entry into regional bodies such as the accredited Asia Pacific Forum (APF) of National Human Rights Institutions. While a fairly good revised law on the NHRC was recently passed by the legislative members, the quality and commitment of its members, (chosen by the President), appear to preclude the body functioning independently.

## **Freedom of Expression and the Media**

The media had been largely government controlled and the space for independent media had been opened up only very recently. Journalists of independent newspapers such as the Minivan News work under constant threat of being arrested, charged or detained as demonstrated in the cases of Ahmed Abbas discussed in this report previously. A Maldives Bill on Freedom of the Press has been heavily critiqued as allowing for abuse and repression of the media.<sup>77</sup>

## **Conclusion**

The activism of the Maldivian people in response to patterns of extreme repression as detailed in this Report has been both spontaneous and courageous. The Government's recent accession to international human rights treaties such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention Against Torture signifies that the Government is taking note of stern criticism of its human rights record.

Practical implementation of these standards needs to take place through sustained domestic, regional and international activism and advocacy

### **Annex One – Cases of Some Political Detainees**

(based on details supplied by the Maldivian Democratic Party)

#### **A) Arbitrary Arrest and Detention of Imran Zahir**

Name: Imran Zahir (Alias: Bakuri)

**Sex: Male**

Age: 25 years old,

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<sup>77</sup> See Report by the international non-governmental organisation Article XIX dated May 2006 which commented on the fact that the Press Bill created 'new media crimes.' Its prohibitions on publications were also termed vague and open ended which meant that they could be abused for political purposes.



Address: H.Aman, Male', Maldives

Profession: Press Secretary of Male' Constituency for the Maldivian Democratic Party.

Member of Human Rights Committee of the Maldivian Democratic Party

Freelance photographer and journalist for Minivan Daily newspaper

In early 2004, Imran Zahir, along with Aminath Najeeb requested a human rights NGO called Human Rights Association Maldives to be registered in the Maldives. The Ministry of Home Affairs denied registration on the basis that Imran Zahir had committed a traffic offence (riding a motorcycle without a license) as a minor, giving him a criminal record that prevents him from registering an NGO.

Imran Zahir had always been a vocal human rights activist. Before NGO's and the Maldivian Democratic Party came into existence, Imran Zahir was working as an individual promoting and raising awareness on the human rights violations that were committed in the Maldives. He has been an active influence in the youth as he has an extensive youth connections.

Imran Zahir has been involved in doing activities such as organizing and getting signatures for petitions requesting human rights violations to be stopped. He has also been involved in producing awareness raising t-shirts, especially on International Human Rights Day (10 Dec).

He was an active freelance photojournalist and journalist for Minivan Daily. On 6<sup>th</sup> September 2005, he was arrested while he was taking pictures for Minivan Daily. He was beaten up during arrest and released without charge after being detained for over two months.

Believing that he can serve his nation better in the human rights area, he joined the Maldivian Democratic Party. In this capacity, Imran Zahir was involved in successfully organizing a non-violent Women's March on 30 March 2006.

As a member of the Human Rights Committee of the Maldivian Democratic Party, Imran Zahir has worked extensively with families of people who have been detained unfairly and actively participates in petitioning for their release.

On 30<sup>th</sup> October 2006 – Plain clothed policeman came to Imran Zahir's house and asked his mother where he was. When Imran's mother replied that he wasn't home, the plain clothed policemen left. They came twice to his house asking after him

On 31 October – Plain clothed policemen came to Imran's house asking for him. No police summons was issued.

On 1 November – Plain clothed policemen came to Imran's house asking after him. No police summons was issued.

ON 3 November 2006 – The State-owned TV (Television Maldives) started announcing alongside with pictures that Imran Zahir was someone who has been sought and currently not found by the police. Note that Imran was never given a summons to the police station.

Members of the Maldivian Democratic Party (MDP) and a number of political and human rights activists have been arrested because of the gathering planned to take place on 10<sup>th</sup> of November in Male' (The gathering has been cancelled by the Maldivian Democratic Party stating that they did not wish more harm to come to their supporters).

Imran has been arrested before severely beaten, tortured and held in detention for long periods of time and released without charge. Imran is currently in fear that the riot force may barge into his home and attack him and his family. Imran also fears being beaten up severely during arrest.

History of arrests

**1) 14<sup>th</sup> August 2004 – 21<sup>st</sup> October 2004 (INFORMATION FROM DETAINEE NETWORK)**

Imran Zahir was arrested after a spontaneous pro-reform demonstration that took place on the 12-13 of August 2004 in the Independence Square in Male', Maldives.

Imran was blindfolded and his hands and feet were cuffed for over 15 hours. He was detained in Girifushi (island used for training police) for 8 days on a mat with his hands cuffed after which he was transferred to Dhoonidhoo Detention Center.

Imran was released to Male' arrest on the 21<sup>st</sup> October 2004 (meaning he was not allowed to leave the capital Male') On the 6<sup>th</sup> November 2004, state owned TV announced Imran's case was sent to the courts but he was not informed of his charges. On the 7<sup>th</sup> November 2004 it was reported in a state run newspaper that Imran was being charged for participating in an unlawful assembly.

On the 31<sup>st</sup> December 2004, President Gayoom announced on state owned TV that all those people charged for various crimes committed on 12-13<sup>th</sup> of August were given a Presidential pardon and that all cases were now dropped. Imran was never informed of this in writing.

**2) 2<sup>nd</sup> August 2005 - (INFORMATION FROM DETAINEE NETWORK)**

Imran Zahir was apprehended and detained by the police for several hours after accompanying members of the Maldivian Democratic Party to the Police Headquarters to enquire after people who were detained on the 1<sup>st</sup> of August 2005. Imran Zahir was taking photographs of the incident.

4<sup>th</sup> September 2005- 12th October 2005

On 4<sup>th</sup> September 2005, Imran attended a rally by the Maldivian Democratic Party which was held after the arrest of their Chairperson, Mohamed Nasheed. He was

there to photograph the event. After the police removed the public address system, Imran photographed them leaving the rally.

Imran was then abducted by 6 policemen outside on the road and dragged into the police vehicle where he was severely beaten and verbally abused. Imran sustained injuries to his head and arms. He was detained for allegedly obstructing the police from their duty and for engaging in violent activities. On 26<sup>th</sup> September 2005 Imran was brought to court and his detention was extended for a further 21 days under house arrest because the police claimed the investigations were still unfinished even though they required no further information from him. Imran was accused of violent behaviour after the unprovoked violence the police had inflicted on him. Imran was released from house arrest on 12<sup>th</sup> October 2005 without charges.

### **3) 3<sup>rd</sup> April 2006 – 4<sup>th</sup> April 2006 - (INFORMATION FROM DETAINEE NETWORK)**

On 3<sup>rd</sup> April 2006 Imran was arrested while standing outside a café' in Male' whilst the police had blocked a street surrounding a public gathering. Imran was handcuffed, dragged to a police vehicle and then sent to Dhoonidhoo Island detention Center. Imran was not informed of the reason for his arrest.

Imran was then released the following day on the 4<sup>th</sup> April 2006 without charge.

### **4) 16<sup>th</sup> April 2006- 25 July 2006 (INFORMATION FROM DETAINEE NETWORK)**

Imran was arrested again on the 16<sup>th</sup> April 2006 during a peaceful demonstration in front of the United Nations building in Male' housing the UNICEF, UNDP and UNFPA in Male'. Imran was calling for the release of people detained on 14<sup>th</sup> of April 2006 after the demonstration for fishermen's rights and the elimination of the 29 unelected parliament members appointed by the President. While in detention he was denied his right to a lawyer for a long period of time. Imran was able to meet his lawyer more than a month after detention. On 7<sup>th</sup> May 2006 a judge extended his detention period for a further 30 days. Imran did not have access to his family for over a month. Imran was questioned on his involvement with the Maldivian Democratic party as Press Secretary and on his communication with foreign media organisations. Imran was kept in solitary in a small cell and informed that he could not be released from the detention centre due to the nature of his case. Imran was transferred to house arrest in July 2006 and was subsequently released without charge.

## **B) Arbitrary Arrest and Detention of Mohamed Saleem Ali**

### **1. Personal Details**

Name of Victim: Mohamed Saleem Ali

Address: Narugis Vila, Thinadhoo, Maldives.

Profession: President of Gaaf Dhaal Atoll Constituency,  
Maldivian Democratic Party.

Contact details: (Thinadhoo hospital, in police custody)

**2. Status of the victim as a human rights defender:** Mohamed Saleem Ali has been promoting awareness of human rights in his constituency through meetings, workshops and pushing for human rights orientated reforms in his political role. He has been working with his constituents to establish a network for reporting of human rights abuses and human rights education throughout the Atoll. Mohamed Saleem Ali is a vocal opponent of human rights abuses perpetrated by the government of Maldives against his constituents. He has been extremely successful in that due to his network, human rights abuses in the atoll are now promptly reported about both in newspapers and magazines in the Maldives, and on news websites based in other countries. This would have been unimaginable for people in the atoll a year ago.

**3. Alleged violations committed against the victim:** Mohamed Saleem Ali was arrested at his home in Thinadhoo by the police on November 1st 2006. He has since been arbitrarily detained. He has also been physically abused and tortured. His family was not told of his whereabouts for two days. During detention he was tortured by the police resulting in his arm being broken at the elbow joint. He was not allowed medical attention for two days, but is now at the hospital in Thinadhoo receiving treatment. However he is still in custody and has still not been charged with any offense. He has not been offered any legal representation.

**4. Perpetrators:** Maldivian Police Force- Riot Police known as Star Force

**Witnesses:**

Mohamed Saleem Ali was detained on the same night as:

Yamin Mohamed (Abhareege, Thinadhoo),  
Mohamed Waheed (Skooner, Thinadhoo),  
Mohamed Niyaz (Blue Fish, Thinadhoo).

They were transported together and kept in the same detention center.

Mohamed Saleem Ali and Yamin Mohamed were held in the same cell measuring 5 ft. by 5.ft. where they were tear-gassed for being too loud and asking for medical attention.

5. **Action by authorities:** The Maldivian government/police have denied the physical abuse and torture.

6. **Link between violation and human rights work:** Mohamed Saleem Ali is a target for government attacks because of his promotion of freedom of expression, association and assembly among his constituency. His detention is part of a government crackdown and campaign of intimidation against coordinators and would be participants of a nationwide rally for human rights and democratic reforms. The rally was to be held on the 10<sup>th</sup> of November 2006.

7. **Previous incidents:** Mohamed Saleem Ali was arrested in 2005 for participating in a demonstration against human rights abuse in Male. He has never been charged with any offense.

### C) Arbitrary Arrest and Detention of Shehenaz Abdulla

#### 1) Personal Details

Name: Shehenaz Abdulla

Sex: Female

Age: 32

Nationality: Maldivian

Profession: Independent Consultant currently under contract with Asian Development Bank (ADB) stationed at the Ministry of Finance and Treasury. Shehenaz has previously worked for the Ministry of Education, World Bank and the United Nations.

2) In October 2005, Shehenaz Abdulla became openly and actively involved in the 'Free Jenny' campaign to bring justice to a person she believed was unfairly sentenced to ten years for terrorism. She openly started a petition stating that she was present on the roads in the 20<sup>th</sup> September 2003 riots in Male' after the murder and subsequent shootings of prisoners in Maafushi Prison took place. And that if being present during the riots means an act of terrorism, she too is a terrorist. Over 300 people signed this petition. (Attached is a brief statement written by Shehenaz Abdulla and sent to Native Operators On Rights – NOOR as of yet unregistered NGO in the Maldives. It explains her reasons and background as to why she got involved in her current action in human rights field)

In October 2006, when the MDP decided to hold a peaceful gathering to urge for faster constitutional reform on 10 November 2006, Shehenaz was contacted by the MDP to coordinate the gathering. On 6 November 2006 Shehenaz was arrested while she was in a gathering that was observed by international monitors and media.

3) Date of Arrest – 6<sup>th</sup> November 2006

### **Place of Arrest – Male’, Maldives**

Shehenaz was in a peaceful gathering on 6<sup>th</sup> November urging for faster constitutional reform. She was in the crowd with the opposition party Maldivian Democratic Party although she is not a member of any political party. While she was at the gathering, she was handcuffed and carried by all four limbs into an awaiting police vehicle. Shehenaz Abdulla is currently in Dhoonidhoo Detention Centre. Reason of arrest is not yet known.

While Shehenaz Abdulla was working for the Ministry of Education, she was asked to show support to the government by writing a letter to the President and to publicly disassociate herself with Jennifer Latheef (a key human rights activist in the Maldives). She was told that she would in return get a promotion. Shehenaz Abdulla resigned from her post, as she did not believe in political motivation in her work place. However, Shehenaz stayed on for three more months on the request of the government to train some employees before she left. (More details in Shehenaz’s attached statement).

4) **The Riot police that were sent to disperse the crowd:** No names or ranks of the riot police are known or visible in their uniforms. There was a crowd gathered near where Shehenaz was arrested. Detailed names of the witnesses can be obtained.

5) **The family has contacted the authorities:** The Maldivian Democratic Party has released a press statement. International NGO’s and other foreign bodies have been notified.

6) Shehenaz Abdulla was arrested prior to the 10 November 2006 peaceful gathering that was called by the Maldivian Democratic Party as she was helping to coordinate the gathering. Shehenaz Abdulla was also arrested because of the pro-human rights work she has been doing such as the petition. She is also a vocal critic of the human rights violations that takes place in the Maldives. She anticipated being arrested because she was helping in coordinating a peaceful gathering to exercise and ask for the fundamental human rights.

### **D) Incident at Gaaf Dhaal Thinadhoo Island, Maldives – 1 November 2006**

At approximately 12:00 hrs on 1 Nov 2006, about 70 riot force police arrived by speedboats to Thinadhoo Island in the Southern Atoll of Gaaf Dhaal, Maldives. The police were in full riot gear. Upon arrival, the riot police proceeded straight to the office building of the Maldivian Democratic Party (MDP). On their way to MDP office, they saw Mohamed Gasam (Deputy President of the Gaaf Dhaal Constituency). He was apprehended by the riot police and forced to accompany them to the MDP office. The riot police then invaded the MDP office building, where six members of MDP were working. The riot police threatened these individuals by telling them that if they did not leave the office immediately, they would be arrested. The riot force then proceeded to

ransack the office and confiscated banners, posters and other material. MDP office is occupied by the riot police without any members of the Maldivian Democratic Party being allowed to enter or be near the vicinity. When they arrived at the office, they did not show a search warrant or an arrest warrant. Mohamed Gasam was taken to a holding cell in Thinadhoo Island straight from MDP office. Gasam, while being detained in the holding cell, was pepper sprayed in the face.

A group of riot police approached Mohamed Nazim (Maldivian Democratic Party's Gaaf Dhaal Constituency Deputy Secretary) while he was working in his shop. He was asked to accompany the riot police to the Police station. Nazim is currently being held in a cell in Thinadhoo. Nazim was also pepper sprayed while he was inside the cell. The information about both Gasam and Nazim being pepper sprayed while inside the holding cell comes from a source within the police station.

Unofficial curfew has been declared. People are not allowed to leave their homes, and no boats are allowed to leave or enter the Thinadhoo Island. People who are seen out on the road have had extreme force used on them. One man was arrested and later released because he told the police that he had a right to walk on the roads in Thinadhoo Island. People who are in their homes are being threatened and verbally abused by the riot force.

Island officials (government workers) are going around repeating a list of 5 people asking them to come to Thinadhoo Island Office. The officials are driving around the island announcing that if any protection is given to these five people, it would be considered as an offense.

The five people being sought out are:

- 1) Mohamed Saleem Ali (Narugis Villa, Thinadhoo)
- 2) Sheik Ibrahim Fareed Ahmed
- 3) Yamin Mohamed (Abhareege, Thinadhoo)
- 4) Mohamed Waheed (Skooner, Thinadhoo)
- 5) Mohamed Niyaz (Blue Fish, Thinadhoo)

Mohamed Saleem Ali, Mohamed Waheed and Yamin Mohamed have been arrested. About 50 riot police entered Mohamed Saleem Ali and Mohamed Waheed's homes and arrested them. Yamin Mohamed handed himself over to the riot police knowing that they were looking for him. Mohamed Niyaz has been arrested, but no further details on his arrest are known.

During the arrest, Waheed was brutally hit on the face causing his face to swell up.

Saleem's main joint on his arm near the elbow was broken during arrest. Confirmed reports at 02:10hrs (2<sup>nd</sup> November 2006) that Saleem has been asking for medical attention constantly and has been denied access to a doctor. Saleem is in extreme pain.

Confirmed reports that ‘due to excessive noise’ made by the detainees, tear gas has been used inside the holding cell (measuring 5ft by 5ft).

Confirmed reports that Mohamed Waheed and Mohamed Niyaz are being held in one cell, Mohamed Saleem Ali and Yamin Mohamed in one cell, and Mohamed Gasam, Mohamed Nazim are held in solitary cells. Note that each cell’s dimensions are 5 feet by 5 feet.

Confirmed reports that at around 02:00hrs, Yamin Mohamed was taken out of his cell, handcuffed and dragged outside by the neck. Confirmed reports that Yamin Mohamed has been severely beaten by the riot police.

2<sup>nd</sup> November 2006

10:20hrs - Mohamed Yooshau (Abhareege, Thinadhoo) arrested while he was with an acquaintance on a speedboat ready to leave to nearby Kaadhedhoo Island (airport island) to receive journalists. More than 15 riot police came to detain Mohamed Yooshau.

12:15 – Mohamed Yooshau has been released from detention.

Reports from riot police in Thinadhoo indicate that Mohamed Saleem Ali is in critical condition and has been taken to Gaaf Alif atoll Villingili Island for medical treatment for his arm.

Names of those Detained currently in Gaaf Dhaal Thinadhoo

- 1) Mohamed Gasam (Sunnydale, Thinadhoo)
- 2) Yamin Mohamed (Abhareege, Thinadhoo)
- 3) Mohamed Waheed (Skooner, Thinadhoo)
- 4) Mohamed Nazim (Thinadhoo)
- 5) Mohamed Saleem Ali (Narugis Villa, Thinadhoo)
- 6) Mohamed Niyaz

4<sup>th</sup> November 2006

00:30 - Approximately 150 people went to the Island Office in Thinadhoo to ask them to talk to the police to give the people of the island a few hours of peace to sleep.

Mr. Nizar opened the door, looked at the people and telephoned the riot police, who immediately came and dispersed the crowd with brute force.

Detained and released a few hours later

- Phillip Wellman - American working in Maldives for Minivan News.
- Graham Quick – English photo-journalist under contract with a leading newspaper in the UK.



Phillip Wellman was harassed and asked to delete some of his recordings. Both Phillip Wellman and Graham Quick were informed that they were traveling in the islands without proper permit by the government. Phillip Wellman however, has a work permit as a journalist in the Maldives. Phillip Wellman and Graham Quick were asked to leave the country. Phillip Wellman was unofficially informed that it was a 15-day ban from the Maldives.

**Points of importance:**

- The money in the fund box for 10 November demonstration containing approximately \$4000 has been taken. The box has been left in the office without any money. (1 Nov 2006)
- Children who were sitting the IGCSE O'Level exams left their exams due to extreme fear after hearing the police threatening and abusing people out on the roads. This is an exam that they have been working for the past three years and will not be allowed to sit again for another six months. (1 Nov 2006)
- Ahmed Shameem's pre-school (Raulaa pre school) and home has been ransacked and searched by the police. Two of his children, a 15 year old boy and 20 year old girl were present when the riot police arrived and asked them to co-operate and to show the pre-school and their home. The police then proceeded to check the two buildings. When Ahmed Shameem arrived home from his prayers at the mosque, the riot police were leaving. When asked the reason for ransacking his home and pre-school they said that it was in relation to a report they had received saying that Sheik Ibrahim Fareed Ahmed was hiding there. (1 Nov 2006)



## **ASIAN HUMAN RIGHTS COMMISSION**

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### **NEPAL: The Human Rights Situation in 2006**

#### ***Impunity for abuses remains as country undergoes political revolution***

##### **Introduction**

2006 has been a tumultuous year in Nepal. It began with widespread protests in January in the build up to the first anniversary of King Gyanendra's infamous coup and municipal elections. These protests were met with curfews, mass arrests, increased threats to human rights defenders and violent repression. This took place against a background of continuing armed clashes between State security forces and Maoists insurgents and widespread human rights abuses being perpetrated by both sides. The Maoists also launched lengthy and crippling blockades of the capital, Kathmandu, and other major cities.

On March 19, 2006, representatives of the seven allied opposition political parties and the Maoists announced an agreement to launch another uprising on April 6 against the King. They issued a public Memorandum of Understanding detailing their common stance, which paved the way for future developments. The Maoists also decided to lift the indefinite blockades that had been in place since March 14.

On April 3, the Maoists announced a unilateral ceasefire. On April 6, the uprising led by the Seven Party Alliance (SPA) began and was initially planned to include a four-day general strike and civil disobedience movement, as well as a large public rally in the Kathmandu on April 8. The next days and weeks saw an unprecedented popular uprising including hundreds of thousands of protestors from all walks of life in the capital and elsewhere. This was met by repression during which hundreds were arrested or injured and 20 persons were killed. However, the movement continued to gather momentum and resulted, on April 24, 2006, in the King relinquishing his strangle-hold on absolute power and in his reinstating the House of Representatives that had been dissolved on October 4, 2002. This can be seen as one of the most important days in the country's recent history.

On April 26, the Communist Party of Nepal (Maoist) announced a three-month unilateral cease-fire starting with immediate effect. Following this, Girija Prasad Koirala was nominated as Prime Minister and on April 28 the House of Representatives met for the first time since being reinstated. Central to the demands of the amassed protestors had been the holding of elections to a Constituent Assembly, the establishment of which became the central mandate and duty of the newly formed government. On May 3, the

government reciprocated by announcing a cease-fire of its own and also invited the Maoists for talks. A high-level probe commission was set up to investigate the violent repression that occurred during the April popular uprising.

Since this time the government and the Maoists have been holding talks that on November 8 resulted in a six point agreement that concerned the signing of a peace accord, to bring an end to the decade-long internal conflict in the country, as well as key issues such as arms management, the creation of an interim constitution and government and the holding of elections to the constituent assembly, which among other things, will be tasked with deciding on the future of the monarchy.

All of these events are remarkable and welcomed. They represent an impressive series of political developments that open the way for significant improvements to the human rights situation in Nepal. However, it must be said that many human rights problems remain within the country, and although there has in general been an improvement to the situation, key issues such as impunity and redress for victims have not seen any real improvement. While one cannot expect everything to change so radically all at once, it is vital that judicial reform and the establishment of the rule of law accompany the progress being made at the political level, if sustainable improvement to the human rights situation in the country is to be achieved.

In terms of both the political and the human rights in Nepal during 2006, it is best to view the situation chronologically, which can be split into two distinct periods: before the culmination of the popular uprising on April 24, and the period after this date. Throughout these periods, while much attention has been given to the political developments, the AHRC has continued to document human rights violations, which will be presented in this report.

### **January 1 to April 24, 2006**

The period spanning January 1 to April 24, 2006, can, in retrospect, be seen as the dying throes of a faltering regime under which widespread human rights abuses were the norm. It must be recalled that in previous years, Nepal had the world's worst record concerning forced disappearance, with torture and extra-judicial killings also being widespread and endemic. While human rights organizations had been active in documenting and publicizing these cases in previous years, following the so-called Royal Coup on February 1, 2005, in which King Gyanendra seized absolute control of power, the threats and risks to the lives and liberties of human rights activists since that time made this process even more difficult, resulting in a significant information gap concerning the number of individual cases being reported as compared with the total number being perpetrated. As a result of the worsening situation following the coup, the international community began to apply concerted pressure on the King and his government, which led to the establishment of a field office of the United Nations Office of the High Commissioner for Human Rights (OHCHR) in late 2005. This office benefited from having access to places of detention, which it is thought had the effect of reducing the

number of forced disappearances being carried out by the State, despite the ongoing and growing political and insurgent problems within the country.

On November 22, 2005, the seven-party alliance (SPA) and Communist Party of Nepal (Maoist) reached a 12-point agreement that would redefine the Nepali political landscape in the days to come. The Maoists agreed to shun violence in due course and join the political mainstream. Both the parties and the Maoists also agreed to work together to enable Constituent Assembly election, during which the UN or accepted international entities would supervise the weapons of both the rebels and the Royal Nepalese Army.

At the beginning of 2006, the situation in Nepal was very tense, with human rights defenders facing serious threats to their personal security and freedoms for carrying out their work. Despite the OHCHR's monitoring activities, human rights abuses continued to be perpetrated throughout the country, including by the Maoist insurgents. However, the alliance between the SPA and the Maoists provided a common front, based upon which the people of Nepal would begin to express their resistance to the King, his government and the situation of insecurity and gross human rights abuses that reigned in the country.

### **The January/February uprisings**

The first sign of mass popular dissent can be seen in the protest demonstrations that were organized in the run-up to the first anniversary of the Royal Coup, on February 1, and the municipal elections that were to take place on February 8, 2006.

On January 17, 2006, a curfew from 11 pm to 4 am each night and a total and indefinite ban on peaceful demonstrations came into operation. The security forces were reportedly allowed to shoot to kill under this curfew. It is likely that these measures came as a knee-jerk reaction to the recent advances made by the Maoist insurgent forces closer to the capital, Kathmandu, as well as the large number of legitimate, peaceful demonstrations being held in the country in response to the series of clampdowns on fundamental freedoms. Since the royal takeover in early 2005, the situation in Nepal had deteriorated to such levels that ordinary life was no longer possible for its citizens. This led to a massive exodus of Nepalese persons to neighbouring countries and beyond. Those who protested against the atrocities committed by the armed forces were threatened, beaten, arrested and even killed. Domestic institutions, including the courts and the National Human Rights Commission were also not immune to such intimidation and attacks.

The continuous and successful attempts by the Government of Nepal to bring in various draconian laws under ordinances limiting the peoples' freedoms, civil society and the media resulted in a complete clampdown on fundamental freedoms. Further to this, the growing discontent in the country was being fuelled by widespread opposition to the King's plan to hold municipal elections, which were seen as being primarily aimed at duping the international community into thinking that the process of democratization was on track in the country following the coup. The major political parties - that had received the majority of the vote in previous elections – planned to boycott the election and stage

protests against them, as the situation prevailing in the country could not ensure free and fair elections, and the elections were seen as being a ploy by the King, designed to place his cronies in office around the country.

On January 19, 2006, over 100 political leaders and human rights activists were arrested. The homes of a number of prominent human rights defenders were also visited by the security forces. Nepalese Home Minister, Kamal Thapa, said that at least 100 opposition leaders and activists had been detained for security reasons. The targeting of human rights defenders was a particularly worrying development. A number of persons were served with three-month detention orders under the Public Security Act (PSA), following their arrest. PSA permits detention without trial, initially for up to 90 days, to prevent persons from committing actions that "undermine the sovereignty, integrity or public tranquillity and order of the Kingdom." Many persons arrested during this and following days were issued with detention orders under the PSA, which could only be considered as punitive rather than preventive actions.

The crack-down was launched the day before large-scale demonstrations were to be held, to protest against the government's planned municipal elections. Security reasons relating to Maoist insurgents were used to attempt to justify these actions by the State. The Office of the United Nations High Commissioner for Human Rights (OHCHR) in Nepal denounced the government's actions and stated that the alleged suspicion of Maoist infiltration in the planned demonstrations, that had been called by the alliance of seven political parties to denounce the King's arranged municipal elections on February 8, 2006, could not justify the harsh measures being used to clamp down on democratic protests. Land-lines and mobile phones, as well as internet connections, were cut off in Kathmandu and other major cities in the country, in a reminder of the methods used during the royal coup one year earlier.

On January 20, the day of the planned demonstration, the crackdown increased. A curfew was imposed from 8 am and was scheduled to last until 6 pm, which came in addition to the curfew already in force from 9 pm to 4 am. Given that the security forces had allegedly been given the authority to shoot to kill persons during the curfew hours and the continuing disruption of mobile phone services, the planned large-scale pro-democracy rallies were too dangerous to hold in the capital, Kathmandu. At least two dozen demonstrators were arrested at a small rally in Sundhara before the morning curfew began, and the leaders of political parties who had not already been arrested on January 18 and 19, 2006, were placed under house arrest. Over 200 persons were arrested in the Gausala area of Kathmandu.

In the Mid-Western region, students clashed with the security forces in Surkhet, with 6 being injured and over 30 being arrested. In the Western region there were clashes between the police and demonstrators in several places including Nawalparasi, Sangja, Chitwan and Palpa, with further arrests being carried out. UN Secretary General Kofi Annan declared his "dismay" at the developments in Nepal and urged "all sides for calm, the suspension of fighting and the urgent initiation of an inclusive national dialogue." The Indian government, for its part, called these events "regrettable" and of "great concern."

Similar statements were issued by the European Union, the United States, the United Kingdom and Japan.

On January 21, following the disruption of the large-scale demonstrations planned for January 20, thousands of protestors took to the streets of Kathmandu. The demonstrations on that day were held in the New Road and Basantapur areas in central Kathmandu, in defiance of the anti-constitutional, total ban on peaceful demonstrations that the government had launched earlier in the week. The police reportedly intervened to break up the demonstration in the afternoon in Basantapur, as thousands of persons converged on the venue. Dozens of demonstrators were injured along with some policemen in the clashes that ensued. Dozens of leaders and activists, thought to number over 200, were reportedly arrested. The police charged the demonstrators using batons and fired tear-gas shells to disperse the crowd in the New Road and Basantapur areas. The Armed Police Force and the Royal Nepalese Army were also deployed.

Reports indicated that the conditions in which the demonstrators were being detained were for the most part acceptable, although there were reports of inhuman conditions of detention in No. 2 Police Battalion in Maharajgunj, where detainees were being kept in a silo with a corrugated iron roof and only received rice infected with fungus to eat and dirty water to drink. Access to detainees by their families, lawyers, human rights monitors and doctors was not guaranteed to a number of the detainees.

The ban on demonstrations was lifted in many parts of Kathmandu on January 23. However, Ratna Park remained prohibited and was the scene of continuing demonstrations. Dispersals and arrests continued. On January 24, peaceful demonstrators that attempted to enter the prohibited zone were met with police baton charges, with many pro-democracy activists being physically assaulted and injured. Beatings took place even after the police had secured the area. Dozens of demonstrators were arrested. There were no female police personnel deployed to control and arrest female demonstrators – these arrests were conducted by male police personnel. Journalists were also reportedly injured during the police action. Chandra Bishta, a camera-operator for Channel Nepal Television was seriously injured during these events. Bystanders were also reportedly been attacked and abused. Separately, students from the Amrit Science College had been protesting at their campus. They reportedly clashed with police, throwing stones, and were met with a baton charge and tear-gas. The police reportedly chased the students and beat all of them, including those seeking refuge in classrooms and the student union office. Furthermore, seven political leaders in Banke were arrested between 8:30 and 9 am on January 24 at Bageswori Street, Nepalgunj municipality-3, while participating in door-to-door canvassing for people to reject the upcoming municipal elections.

Large-scale demonstrations took place in Birendranagar, Surkhet, involving around four to five thousand participants on January 25. Demonstrations around the country and in Kathmandu continued on January 26 and were met with increasingly violent repression and mass arrests. For example, members of the security forces opened fire on demonstrators in Pokhara. Here, dozens of demonstrators were arrested and more than a dozen including bystanders, workers, journalists and human rights defenders, were

injured when the police and the army opened fire with live ammunition and conducted baton charges against the assembled demonstrators. The security forces had reportedly been using teargas, bricks and stones against the demonstrators, with bricks and stones having been loaded into their vehicles for such use. Tear gas and baton charges were also being used to repress demonstrations elsewhere around the country.

The offices of human rights organisations were also raided - one in Kanchanpur and the other in Udyapur. Over two hundred political activists were arrested during demonstrations around the country during a nationwide general strike that had been called by the SPA on January 26. A number of human rights defenders and journalists were physically assaulted, threatened and/or arrested by the security forces. The security forces in Kathmandu reportedly ill-treated journalists, seized communication equipment from them, prohibited them from moving and threatened some of them following the publication and broadcasting of news related to the demonstrations. The Federation of Nepalese Journalists condemned these acts.

On February 1, 2006 - the first anniversary of the royal coup – the cycle of violence and repression escalated further. An all-day curfew was imposed in many towns around the country. Over 600 persons were arrested while participating in peaceful demonstrations. Those detained included political leaders, professors, writers, teachers, an ex-minister, lawyers, human rights defenders and journalists. Hundreds of demonstrators were injured and many hospitalised as a result of the repressive actions conducted by the security forces, who conducted violent baton charges and used stones, tear gas and water canons against the demonstrators. They even opened fire with live ammunition in some cases, with at least one person, Uddhav Bahadur Singh, having been shot during a demonstration in Surkhet. This protestor was shot in the left leg and was admitted to Surkhet Hospital for treatment. Some of the arrested demonstrators were released the same day, but many more remained in detention, adding to the large number of persons being held following similar arrests during the previous two weeks.

In particular, over 100 lawyers were arrested while participating in the events to mark the one year anniversary of King Gyanendra's royal coup. The lawyers arrested in Kathmandu were all reportedly released on the same day. However, many of those detained in other districts were detained for lengthier periods, with some of their number having received three-month "preventive" detention orders under the draconian Public Security Act. No reasons were given by the authorities for these arrests, and the arrested persons were not provided with detention orders or been charged with any specific offences.

In contrast to and despite the reality of the crisis been played out in the streets, King Gyanendra made a series of claims in a televised speech on February 1st, 2006. He stated that the municipal elections that were set to take place on February 8, 2006 would still go ahead and that they were going to be free and fair elections. However, several election candidates had already resigned and most others had taken up residence in military camps for protection. The security situation and the planned boycott by the majority of political parties could not be deemed to set the stage for fair elections, however, the King seemed

bent on holding these elections at all costs. It is thought that the King was attempting to dupe the international community into thinking that he was committed to democracy by holding these sham elections, in which pro-monarchist candidates would be elected in a fraudulent manner.

Furthermore, the King reportedly stated in relation to the Maoist insurgents that "terrorist activities have narrowed down to just a few sporadic criminal activities." The AHRC received reports that on the previous day, January 31, 2006, over 20 security personnel had been killed and some 200 were missing following a concerted series of attacks by the Maoists. The King had launched the royal coup one year before under the pretext of being able to more effectively tackle the Maoist insurgency. One year later, however, the insurgents had only gained in strength and political influence, notably after the agreement with the SPA, under which they pledged to back the democratic process and put an end to the conflict in the country. The Maoist insurgents also held a unilateral ceasefire in late 2005 and offered to have their forces placed under international supervision. If the King had been interested, in reality, in solving the conflict with the insurgents, he should have reciprocated this cease-fire and entered into talks. Instead, the cease-fire was allowed to run out and when the Maoist attacks resumed, the King used this as a pretext to crack down on the pro-democracy movement.

During the course of the year since February 1, 2005, State institutions, such as the judiciary, the National Human Rights Commission and others, were infiltrated by pro-royalist, unqualified persons in order to undermine the functioning and independence of these bodies, greatly weakening them. Furthermore, the King also appointed pro-royalist regional and zonal administrators, sidelining those persons best suited and qualified for the jobs, further exacerbating the collapse of the rule of law and institutions throughout the country.

Throughout the year, the human rights of the people of Nepal were wantonly sacrificed. Torture remained systematic, forced disappearances remained at extremely high levels, mass arbitrary arrests continued in response to legitimate peaceful demonstrations, political leaders and human rights defenders were targeted. The King became increasingly isolated at both the national and international levels and was directly responsible for the many acts that constitute crimes against humanity being perpetrated in the country. By completely disregarding the reality of the situation the King was digging himself into a deeper hole.

At the time, the AHRC deemed that for this disastrous crisis to be brought to an end, free, fair multi-party all-inclusive elections needed to be held, in order to restore the legislature and democracy in the country. Democratic civilian oversight of the military needed to be put in place. The perpetrators of human rights violations needed to be brought to justice. This required the acts of torture and forced disappearance to be criminalized under the law. The multitude of recommendations made by various international bodies, notably the United Nations, needed to be implemented. One example of immediate action that the AHRC believed could and should be taken was the setting up of a register of all persons being detained in Nepal, with the database being made accessible to the public. The lack



of such records was a causal factor in permitting the levels of torture and forced disappearance witnessed in the country. These issues still need to be dealt with to date.

Against a background of continuing unrest in the build-up to the February 8 municipal elections, one case attracted particular attention. On 4 February 2006, at approximately 12.45pm, police personnel fired on Amrit Aryal, the Nepali Congress Party President of Morang District. Mr. Aryal and Congress Party Activist Kamachya Parajuli were returning home after participating in a peaceful demonstration organised by a group of women leaders and cadres of the seven political parties. On nearing the Sanischare Maisthan, a police officer on a motorcycle fired live ammunition at Mr. Aryal. Mr. Aryal, however, was not hit and continued home. Mr. Aryal was then followed by a police van, and a group of police personnel ordered Mr. Aryal to wait where he was. Members of the police then attempted to apprehend him, but he escaped on his motorbike. Upon nearing Sanischare Maisthat another van appeared and police personnel travelling in the van opened fire at Mr. Aryal, who avoided being hit by entering a narrow avenue down which the van was unable to follow. The premeditated attempted assassination of a member of the political opposition in broad daylight was a serious concern.

On February 7, Home Minister Kamal Thapa issued a press statement informing the public that the security forces had been granted the power to shoot on sight any person who disrupted the elections. The violence and repression again peaked on 8 February 2006, the day of the municipal elections. The security forces opened fire on a group of peaceful demonstrators in Dang. As a result, UML activist, Umesh Thapa, was killed and Krishna Giri was seriously injured. The security forces then arrested more than 300 of the demonstrators. It is also known that security forces fired indiscriminately on other demonstrators who had gathered in other cities around the country.

The arbitrary arrest and detention of demonstrators commenced from early in the morning, including political party activists, journalists and human rights defenders. In Rajbiraj, 28 people that had been arrested in relation to demonstrations held on previous days were released following a decision by the local Appellate Court. However, upon their release, four persons were immediately re-arrested by security forces before they had even left the grounds of the court. The remaining 24 people fled for shelter in the nearby Bar Association's building. The security forces surrounded the building for the entire day, making it impossible for those inside to escape. At 9 pm the security forces warned them that if they did not come out, they would be shot dead. Knowing full well that the security forces would not hesitate in undertaking such action, the persons inside surrendered and were immediately re-arrested.

Concerning the elections themselves, turnout was very low, notably because of the insecurity that reigned and the fact that the seven major political parties of Nepal had boycotted the elections. At each voting station, there was a heavy security forces presence. In some locations a mere 2% of those eligible to vote did so. At best, no more than 30% of people cast their vote at their local polling stations. The government had issued an order making it compulsory for all civil servants and army and police personnel to vote. In several locations, persons were able to vote more than once, as no photo ID

was required. Of the 58 municipalities in 43 districts, the elections were conducted in just 36 municipalities in 28 districts. Out of 4,146 posts available, contested elections were held concerning just 618 posts. 1,682 candidates from small parties and independents contested for the posts of mayor, deputy mayor, ward chairmen, ward members and women members. Candidates were elected unopposed to 1,277 posts. A total of 2,251 posts – around 54% - remained vacant at the end of the election, as no candidates had registered their names in these municipalities. It is clear that these elections cannot be considered as being credible.

### **Other human rights issues**

While much attention was being paid to the uprisings that took place from mid-January to early February, the situation of human rights in Nepal continued to be as it had been for several years – deplorable. The AHRC continued to receive information concerning cases of torture, forced disappearance, extra-judicial killing and the failure of the judicial system and institutions of the rule of law throughout early 2006. The AHRC's partners in Nepal have documented around 800 cases of torture between March 2005 and April 2006 alone. Some examples that illustrate this situation follow:

#### **Case 1**

The first case is that of Mr. Nar Bahadur Bista, who was arrested on 1 March, 2006, and subsequently arbitrarily detained and tortured by police personnel from Mahendranagar District Police Office (DPO). Mr. Bista, a 22-year-old male, and permanent resident of Kanchanpur District Mahendranagar Municipality-13, Badaipur was arrested by police personnel from Mahendranagar DPO on March 1 on the charge of murder. However, the police only handed him a detention letter on March 12. He was first remanded by the District Court for three days on March 12, and on March 15 his remand was extended for a further seven days. During his detention Mr. Bista was tortured by personnel from the Mahendranagar DPO to the point that he had difficulty breathing. Two police officers reportedly held him while Police Inspector Deepak Regmi tortured him. Inspector Regmi reportedly told the victim that he would "take 30 years off his life" by beating him and forced him to confess to the crime of murder. Mr. Bista claims to be innocent and was forced to confess due to the torture. As a result, on March 14, Mr. Bista was admitted to the Mahakali Zonal Hospital to receive treatment for the injuries he had sustained. On March 15, he was produced before the court directly from the hospital when he was made to attend. At this point he spoke to a lawyer and claimed to have been beaten on the chest, knees and legs with a stick for two nights.

In a further worrying turn of events, the lawyer that was representing Mr. Bista and had filed an application to the District Court on his behalf, then faced reprisals from the police. Following the filing of the case, it was reported that 10 policemen went in search of the lawyer. The case of Mr. Bista is one example of many, and clearly shows how the use of arbitrary detention and torture to produce forced confessions are used in order to supplant acceptable means of investigation in Nepal. Further to this, the fact that the

lawyer representing the victim was immediately targeted illustrates the conditions under which human rights defenders were working under the King's regime. Furthermore, the impunity with which such acts are committed is also a regrettable hallmark of the way in which human rights abuses have been perpetrated in Nepal. To date, the victim has received no reparation for the torture which has had a damaging effect on his health, leading to his hospitalization and no action has been taken against the perpetrators.

## **Case 2**

Another example of the intensified harassment and attacks to which human rights defenders were being subjected in the early part of 2006 is the case of Kali Bahadur Malla, the Kalikot District Representative of local human rights organization INSEC, and Rabindra Shai, who is the Kalikot District NGO Federation President and a *Dristi Weekly* journalist. At around 6:30 pm on February 13, 2006 an army patrol from Ranadal Gulma in Manma Bazaar approached the two human rights defenders, asking them to identify themselves. Malla and Shai gave details of their roles as an INSEC representative and a journalist respectively, at which point the army personnel began beating them. The army personnel attacked the two victims with the butts of their guns and their boots. Shai was kicked and knocked to the ground, while Malla was hit on the head with the butt of a gun and knocked unconscious for four minutes. Shai sustained minor injuries, but Malla was wounded more seriously during the attack and was taken to the local medical hall for primary treatment, where he received two stitches to the head and one to his chest. This blatant and arbitrary attack is only one of many such incidents involving human rights defenders during the period in question. Perpetrators of such acts enjoyed complete impunity for their actions, which perpetuated a state of significant insecurity and hindered human rights defenders' work.

## **Case 3**

A case which highlights the ingrained culture of impunity, the use of torture and the failings of the judicial system in Nepal, is that of Mr. Hom Bahadur Bagale, a Sub-inspector working as a technical officer at the Central Police Band Gulma (Battalion), in Maharajganj, Kathmandu, which began in late 2002. On November 23, 2002, Mr. Bagale, refused to run a personal errand (collecting some gold from the airport) for his superior Deputy Superintendent of Police (DSP) Khadka Singh Gurung, stating that it was not part of his duties to carry out such tasks. On November 28, 2002 he was sent to Kathmandu District Police Office (KDPO). When he entered Inspector Pokharel's office, the latter reportedly closed the door and assaulted him with a bamboo stick for an hour without saying a word. At that time, Mr. Bagale was wearing his police uniform. After the attack, Inspector Pokharel demanded that Mr. Bagale confess to where he had hidden DSP Gurung's gold. Mr. Bagale was then detained without an arrest warrant.

On November 29, Mr. Bagale, who had been forced to change into civilian clothes, was handcuffed and taken to the office of Superintendent of Police (SP) Kuber Singh Rana, of the KDPO. SP Rana and Inspector Pokharel then reportedly severely beat Mr. Bagale with sticks, before ordering him to roll a heavy cement log onto both of his thighs. Mr.

Bagale fainted numerous times while being tortured. At around 1:00 am, they took the victim to the investigation room, where he was blindfolded and tortured again by another police officer, allegedly Inspector Ganga Panta, for about 15 minutes. At 1:30 am, the police, led by Inspector Panta, forced Mr. Bagale to show them where he lived. They then searched his house and surrounding land but they could not find the gold. Police officers also reportedly threatened members of Mr. Bagale's family with torture if they spoke to anyone about the situation. Mr. Bagale was then taken back to the police station, where he was detained without food or water until November 30, 2002.

On December 2, 2002, the police took Mr. Bagale to the Investigation Branch of the KDPO and ordered him to sign a document which he was not given a chance to read. When he refused to sign it, the police laid him down on the floor and started beating him on the soles of his feet. Beatings continued on December 3 and 4, 2002. On December 5, 2002, the police attempted to transfer Mr. Bagale to the Legal Section of the Police Head Quarters and the Quarter Guard, Armed Police Battalion No. 1, in Naksal, but both of these establishments refused to keep Mr. Bagale in their custody. As a result, the police then brought the victim to his own office in Maharajganj and ordered him not to go outside the station. Meanwhile, a *habeas corpus* petition was filed in the Appellate Court by Mr. Bagale's wife on December 3. On December 4, the court ordered the police to present the victim within 24 hours to the court. However, DSP Gurung stated to the court that the victim was not detained because he had not committed any crime and was currently working in the office. Similarly, SP Rana of the KDPO also told the court that no complaint had been filed against Mr. Bagale by his superiors and that he was therefore not being detained by them.

After being released from custody, Mr. Bagale filed a case for compensation at the Kathmandu District Court on December 31, 2002 (Registered case number: 455). The District Court ruled on July 13, 2004 in favour of the perpetrator. Mr. Bagale registered an appeal against the decision before the Patan Appellate Court on December 6, 2004. Mr. Bagale had also lodged an injunction before the Patan Appellate Court on February 24, 2003 demanding directive, prohibition orders against the perpetrators, but the decision went against him. The court stated that it remained a matter of investigation to be conducted within the police organisation, whether a junior member of the police was obliged to follow his senior's command, if it was for personal purposes. Mr. Bagale subsequently appealed to the Supreme Court to challenge the appellate court's decision. The appeal was lodged on August 2, 2004. The trial date was set for March 5, 2006.

Mr. Bagale has reportedly received countless death threats due to his legal action and has been pressured by his superiors to resign from his post as a police officer. In February 2006, six unidentified men in civilian clothes reportedly went to his house looking for him. His superiors have also threatened him in order to have him withdraw the cases filed at the Patan Appellate Court and the Supreme Court of Nepal. Furthermore, they have threatened to terminate his job as a police officer. Their threats have been reinforced by a letter sent to Mr. Bagale from the legal department of the police station, asking him to either withdraw his two cases or to resign.

As a result of the threats, Mr. Bagale submitted his resignation on March 13, 2006, but the police administration refused to accept it. He believed that the administration was seeking a way to terminate his employment in such a way as to prevent him from receiving his pension. Mr. Bagale has served for 22 years as a police officer and is thus eligible to receive a police pension.

The judicial process has been prolonged for over three years without making any headway. The courts have not conducted any effective enquiry into the incidents in question and Mr. Bagale continues to live under the threat of losing his job, pension and even his life, without protection. Furthermore, when Mr. Bagale tried to lodge a complaint with the Inspector General of Police (IGP) in December 2005 against the alleged perpetrators, his complaint was refused by the secretariat of the IGP. Instead of conducting any investigation, the police administration, including the IGP, have taken action against Mr. Bagale and pressured him to withdraw his cases.

This case shows the extent to which torture was being carried out in Nepal in total impunity, with a lack of investigations, intimidation and a failing judicial system making it practically impossible to gain reparation for even the most serious abuses, even in the case where the victim is a member of the police. Persons from more vulnerable sectors of society have even less chance of being protected from abuses or gaining redress following such treatment.

The AHRC has documented numerous cases of torture during the early part of 2006 and these only represent a fraction of those thought to be being perpetrated in the country. They include the following cases:

### **Torture by members of the Army**

- 14 year-old Aashis Gurung, a permanent resident of Mahendranagar Metropolitan City -5 was arrested on January 26, 2006 and tortured.
- 20 year-old woman Sarmila B.K, arrested and tortured in Pokhara on January 30, 2006.
- 28 year-old Ashok Ghimire, arrested on 31 January 2006 in Ekudol, Lalitpur and tortured.
- 22 year-old Krishna Pd. Tharu, arrested on February 3, 2006 in Bardiya, detained illegally by the Army for 12 days and tortured.
- 17 year-old Pradeep Gharti Magar, arrested at Kohalpur Security Check Post, Banke on February 10, 2006 and tortured.
- 23 year-old Tej Bahadur Pariyar, his wife, 22 year old Basmati Pariyar, and their 14 month-old daughter were arrested February 17, 2006. Both adults were tortured.
- 55 year-old Dashrath Parajuli, arrested on February 24, 2006 in Kohalpur VDC-5 and tortured.

- 26 year-old Nar Bahadur Buda Magar, arrested on February 28, 2006 in Hansapur, Dharapani and tortured.
- 20 year-old Ram Bahadur Tamang alias Lal Bahadur, shot and then arrested and tortured on March 5, 2006 in Lekhanath Municipality- 7 Jayamire.
- 20 year-old Lok Raj Achrya, arrested on March 9, 2006 in Prithivi Narayan Campus, and subjected to death threats and torture.
- 42 year-old Bishow Nath Pulami Magar, arrested on March 20, 2006 in Darbarmarg and tortured.
- 23 year old Amrit Sharki, arrested from Kohalpur Medical College Banke district, where her was receiving medical treatment, on March 20, 2006 and tortured.
- 20 year-old Laxman Thapa, arrested at the Check Post of Joint Security Base Camp, Kushum, Banke district on March 28, 2006 and tortured.
- 20 year-old Ram Kaji Shrestha, arrested on April 18, 2006 in Banastahli, Kathmandu and tortured.
- 26 year-old Bhairab Bahadur Bhandari, arrested on April 18, 2006 in Banastahli, Kathmandu and tortured.
- 30 year-old Ganesh Aer, arrested on April 21, 2006 in Kanchanpur and tortured.

#### **Custodial torture by members of the Police**

- 24 year-old Bishnu Lal Joshi, arrested on January 17, 2006 in Titihiriya village, Banke district and tortured.
- Nima Guru arrested in Prithvichowk on January 26, 2006 and tortured.
- Komal Thapa Magar, arrested on 30 January 2006 in Babarmahal, Kathmandu and tortured.
- Jog Bahadur Gurung (studying in class 12 at St. Lowrence College), arrested on 31 January 2006 and tortured (including beatings, burning of hands, piercing of finger-nails).
- Ramesh Magar, arrested on February 18, 2006 in Gaushala and tortured.
- 36 year-old Prem Bhandari, arrested on February 23, 2006 in Ganeshtan Kathmandu and tortured.

In cases of torture by the Army or the Police, when the individual victims were presented before courts following their arrest – normally several days later – the judges in most cases did not ask whether the person had been subjected to torture or ill-treatment during detention and thus failed to take this into consideration or provide protection to these individuals.

#### **Torture by Maoists**

- 46 year-old Sarki Ram Danuar, abducted by two armed Maoists in Bhandabari Chock, Triuga Municipality and tortured.

- 42 year-old Binod Khatiwoda, abducted by Maoists in Dharampur VDC-5, Saptari district on March 17, 2006 and subjected to torture and a failed assassination attempt.
- 50 year-old Purna Bahadur Thapa, abducted by six Maoists in Chhiudipuchhakot VDC-8, Dailekh district on April 13, 2006 and tortured resulting in the need to amputate his right leg.

Concerning cases of torture by Maoists, it must be noted that information concerning such cases were particularly difficult to document during the first part of 2006, due to the high risks faced by human rights defenders in doing so. The number of actual cases is thought to be much higher than those cited above.

### **The April Uprisings – The People's Movement Part 2**

While the uprisings that had occurred in January and February 2006 showed rising popular dissent against the situation prevailing in the country and the King's autocratic rule, they cannot be said to have had a tangible impact on the King's power or the activities of the Army, or brought about significant change in the country. However, those that were to follow in April were to bring about a sea-change in the political make-up of the country, causing the King to abandon his autocratic rule and reinstate parliament. This, in turn, paved the way for a series of developments in the second half of the year, aimed at bringing about democracy, as well as a formal end to the conflict that had been raging in the country for over a decade.

The difference between the two uprisings and their impact can perhaps be explained for several reasons: in the January/February uprisings, the protests were organized specifically to protest against two events – the first anniversary of the royal coup on February 1, 2006, and the municipal elections on February 8, 2006. In this sense, they were limited in their scope, notably in terms of duration. Furthermore, this was the first time that the Maoists and the SPA political alliance, along with both sides' supporters, were acting in concert following the agreement reached between the two sides in November 2005. In the April uprisings, the protests were initially planned to be limited in duration – a pro-democracy, anti-monarchy demonstration and four-day general strike - but a groundswell of support that resulted both from widespread fatigue with the situation in the country and from the much publicized repression of the ongoing demonstrations, changed a limited operation into an irresistible movement. In addition, the understanding between the SPA and the Maoists was starting to bear fruit, with the SPA leading the demonstrations with support in various forms coming from the Maoists, including ensuring the freedom of movement of persons outside Kathmandu that wished to travel to the capital in order to take part in the demonstrations.

On April 3, 2006, the Maoist leadership announced that the insurgents would observe a unilateral cease-fire within the Kathmandu valley with effect from that evening, until further notice. This was significant in that it allowed persons to travel in relative safety to the capital to participate in the planned demonstrations.

In the lead-up to the proposed peaceful anti-monarchy demonstration on April 6, that was called by the seven political parties, and which was to begin a four-day general strike, the police began a crackdown by conducting mass arrests beginning on April 5, 2006. On that day, they arrested approximately one hundred people for planning to defy a ban on public rallies in the capital, Kathmandu. These included political figures, lawyers, journalists, teachers, doctors and political activists, with many having been detained following police raids on their homes.<sup>78</sup> (Please see the documents referred to in the footnotes for greater details concerning these events as they unfolded). The first casualty of this uprising also occurred on this day, when Mr. Darshan Yadav was killed by the security forces.<sup>79</sup>

On April 6, 2006, over 400 pro-democracy protesters and journalists were arrested in Kathmandu, while dozens of others were injured on the first day of the four-day nationwide general strike. Along with the arrests, curfews were also imposed in Kathmandu and Lalitpur during the night. People were barred from entering the Kathmandu area and the government restricted all gatherings or assemblies in Kathmandu city.

On April 7, 2006, protests continued on the second day of the four-day nationwide strike against King Gyanendra. As of this day, there was a de facto state of emergency in Nepal. Thousands of people had taken to the streets. Parts of the country had been declared 'restricted areas'. However, thousands of demonstrators defied the declaration and flocked to the streets to voice their anger and opposition to the current situation in the country. The difference between these protests and those conducted earlier in the year was that these were totally ignoring curfews and restrictions and were gaining support from all manner of sector of society in Nepal. Even doctors and nurses had joined the protests, after one of their colleagues, Dr. Kedar Narshingh, was taken into custody and assaulted while on his way to hospital on April 6. Others professional groups that joined the demonstrations included bank and telecommunication employees.<sup>80</sup>

On April 8, against the background of continuing protests, the Government imposed a further curfew in the Kathmandu Valley from 10 am to 9 pm effective immediately until further notice. The local administrations in the Surkhet, Butwal and Chitwan districts issued fresh curfew orders for their respective districts, while the administration in Nepalgunj extended its existing curfew order by four hours.

On April 9, three persons were killed and over 26 protesters injured when security forces opened fire at demonstrators in different parts of the country. The SPA announced further demonstrations for April 10 and the following days, extending the initial protest plans.<sup>81</sup> Alongside this, the Maoists announced a nationwide campaign, including defying curfew orders, capturing highways and breaking royal statues. The authorities announced a 12-hour curfew in the city of Pokhara.

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<sup>78</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1639/>

<sup>79</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1648/>

<sup>80</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/475/>

<sup>81</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1654/>



On April 10, some 70 demonstrators were injured when the security forces fired rubber bullets on the demonstration in Dhangadhi, the district headquarters of Kailali. Daytime curfews were imposed in Bharatpur in Chitwan district, Pokhara in Kaski district, Butwal in Rupandehi district and Banepa in Kavre district.

In a statement on April 11, 2006, the United Nations Office of the High Commissioner for Human Rights in Nepal qualified the authorities' actions as being an "excessive use of force."

On April 12, as the cycle of demonstrations and repression continued to increase, a protester was killed and 36 others injured when police opened fire in Parasi Bazaar, Maheshpur Chowk and Bhrikuti Chowk in Nawalparasi district. Police repression and excessive use of force also led to the injuring of 30 persons in Syangja, at least 50 persons, including two children, in Dipayal, some ten persons in Sarlahi, more than 30 persons in Gaighat, and at least 28 demonstrators in Chandragadhi.

On April 13, King Gyanendra, in a message to the nation on the occasion of Nepalese New Year's Day, called upon all political parties to enter into a dialogue concerning re-launching a multiparty democracy. Alongside this, however, clashes in the capital led to more than 50 people being seriously injured. Doctors claimed that live rounds were used on demonstrators. The police also reportedly opened fire on protesters in Pokhara, resulting in many injuries, including to two female bystanders. 29 journalists were also arrested in Bhirkutimandap and were detained in Singha Darbar Ward Police Station, with the following individuals being injured during this process: Damodar Dawadi, Surya Prasad Neupane, Amar Nath Dhakal, Deepak Acharya, Punya Bhandari. The journalists reported that they were kicked and punched while in detention.<sup>82</sup>

On April 14, the leaders of the SPA rejected the King's offer for dialogue with political parties. On April 16, the SPA decided to no longer pay taxes to the government and called on the people of Nepal to boycott any products and services of businesses and industries belonging to the royal family.

On April 17, one person was killed and several others were injured when the security forces opened fire at demonstrators in Nijgadh, Bara district. In Kathmandu, police action in the Chabahil-Chuchepati area left 62 persons injured. In Kalaiya, 24 persons were injured. In Birgunj, over a dozen persons were injured. In Itahari, the security forces opened fire on demonstrators, injuring 24. In Nepalgunj, 20 demonstrators were also injured.

On April 18, another protestor was killed and over 70 were injured during a police baton-charge in Nepalgunj. In Pokhara, at least 36 demonstrators were injured when security forces opened fire at a rally in Savagriha Chowk.

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<sup>82</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1659/>

On April 19, in a further escalation of the violence being perpetrated by the authorities, four protestors were killed and over a hundred injured when the security forces opened fire on protestors at Chandragadhi in the Jhapa district. The demonstrations were now entering their third week and were of an ever-increasing size and scope. Thousands of people had been arrested and the number of persons killed was rising dramatically. Many demonstrators and bystanders were being targeted indiscriminately and with excessive, disproportionate force by the security forces, including the firing of rubber bullets, the use of baton charges and live ammunition being fired into crowds. Torture of detainees had also been reported, notably in Morang prison, and access to detainees by lawyers and doctors was being denied in numerous detention facilities. Inadequate and overcrowded facilities were also of serious concern, as were the restrictions being placed on the media, including attacks upon journalists trying to cover these events.

The indefinite strike and widespread determined protests included the "usual suspects": political opposition groups, members of civil society and students. However, in addition, a range of groups and individuals, including Supreme Court staff, lawyers, doctors, engineers, disabled persons groups, tourism workers, journalists, teachers, civil servants, and others not usually known to participate in such actions, were now also engaged in the demonstrations and were also being met with indiscriminate and disproportionate force on several occasions. The arguments claiming that opposition to the authorities was only coming from marginal groups were being exposed as baseless. The prolonged crisis was by now leading to a shortage of vital supplies, most notably food, in much of the country. In an interview with the BBC, the UN High Commissioner on Human Rights, Louise Arbour, intimated that Nepal may be referred to the UN Security Council. The King and his government were becoming totally isolated from the international community, as numerous States, including the US, UN, EU, Japan, Switzerland and even Nepal's traditional supporters India and China were becoming more vocal in denouncing the authorities' actions and were calling for reconciliation between the King and the political parties. Ms. Arbour expressed "shock" at the use of excessive force in Nepal. The US State Department stated that the King's direct rule had "failed in every regard".

On April 20, three persons were killed and over 50 injured when the security forces opened fire on a demonstration in the Kalanki area of Kathmandu. Over 36 protestors were injured in Patan when they clashed with riot police. Close to seven thousand people reportedly defied curfew orders in the Bansbari area and reached the Ring Road where the police fired teargas to disperse them. Separately, Indian Prime Minister Manmohan Singh's Special Envoy, Karan Singh, met with King Gyanendra at the Narayanhiti Royal Palace in Kathmandu concerning a resolution to the grave and escalating crisis in the country. The size of the demonstrations in the capital and around the country continued to grow, as media coverage of the repression led to an ever-growing support-base for the generally peaceful demonstrations. Despite the violent repression, the movement was gaining unprecedented momentum.

On April 21, in a televised address, King Gyanendra announced that he would hand the political power he had assumed 14 months before back to the people and asked the Seven-Party Alliance (SPA) to name a new Prime Minister. The SPA rejected the offer as

being inadequate, while the Maoists stated that they would not accept anything less than the establishment of a Constituent Assembly. Central to the demands of the demonstrators was the creation of a constituent assembly that would re-write the constitution of Nepal through a democratic process and enable the abolition of the monarchy through popular consent.<sup>83</sup>

On April 22, over 200 demonstrators were wounded when the security forces opened fire on them at different locations in Kathmandu. In Pokhara, nearly one hundred thousand people joined in SPA-led demonstrations, while other massive rallies were organised in other western district headquarters including Baglung Bazaar, Beni, Kusma, Damauli and Gorkha.

On April 23, the SPA announced another wave of nationwide protests, aiming to bring two million people to demonstrate in Kathmandu on April 25.

On April 24, in a televised address to the nation, King Gyanendra announced that he was effectively stepping aside and restoring the House of Representatives that had been dissolved on October 4, 2002. Welcoming this proclamation, Nepali Congress General Secretary Ram Chandra Poudel stated that the seven parties would now move ahead "upholding the spirit of the demonstrators and the SPA's roadmap based on the 12-point understanding with Maoists". The SPA then withdrew its nationwide indefinite general strike. However, the Maoists initially rejected the proclamation, although they later accepted to join talks with the new government.

The April uprisings, which included hundreds of thousands of demonstrators over 19 days, have been called the "Janaandolan Bhag 2," which in Nepali means the "People's Movement Part 2." They were a truly significant historical event. For an absolute monarch to be swept from power through the concerted efforts of a popular, peaceful pro-democracy movement is a rare event in Asia. As shall be described later in this report, within six months, the monarchy was to be stripped of its assets and its constitutional powers. The movement was known as "Part 2," as it was seen as being a continuation of the popular movement that occurred in 1989, following which then-King Birendra declared a multi-party political system in Nepal. Progress to full democracy had, however, not been attained during this first attempt and the decade-long conflict between the Maoists and the authorities prevented further positive developments in this regard. It is hoped that full democracy – or Lok Tantra as it is known in Nepali - will be reached as a result of the latest movement.

This movement came at a cost, however, with 20 persons having died, hundreds having been injured as the result of beatings, shootings or torture and thousands having been arrested. Those killed have been identified as follow:

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<sup>83</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/493/>

1. **Dasharnlal Yadav**, 50, a permanent resident of Malekpur VDC, Saptari district, who died during the course of treatment at Sagarmatha Zonal Hospital, Rajbiraj on April 5, 2006.
2. **Debilal Poudel**, 25, a permanent resident of Bichari Chautara VDC-9, Syanja district, who was shot dead on April 7, 2006 while he was attending a demonstration by eight student unions at Butwal, Rupendehi district. He was president of Nepal Pragatishil Student Union.
3. **Bhimsen Dahal**, 34, a permanent resident at Ugrachandi Nala VDC, Kavrepalanchowk district, who was shot dead by Nepal Army personnel at Pokhara on April 8, 2006. He ran a cyber-café in Pokhara.
4. **Tulsi Kshetri**, a married woman and permanent resident of Bharatpur of Chitwan district, who was shot dead on April 9, 2006 by security personnel while she was sitting on the roof of her home, watching the demonstrations.
5. **Shiba Hari Kunwar**, 22, a permanent resident of Walting VDC-7, Banepa district, who was shot dead on April 9, 2006 by the security forces during a demonstration in Kavrepalanchowk district.
6. **Bishnu Pande**, 32, a permanent resident of Swathi VDC-5, Nawalparasi district, who was shot dead on April 12, 2006 in Nawalparasi district by Nepal Army personnel while he was demonstrating. He was an active member of the CPN-UML party.
7. **Hiralal Gautam**, 25, a resident of Nijghad VDC-2, Bara district, who was shot dead on April 17, 2006 by the security forces of Nijgadh, Bara. He was an active member of CPN-UML.
8. **Mohammad Tahir Ansari**, 72, a permanent resident of Mathiya-1, Rautahat district, who succumbed to his injuries on April 22, 2006, having been injured several days before by a tear gas shell in a demonstration in Ratnapark, Kathmandu.
9. **Setu B.K.**, 55, a permanent resident Bageshwori VDC, Banke district, who died on April 18, 2006 as the result of injuries sustained from a tear gas shell during a demonstration in Nepalganj, Banke district.
10. **Rajan Giri**, a 12<sup>th</sup> grade student and permanent resident of Arjundhara VDC-6, Jhapa district, who was shot dead on April 19, 2006 in Chandragadhi, Jhapa district by Nepal Army personnel. He was a member of the student wing of the Nepali Congress party.
11. **Suraj Bishwas**, 26, a permanent resident of Bhadrapur VDC-9, Jhapa district, who was shot dead on April 19, 2006 in Chandragadhi, Jhapa district, during a demonstration. He was a supporter of the Nepali Congress party.
12. **Deepak Kami**, 21, a permanent resident of Necha VDC, Solukhumbu district, who was shot dead on April 20, 2006 in Kalanki, Kathmandu district by the armed police forces. He was a member of the Janamorcha Nepal party.
13. **Basudev Ghimire**, a permanent resident of Amabhanjyan VDC-3, Makwanpur district, who was shot dead on April 20, 2006 by the security forces during a demonstration in Kalanki, Kathmandu. He was a member of the Nepali Congress party.

14. **Sagun Tamrakar**, 18, permanent resident of Panauti Municipality-7, Kavre district, who was shot dead on April 20, 2006 at Kalanki, Kathmandu during the demonstration.
15. **Yamlal Lamichhane**, 55, a resident of Gulariya Municipality, Bardia district, who died during the course of treatment for injuries sustained in a demonstration in Lakhanau, India on April 21, 2006.
16. **Gobinda Natha Sharma**, 53, a resident of Kushma, Parbat district, who died on April 25, 2006, after being injured by bullets on April 21. He was injured while watching a demonstration from the roof of his house.
17. **Pradhumna Khadka**, 32, a resident of Suchatar VDC-4, Kathmandu district, who died on May 7, 2006, as the result of bullet injuries sustained in Kalanki, Kathmandu on April 22, 2006. He was an active member of the Nepali Congress party.
18. **Mohammad Jahagir**, an Indian citizen, who died on April 22, 2006 during the course of treatment. He was shot and injured in Tripureshwor, Kathmandu.
19. **Anil Kumar Lama**, a resident of Vidur Municipality-7, Nuwakot district, who died on May 6, 2006 having been injured by a tear gas shell in Tripushor, Kathmandu. He was an active member of CPN-UML.
20. **Chandra Bayalkoti [Sarki]**, a permanent resident of Bidur Municipality-7, Nuwakot district, who died on May 6, 2006 after being injured by a tear gas shell on April 22, 2006 in Bhotahiti, Kathmandu. He was an active member of CPN-UML.

### **April 25 onwards – the beginning of a new era?**

The period that began following the King's having relinquished absolute power and reinstated parliament was greeted as being a new dawn for Nepal, and raised hopes that the antagonist elements within the country would be able to resolve the internal conflict that had led to the death of an estimated 13,000 people and many more thousands being subjected to gross human rights violations. The situation of human rights, including the issues of ongoing violations by State-agents and Maoists, as well as the issue of impunity for past abuses, will be detailed. Here, we shall see in this section of the report how the various political developments have brought the country closer to the creation of a lasting peace, as well as the challenges that remain ahead. It is worth noting that the AHRC has continued to document a significant number of human rights violations by both State-agents and the Maoist insurgent forces, throughout the period from April 24 to the date of this report's publication.

Following the successful conclusion of the popular pro-democracy uprisings on April 24, King Gyanendra appointed Nepali Congress president Girija Prasad Koirala as the new Prime Minister on April 27, and the reinstated House of Representatives (HoR) held its first meeting on April 28. The new Prime Minister then formed a seven-member Cabinet. While representing a significant landmark in itself, the reinstatement of parliament can only be seen as a step towards the fulfilment of the key demands of the people's movement. The people's demands centred on the creation of a truly democratic system in

Nepal, through the holding of elections to a Constituent Assembly, which would be all inclusive, and lead to the re-writing of the country's constitution and a decision on the fate of the monarchy. An end to the conflict and the abuses and injustice in the country was also an underlying theme of the protests.

Proper constitutional arrangements and the development of forms of governance capable of battling Nepal's long standing problems, along with the cessation of hostilities remained the key hurdles at this point. The AHRC released a statement following these events highlighting the need for the following issues to be addressed in a timely manner: the rapid formation of an inclusive interim government; the establishment of effective civilian control over the military; the disarmament and inclusion in the political mainstream of the Maoists; the holding of elections to a Constituent Assembly; the drafting of a new constitution; and the formation of State institutions that would engender the rule of law and enable the bringing to justice of all perpetrators of gross human rights violations, both during the repression of demonstrations in April and throughout the years of violence that preceded these events.

**The rapid formation of an inclusive interim government:** in order for changes to continue with the required momentum, it was suggested that an interim government be formed. The members of this body would be tasked with ensuring that key required developments, notably the elections to the Constituent Assembly, proceed with all speed, abandoning any petty party line considerations or intransigent ideological dogma in favour of progress towards the commonly held aims of the people of Nepal.

**The establishment of effective civilian control over the military:** in order to ensure the continuation of the cease-fire, the strengthening of the democratic political mainstream in the country and the possibility of bringing the Maoists into fruitful negotiations, full control of the military needed to be handed over from the King to the government. Without reforms to the military and further safeguards, security would remain precarious and there were signs that the Maoists may drag out the process of peace negotiations and joining the political mainstream.

**The disarmament and inclusion in the political mainstream of the Maoist insurgents:** of paramount importance for a durable peace, and intrinsically connected with reforms to the military, was the need for the well-monitored disarmament of the Maoist insurgents. The Maoists had previously intimated that they were open to monitoring by the United Nations, and this body seemed best able to effectively monitor the insurgent's disarmament. Without disarmament, any political process and elections would be being conducted under a climate of fear, which is unacceptable. As a prerequisite for their participation within the political mainstream, the Maoists had to disarm. This process should be formalized as a result of the peace process negotiations that were to be held in the near future. Any obstacles to this process created by the Maoists should be seen as efforts to sabotage the demands of the people of Nepal concerning the holding of a Constituent Assembly.

**A future for Nepal based on peace, security of the person and the enjoyment of**

**human rights:** the recent political developments had resulted from the frustrations and suffering of the people of Nepal and their needs for lasting peace and the respect for human rights. The eradication of torture, forced disappearances and extra-judicial executions would be key indicators concerning the success with which all political forces were meeting their demands.

One suggestion to enable the battle against impunity was the setting up of a high-level commission, through legislation, armed with the mandates of investigation and prosecution. The jurisdiction of this commission would be to investigate and prosecute all persons who used excessive force during the repression of the 19-day April uprisings. Following this, the commission should ensure the prosecution of all persons who have violated human rights since King Gyanendra's coup on February 1, 2005. Subsequently it should turn its attention to all perpetrators dating back to October 4, 2002, when King Gyanendra dismissed the democratic parliament, before turning to the beginning of the Maoist armed insurgency over a decade ago. The Commission should also ensure the implementation of findings made by the Malik commission, which has identified perpetrators of abuses during the repression of the first people's democracy movement in 1990. This Commission should be established without delay and follow a clear time line to address these issues. It should be designed to integrate support from the UN Office of the High Commissioner for Human Rights and other human rights bodies in Nepal.<sup>84</sup>

As we shall see, over the coming weeks and months many of these issues were addressed, although the final point concerning the bringing to justice of all perpetrators of grave abuses remained untouched at the time of writing of this report.

The Maoists had announced a unilateral cease-fire for three months with immediate effect on April 26, 2006. In its second meeting on April 30, the HoR unanimously passed a proposal concerning the holding of elections to a Constituent Assembly. On May 3, 2006, the government announced a cease-fire of its own and invited the Maoists for talks. Prime Minister Koirala stated that the Maoists would be included in an interim Government in the future and that they could take part in elections to a Constituent Assembly.

The government also revoked the municipal elections that had been conducted on February 8, 2006 as well as all appointments to the District Development Committees, and cancelled the appointment of regional and zonal administrators by the erstwhile royal government. On May 7, the Cabinet annulled all appointments made by different governments since October 4, 2002. This was a key step in undoing some of the damage done by the King, who placed royalist and for the most part incompetent cronies in positions of power throughout the country. Many of Nepal's State institutions, including the judiciary, police and prosecution, will require significant personnel replacements over time, in order to enable them to represent and deliver upon the requirements of the new realities in the country.

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<sup>84</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/527/>

On May 5, the government formed a five-member judicial committee, headed by former Supreme Court judge Krishna Jung Rayamajhi, which was mandated to investigate the royal regime's violent suppression of the April 2006 mass movement. While this move was welcomed, the AHRC was concerned that investigations into past abuses would be restricted to those committed during the uprising. The issue of impunity, which remains a major challenge to the establishment of a country based on solid foundations of justice, requires that this issue be taken up more thoroughly and include all human rights violations perpetrated by all actors since the beginning of the conflict over one decade ago. The failure to address this issue, and to trade justice for political expediency, will not enable solid foundations and institutions of the rule of law to flourish in the country, opening the possibility of a return to such abuses in the future.

On May 12, the authorities arrested five ex-ministers, including: former Home Minister Kamal Thapa; former Foreign Minister Ramesh Nath Pandey; former State Minister for Information and Communication Shrish SJB Rana, former Local Development Minister Tanka Dhakal and former State Minister for Health Nikshya SJB Rana. The government also suspended three service chiefs, Nepal Police Chief Shyam Bhakta Thapa, Armed Police Force (APF) Chief Shahbir Thapa and the Chief of the National Investigation Department.

On May 18, the HoR adopted a proposal depriving the King of privileges enjoyed by him and declared the reinstated HoR as "supreme." With the adoption of the House of Representative's Proclamation, the Nepalese people achieved another victory towards the establishment of a truly democratic State. Included in the proclamation resolution, which was approved by a unanimous verbal vote in the 205-member house, are several landmark reforms that, if implemented, would significantly alter the country's political landscape, in line with the demands made by the people's movement.

As part of the reforms, the government declared Nepal a secular state and stripped the King of a great number of powers, most notably by transferring the authority over the military from the palace to the civilian government. His Majesty's Government is now called the Government of Nepal; the Royal Nepal Army is now called the Nepalese Army. The AHRC at this point in particular welcomed the transferral of control over the military, as it has been a significant actor in many of the numerous and widespread violations of human rights over recent years. The perpetrators of these violations, however, continue to enjoy impunity to date

The proclamation effectively transformed the once all-powerful King into a figurehead: as a result the HoR has the right to make, amend and nullify laws regarding the succession to throne; the activities of the monarchy will be questionable either in the HoR or in courts, removing the King's legal immunity; and, the monarchy's private property and income will be taxed as per the law. Such fundamental changes would have been difficult to imagine as little as two months prior to this proclamation.

Included in the proclamation are the following key elements: the task of the formulation of laws and the establishment by the HoR of "the procedures for moving on the path of



Constituent Assembly"; the inconsistent legal arrangements of the Constitution of the Kingdom of Nepal-1990 and other prevailing laws will be nullified to the extent of inconsistency, with a committee formed within the HoR to ensure this; all of the executive rights of Nepal as a State shall rest on the Council of Ministers; the Council of Ministers shall be responsible to the HoR; the administration, army, police and all the executive organs shall be under the purview of the government, which is responsible to the HoR.

One element that was missing from the proclamation was the issue of judicial reform. The AHRC highlighted the importance of dealing with the issues of justice throughout all processes, including the Constituent Assembly, in a statement at the time, of which the key points are reproduced here:

Strong institutions of justice are needed in the country as an integral part of the country's governance, with its citizens able on all occasions to rely on the courts for the protection of their rights, even in cases against the authorities. The future development of the constitution and other laws must transform the judicial branch and the other arms of justice, such as the policing and prosecution systems. That there has been much to be desired in the Nepalese judicial system is beyond doubt. Now that the pressures from an authoritarian monarchy limiting the independence of the judiciary have been eased, Nepal is in a position to address some of these problems. To do so, it is not enough to state that the judiciary is independent. The future constitution should provide for more detailed safeguards and procedures to ensure this independence. Among these, procedures should be established for the citizens to have speedier resort to justice. Delayed justice can subvert all the achievements produced by the recent historic political developments.

In the area of the protection and promotion of human rights, legal procedures need to be created for individuals to enjoy facilitated access to the highest courts of the country to complain and to obtain redress concerning human rights issues. It should be possible to make direct petitions to the courts in the event of illegal arrest, detention, torture and every other serious violation of rights. To prevent the possibility of disappearances in the future, legal access should be made available without obstacle or condition in cases of habeas corpus. The speedy disposal of such cases should also be ensured. The government should immediately take all necessary measures to ensure that a complete and publicly available register of detainees is established that includes all persons being detained in the country. Furthermore, an independent witness protection programme is essential for the functioning of the legal process, most notably concerning cases of human rights abuse.

The government should also make a clear pledge to take all necessary measures to implement all relevant recommendations made by international bodies, notably the various United Nations human rights special procedures and treaty monitoring bodies. As Nepal is a signatory to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), there must be constitutional provisions enabling the implementation of the judgments of the Human Rights Committee through the Nepalese courts.

The protection of individual freedoms in the future will very much depend on the creation of a modern policing system in the country. Much of the complications about human rights in countries in South Asia, including Nepal, have arisen from the fact that modernised police forces capable of carrying out investigations into crimes without relying on forced confessions have not yet been created. A people-friendly law enforcement agency is indispensable if the democratic movement's achievements are to be consolidated. In the HoR proclamation, steps have been envisaged for the democratic control of the armed forces. The test in practice as to the efficacy of these reforms will be whether legal redress will be available to any future victims of violations by the armed forces.

An independent institution of prosecution, which is not subjected to any party politics, is also essential in ensuring the rule of law. Looking into the past mistakes and limitations in this area, and looking into more advanced prosecutorial systems would be a productive exercise for lawyers, judges and others who wish to contribute to the development of such an institution.

An important test of a democratic society is the way in which it deals with its 'weaker' sections. Centuries of absolute monarchy have forcibly maintained very strict boundaries within Nepalese society, dividing it along caste lines. In this era of change in Nepal there is a significant opportunity to consign the horrors of caste discrimination to the past. The careful development of constitutional provisions to this effect will be required if the elimination of caste and all other forms of discrimination are to be enabled. A modern democratic Nepal also requires specific attention to be given to ensuring gender equality and in order to undo discrimination against women. Special attention must also be made to protect the rights of children, particularly those from under-privileged and poorer sections of society.<sup>85</sup>

On May 25, 2006, representatives of the Government and the Maoists met at Gokarna and held the first round of peace talks. A 25-point Cease-fire Code of Conduct was announced to pave the way for elections to the Constituent Assembly.

On June 12, 2006, the government decided to withdraw all cases filed under the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) as part of the concessions being made to the Maoists. On June 13, the government released 240 Maoists from prisons around the country. The AHRC had previously denounced the TADO as being a major source of illegal arrests, torture and disappearances. Section 9 of the TADO provided that if there are grounds to believe that the person might commit terrorist activities if not prevented from doing so, he or she could be detained preventively for a maximum period of one year. The wording used in this provision enabled loose interpretation and therefore abuse by the security forces. The burden of proof of innocence was on the person accused of terrorist activities. The power to detain persons for a year without judicial scrutiny enabled the practice of torture to flourish in

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<sup>85</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/547/>

Nepal.<sup>86</sup> The withdrawal of cases under TADO is therefore welcomed by the AHRC, as is the fact that the TADO was repealed by the Cabinet of the Government of Nepal following the April uprisings.

On June 15, the government and the Maoists held the second round of peace talks in Kathmandu, and decided to constitute a 31-member Ceasefire and Code of Conduct National Monitoring Committee, headed by human rights activist Dr Devendra Raj Pandey for the implementation and monitoring of the 12-point understanding between the SPA and the Maoists as well as the 25-point Ceasefire Code of Conduct. Both sides also agreed to an eight-point agenda which included framing an interim statute, an interim government, declaring the date for an election to a constituent assembly and dissolving the revived House of Representatives and the Maoists' People's Governments. Both the sides also agreed to request the United Nations' assistance in managing and monitoring both sides' armed forces, to ensure free and fair elections to a Constituent Assembly.

On June 18, following a Supreme Court order, the government released two former Ministers of the royal cabinet, Kamal Thapa and Tanka Dhakal. The three other Ministers that had been arrested following the April uprisings had been released on June 4.

On June 28, the high level judicial commission constituted to investigate the suppression of the people's movement summoned four persons to record their statements at the commission's office in Kathmandu: former Chief of the Royal Nepalese Army, Satchit Shumsher Rana; former Law Minister Nirajan Thapa; former Additional Inspector General of the Armed Police Force Raviraj Thapa; and former Additional Inspector General of the Nepal Police Krishna Basnet. The commission had alleged that these persons had played a key role in the excessive use of force and suppression of the peoples' movement in April.

On July 1, 2006, Deputy Prime Minister and Minister for Foreign Affairs, K.P. Sharma Oli, called on the Maoists to immediately stop the practice of extortion from civilians and the use of the so-called People's Courts, which are a cause of a great number of human rights violations. On July 3, the Maoist leadership directed all the party's district committees to halt the use of People's Courts in major cities, including Kathmandu, and to only accept voluntary public donations in a bid to promote "dialogue, peace and progress." As we shall see later, the Maoist courts and the issue of extortion have led to continuing human rights violations in the country in the latter half of the year.

On August 9, the government and Maoists reached a five-point agreement concerning the assistance of the United Nations with regard to the peace process and the holding of free and fair elections to a Constituent Assembly.

On August 25, the Interim Constitution Drafting Committee (ICDC) submitted a draft Interim Constitution to the government and Maoists' peace negotiating teams.

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<sup>86</sup> [www.ahrchk.net/hrday2005/pdf/Dec102005-IHRD.pdf](http://www.ahrchk.net/hrday2005/pdf/Dec102005-IHRD.pdf), pp. 71-72.

On September 25, the government and Maoists decided to hold summit talks on September 28 to finalize the interim constitution and immediately start the arms management process. However, by October 8, the second round of talks between the government and Maoists had failed to reach any agreement on the crucial issues of the future of the monarchy, the structure of the interim legislature and the modalities of arms management. On October 10, both sides agreed that an election to the Constituent Assembly should be held by the second week of June 2007. On October 15, the summit talks between the government and the Maoists were adjourned for an indefinite period after they failed to reach any further agreement. At the time it was feared that an impasse had been reached.

However, on November 8, the seven-party alliance government and the Communist Party of Nepal-Maoists reached an historic agreement to end the decade-old conflict and restore lasting peace through a six-point agreement. In a statement, sections of which are reproduced below, the AHRC welcomed the agreement reached between the Seven Party Alliance (SPA) political parties and the Maoist insurgents, which paves the way for an end to the decade-long conflict in Nepal and the establishment of peace, security and development, as well as the rule of law, justice, and the enjoyment of human rights in the country. The six-point agreement included provisions that were expected to lead to the signing of a comprehensive peace accord on November 16, which would mark the end to the armed conflict between the Maoist insurgents and the government of Nepal. The agreement also addressed key issues such as arms management, the monarchy, an interim parliament, an interim government and Constituent Assembly elections.

One of the major barriers to the advancement of negotiations to implement the core demands of the people of Nepal stemming from the popular uprisings in April, 2006, had been the issue of arms management. The holding of Constituent Assembly elections, which has been the key demand of the pro-democracy movement, could only have the chance of being held in a free and fair environment if the Maoists and the Nepalese armed forces accepted to have their arms placed under a system of monitoring – otherwise the elections risked being conducted at gun-point. Under the November 8 agreement, all of the Maoist armed insurgents were to be placed in seven main cantonment areas - in Ilam, Sindhuli, Kavre, Palpa, Rolpa, Surkhet and Kailali districts - and 21 smaller ones by November 21, 2006. By November 24, 2006, all of their arms were to be kept under lock and key, with the Maoists retaining the key, but with United Nations monitoring systems ensuring that any attempts to remove them will sound alarms. An equal amount of Nepalese Army weapons would also be secured in such a manner.

According to media reports, under the agreement, the parties agreed to promulgate an interim constitution by November 21, with the King to have no constitutional rights under its provisions. This development could not have been foreseen only seven months previously and is testimony to the scale of achievements in Nepal in recent months. Furthermore, an interim parliament was to be formed by November 26, 2006, with an interim government to be formed by December 1, 2006. Both of these bodies are to include the Maoists, which is an essential step in ensuring that any differences are dealt

with within the political system rather than through armed conflict, as has been the case in recent years. The National Assembly would be dissolved once the existing parliament declares the announcement of the interim legislature and interim constitution. Crucially, in terms of ongoing human rights violations, all of the Maoists' so-called people's governments and people's courts would also be dissolved along with the announcement of the interim constitution and legislature. The AHRC has continued to receive grave allegations of human rights committed by the Maoists since the popular pro-democracy movement took place in April this year, including sentences being handed out to individuals by the People's Courts – these so-called courts fail to reach the internationally accepted standards of fair trial. Numerous individuals have been sent to labour camps as punishment by these courts, with reports of them being subjected to serious ill-treatment and torture as a result. In light of this, the AHRC also urges all parties to ensure that these labour camps are immediately dismantled, under close UN supervision.

Under the agreement, there will be a total of 330 members of the interim parliament, with the Nepali Congress (NC), CPN-UML, Nepali Congress-Democratic (NC-D), Rastriya Prajatantra Party (RPP), People's Front Nepal (PFN), Nepal Majdoor and Kisan Party (NMKP) and Nepal Sadbhavana Party (NSP) retaining the number of seats they have in the existing parliament. Including the Upper House, the NC, UML, NC-D, RPP, PFN and NMKP currently have 75, 73, 8, 5, 1 and 5 seats respectively. The Maoists will have 73 seats in the interim parliament. The remaining 48 seats will reportedly be divided among the SPA, Maoists, smaller parties and members of civil society, with this distribution to be finalized at a later date.

The Constituent Assembly will hold its first meeting by the second week of June, 2007, and will prioritize the issue of the future of the monarchy, which will be decided by a majority of the assembly. The Constituent Assembly will include 425 members and operate under a mixed proportional and geographical representation system, comprising 204 and 205 members under the respective systems. A further 16 members will be appointed by the council of ministers. Any Nepali citizen aged 18 or over will be eligible to vote in the Constituent Assembly election, which will be monitored by the UN. In the interim, the King will have no role in the country. The monarchy's assets will be nationalized and be managed by the government as a trust.

Furthermore, a high-level commission will be formed to recommend the restructuring of the State to ensure inclusive, democratic and progressive institutions and systems, in order to bring an end to class, ethnic, linguistic, cultural, religious and regional discrimination. This presents an opportunity to bring an end to the plight of the Dalits and other minorities in Nepal that must be grasped. Furthermore, the agreement reportedly contains provisions to ensure that relief and compensation are provided with regard to those killed or displaced during the conflict. The establishment of a high-level Truth and Reconciliation Commission is also planned.

It must be noted that at the date of publication of this report, only one of the developments planned in the November 8 agreement had in fact taken place: on November 22, Prime Minister Koirala and Prachanda, the leader of the Maoists, signed a

Comprehensive Peace Accord, which brought an end to the bloody decade-long conflict that had cost the lives of some 13,000 individuals and severely affected countless thousands more. The relationship between the SPA and the Maoists had achieved in the six months since the April uprisings what the monarchy and previous governments had failed to achieve in over 10 years. This accord resulted from the November 8 six-point agreement, which had initially planned for this accord to be signed on November 16. It is therefore likely that many of the dates mentioned in the six-point agreement may also suffer from such delays. However, it is vital that the momentum be kept up and that the road-map concerning the disarmament, cantonment, creation of an interim government and eventually the holding of Constituent Assembly elections.

The end of the armed conflict is a vital and momentous step in ensuring that peace, security and the enjoyment of human rights have a chance of becoming an every-day reality in Nepal. There is much hope that this will now be possible, although, at the time of writing of this report many significant steps contained in the November 8 agreement remained to be completed, as mentioned above. As stated at the beginning of this report, 2006 has been a tumultuous year in Nepal. It is rare that any country undergoes such rapid, positive change in such a short period of time. It is hoped that the momentum will not be lost and that all actors will work together in the coming months to ensure effective arms management, and smooth political transition to free and fair elections to the Constituent Assembly and beyond.

### **Important human rights issues**

#### **Continuing human rights violation by both State-agents and Maoists**

In the period following the April uprisings, it was hoped that the progress that was occurring on the political front would be replicated concerning the human rights situation in the country. While it is true that in many ways the situation has improved, for example concerning the number of forced disappearances being recorded or the threats to human rights defenders from the State, there remain a considerable number of cases of torture, extra-judicial killing and impunity being witnessed in the country, that continue to cause serious concern. In particular, the number of human rights violations being committed by Maoists is of serious concern. The number of cases of this nature reaching the AHRC has increased, although this is likely as the result of the fact that since April it has become easier to document cases in parts of the country under Maoist control.

The AHRC has received numerous cases of the use of torture by both State-agents and by the Maoists. Some examples follow, although these only represent a small portion of the total number of cases of violations thought to have occurred during this period.

#### **Ongoing human rights violations by the Maoists**

Since the April uprisings, the Maoists have continued killing, abducting, collecting involuntary donations and torturing a significant number of persons. Hundreds of people have reportedly been abducted and tortured by the Maoists since the peace process can be seen as formally having started, on May 25, 2006. Many ongoing violations, including torture, stem from the type of "justice" being handed out by the Maoists through the People's Courts system, which cannot be recognized as a legitimate form of justice dispensation. In addition, the Maoists, who have been engaged in extracting forced donations from the people living in areas under Maoist control - which represented most of the country during this period - also started collecting parallel taxes in the Nepal-India boarder of the Eastern region. They collected taxes at the Sugar Mills gate, which is at the entrance to the Biratnagar customs between the two countries. They have also been preparing to collect taxes from customs posts in Sunsari and Saptari districts. This is important to note, because violence is often associated with the process of extracting money from persons, including torture and killings.

The Maoists have also continued with the forced recruitment of youths, with reports surfacing in mid-September of the establishment of a "recruiting centre" in Sindhiyatol, Motipur VDC-5, where some 450 youths were reportedly recruited and placed into political and military training programmes. The total number of persons, notably juveniles, being recruited, either forcible or voluntarily (as a result of potentially untenable promises of remuneration) is thought to have increased significantly towards the end of the year.

On September 11, 2006, the United Nations Office of the High Commissioner for Human Rights (OHCHR)-Nepal had called on the Maoist rebels to fulfil their commitments expressed in the past and to stop human rights abuses. "The concerns include issues relating to the rights to life (killings and deaths of persons abducted), to liberty and security (abductions), and to physical integrity (ill-treatment and torture), as well as the rights of the child and of internally displaced persons (IDPs)," the statement said, adding that, "Children must not be recruited into or involved in armed groups of any kind, including militias, and they must not be intimidated into joining political activities.

Also on September 11, 2006, the National Human Rights Commission (NHRC) asked the rebels to immediately disclose the status of 152 named disappeared individuals. On the following day, September 12, the Prime Minister also called on the Maoists to reveal the whereabouts of disappeared people, adding that the government would make public the whereabouts of those disappeared at the hands of the State only after the Maoists disclose details of those they have disappeared. The AHRC urges the government to release these details unconditionally, and urges the Maoists to do the same.

As a result of the November 8 agreement between the Maoists and the SPA, and the Comprehensive Peace Accord that followed on November 22, it is hoped that violations by Maoists will decrease. This will be possible if the cantonment of Maoists forces is implemented, the arms management process works as planned, promises to dismantle the People's Courts are kept, and forced donations of money are halted. Beyond the need for a cessation of ongoing violations, a key requirement for the establishment of the rule of

law and the enjoyment of human rights is the investigation and prosecution of persons responsible for past violations. With the Maoists in the process of joining the government of Nepal, they should also be accountable under the State's mechanisms and jurisdiction, and should therefore comply and collaborate fully with any independent investigations that are tasked with looking into allegations of past human rights violations. A new system cannot be successfully be built on weak foundations, and the culture of impunity that has prevailed in the country during the years of internal conflict must be removed. Political progress at the expense of justice only leaves the door open for the resurgence of past practices. Now that the issues of peace and security appear to be heading towards a satisfactory conclusion, the issue of impunity remains the greatest obstacle to a truly positive and sustainable transformation of Nepal. Examples of violations allegedly perpetrated by Maoists that have occurred since April 2006 are included below.

### **Cases of violations by the Maoists**

On May 12, 2006, just a matter of days after the cease-fire announcement, Maoists tortured Prem Bahadur Thokar to death. The 40 year-old farmer from Jagatpur VDC-6, Nayabasti, Chitwan district was accused of having defamed the Maoists party and of carrying out unwanted activities in their name.

On June 10, 2006, 19 year-old Grade 10 student, Bishnu Lama, from Thulo Pakhar VDC-3, Sindhupalchowk district was abducted by Maoists. His dead body was found buried in a jungle in Ningale VDC, Sindhupalchowk six days after his abduction. When locals demonstrated against the Maoists, the Maoist commander accepted the "mistake" and made a public apology, although no action was taken against the perpetrators. There are many such cases of killings that have taken place after the cease-fire with no action having been taken to punish those responsible. These glaring injustices need to be addressed if any semblance of normal life is going to be created in the country.

Also on June 10, 2006, 58 year-old Ause Tamata, a resident of Taranga VDC-6, Surkhet district was abducted by Maoist Surkhet Area In charge Govinda as part of a People's Court investigation, on the charge of raping his own daughter-in-law. He was beaten for at least two hours with sticks, and was punched and kicked all over his body. Finally, he was sent to a Maoist labour camp in Taranga VDC-5, Surkhet district for 3 years, after he confessed to having raped her. This case shows how the People's Court system makes use of torture to extract confessions and hands out sentences based on flawed, summary and violent procedures.

Prem Bahadur Thokar, a 40-year-old farmer, former Maoist, and resident of Jagatpur VDC-6, Nayabasti, Chitwan district was killed by Maoists on May 12, 2006. Two Maoists abducted him from his home at around 3 pm, beat him with belts and sticks for more than half an hour, before taking him to Krishnachowk, in Jagatpur VDC for punishment in public. He died in Krishnachowk at around 6 pm. He had reportedly been accused by villagers of being involved in violence and forcibly collecting donations. Maoist district leaders have said that they wanted to warn him by punishing him;



however he died as a result of the treatment. The Maoists apologized for his death and stated that the Maoists who had been involved in the incident had been taken to a labour camp as punishment.

On May 22, 2006, at around 7 am, a group of about 40-50 plain-clothed armed Maoists under the command of the Maoist Deputy Chief of the District People's Government, Mr. Rajendra Patel, alias Prajwa,<sup>1</sup> attacked the Sahani brothers' home in Basanpatti VDC-6, Basanpatti, Rautahat district. The brothers were beaten, their hands tied, and they were marched around the village while being beaten before being abducted. The Maoists also fired multiple bullets at their mother, Anarkali Sahani, when she tried to prevent them from taking her sons. She was taken to hospital as a result of the attack. The brothers were taken to the primary school in Inaruwa VDC-3, Rautahat district, where they were beaten, having been accused of being robbers and rapists. They were finally hacked to death at around 8 pm that evening. Their bodies were found on the bank of the Bakaiya River on May 27, 2006. On May 23, the Maoists organized a press conference in Chandranigapur, during which they acknowledged having abducted the Sahani brothers, but denied having killed them, claiming that the villagers had done so. It is believed that the brothers may have been targeted as the younger one, Birbasan Sahani, was an ex-policeman.

Santa Bahadur B.K, a 24-year-old labourer and resident of Ishaneshor VDC-1, Lamjung district, was abducted by two Maoist cadres on September 6, 2006, at about 6:30 pm, from his home. The Maoists abducted him, saying that they had some work for him to do and that he would be released soon. After the abduction, they took him to Ram Krishna Pariyar's home in Ishaneshor VDC-2, Laxmi Bazaar, Lamjung District and tortured him, having accused him of being involved in a robbery in the village. His hands were tied behind his back and he was beaten with sticks on his thighs, legs, hands and other parts of his body. He was found dead by villagers during the following day. The Maoists have also accepted that Santa Bahadur died as a result of torture during investigation and have promised to punish those responsible.

All of these cases show that Maoist "justice" has been summary and violent. Persons accused of crimes, based on mere hearsay, are tortured into admitting these crimes and are punished as a result. Torture is used both as a method of interrogation and of punishment and often results in death. The Maoists even accept that they use torture and publicly regret any deaths, but in most cases do nothing to punish the perpetrators. When perpetrators are punished, they may also become the victims of rights violations, which cannot be viewed as an acceptable solution to the problem. All allegations of human rights violations by the Maoists since the beginning of their activities must be investigated by the State, with the full cooperation of the Maoists, as part of the process of building a new Nepal.

### **Violations committed by the State**

The AHRC has also received many cases of grave violations of human rights by State-agents following the April uprisings, which gave rise to the creation of a government on the back of a groundswell of pro-democracy support. If this government and the Seven Party Alliance are to retain credibility as the representatives of this movement, they should ensure that they eradicate such violations.

### **Mr. Manoj Das's custodial torture**

It is alleged that Mr. Manoj Das was tortured by the police and died while in detention at the Janasewa Ward Police Office, Kathmandu, following his arrest on October 15, 2006. There are serious concerns that this death will not be fully or effectively investigated and that the alleged perpetrators of the torture that preceded Mr. Manoj Das' death will go unpunished. Mr. Manoj Das was reportedly arrested along with Mr. Arun Das on October 15 on the charge of robbery, having been accused of stealing 24,000 rupees from Ms. Binita Neupane, a staff-member of the Bank of Kathmandu, while she was at work. The police arrested them following evidence of this act allegedly provided by CCTV video recordings in the bank. Sagar Das and Rohit Das were also reportedly arrested on the same day with the help of information provided by Manoj and Arun Das. Police Inspector Nanti Raj Gurung of Janasewa Ward Police Station, Kathmandu, has stated that Manoj Das was interrogated and tortured at his command. It is believed that Mr. Arun Das also underwent similar treatment. This admission shows the extent to which the use of torture and impunity have become ingrained in the policing system in the country. Police Inspector Nanti Raj Gurung has clearly stated that he had instructed Assistant Police Inspector Narayan Pandit and police junior Surendra Adhikari to beat Manoj Das with a plastic pipe on the soles of his feet for around 10 minutes and then make him jump up and down on his feet for around half an hour.

When questioned about Mr. Manoj Das' custodial death, District Superintendent of Police (DSP) Sharad Kumar Oli of the District Police Office, Kathmandu, also revealed that the victim was tortured during interrogation, but claimed that he had died as the result of being weakened by a heavy case of diarrhoea. DSP Oli further stated that the victim had gone to the toilet due to his illness, and had later been found unconscious inside the toilet. According to these claims, he was immediately taken to Bir Hospital, where the doctors declared him dead. Mr. Manoj Das is alleged to have been suffering from heart disease, for which he was taking medication. After the incident, the Police Headquarters in Naxal, Kathmandu formed a three-member probe team to investigate the case. Given that there have been clear admissions of torture by members of the police concerning this case, it is hoped that the investigation will lead to the prosecution of anyone found to have been responsible for these acts.<sup>87</sup>

### **Mr. Bacha Ram Chaudari's extra-judicial killing**

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<sup>87</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/2033/>

32-year-old carpenter Bacha Ram Chaudari, a permanent resident of Rayapur Village Development Committee (VDC)-9, Rayapur, Saptari District, Nepal, was reportedly shot dead by police junior Ram Abatar Yadav of Area Police Station Rupani, Saptari on October 7, 2006, while he was returning home from Rupani Chock, Rayapur VDC.

Police junior Ram Abtar Yadav attempted to detain Bacha Ram Chaudari at Raypur VDC-8. Bacha Ram Chaudari was then dragged along the ground by Ram Abatar Yadav. The policeman reportedly threatened to shoot and kill Bacha Ram Chaudari. The victim managed to get free and attempted to escape, but was then allegedly shot in the back by Ram Abatar Yadav and fell to the ground having been hit twice. The policeman then kicked him several times while he was lying injured on the floor. The police claim that they were attempting to detain the victim because he was engaged in smuggling timber, but eyewitnesses and his family members deny that he was engaged in such activities. The police reportedly left the scene once they had shot Bacha Ram Chaudari.

Police junior Ram Abatar Yadav was on patrol in Rayapur VDC-8 along with other two security personnel, but was alone at the time of incident. The police have claimed that he opened fire upon Bacha Ram Chaudari in self-defence, as a response to an attack by the victim. Eyewitnesses claim that Bacha Ram Chaudari was unarmed. According to the information received, the victim was later taken to Sagarmatha Zonal Hospital, Rajbiraj in a police van, before being transferred to B. P. Koirela Memorial Hospital Dharan, where he died.

After the incident, local villagers demonstrated concerning the killing, calling for compensation to be provided to the victim's family and for proper action to be taken against the perpetrator. The Chief District Officer and Senior Superintendent of Police (SSP) of the District Police Office have given assurances that they would provide one million rupees as compensation to the family, but the family has not received anything to date. Members of the District Police Office have stated that the alleged perpetrator, Ram Abtar Yadav, has been suspended from his functions and that a probe committee has been formed under the coordination of Deputy Superintendent of Police (DSP) Pradip Shrestha. This is welcomed, although there are concerns that the probe committee's activities will not lead to the effective investigation or successful prosecution of the alleged perpetrator in this case. These concerns are based upon the fact that impunity for human rights violations, including extra-judicial killings, forced disappearance and torture, is rampant and remains one of the major challenges in the country.<sup>88</sup>

### **The ongoing disappearance of Maina Sunawar**

Maina Sunawar was 15 years old when members of the Nepalese armed forces arbitrarily arrested her. Since this date - February 17, 2004 – her whereabouts have remained unknown, although recently, evidence suggests that she is buried in or near the Birendra Peace Operations Training Centre in Panchkhal, but the army continues to block

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<sup>88</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/2057/>

investigations. This case highlights many aspects of the human rights situation in Nepal in recent years, as well as the ongoing problem of impunity and lack of justice that continues to plague the country.

All the evidence indicates that Maina Sunawar was tortured to death by members of the military, who subsequently sought to deny her arrest and cover up her death. More recently, three members of the military were tried by a military court, but they have only received derisory punishment. As with other cases of violations of civilians' rights by members of the military in Nepal, they need to be investigated by the police and brought to trial before a civil court, if there is any chance of justice being achieved. Attempts by the police to investigate the case and to retrieve Maina's body are currently being blocked by the army. Furthermore, the United Nations Office of the High Commissioner for Human Rights (OHCHR) office in Nepal's investigation is also thought to have been hampered due to the army's non-cooperation and the government's indifference.

It is thought that Maina was detained because the military were searching for her mother, Devi Sunuwar, who reportedly witnessed the killing of two young girls, one of whom had been gang-raped, by members of the security forces in Pokharichauri, Kavre District, Nepal.

Her family members have sought her in vain in numerous detention centres. They have since been forced to leave their village, having received threats from members of the security forces. Initially, as is the way in many such cases, the military denied holding Maina. Reports surfaced indicating that she had been tortured to death in detention. She was reportedly beaten, dunked in water and subjected to repeated electric shocks, leading to her death. Following these reports, the military claimed that Maina had been killed while trying to escape from custody, and that they had returned her body to her family following a post-mortem examination. Her family has not received her body and there has been no evidence of any post-mortem examination having been conducted, according to AHRC's sources.

The "Court of Inquiry Board" (CIB) of a military court that was investigating this case has concluded that a covert military team from the Birendra Peace Operations Training Centre in Panchkhal had arrested Maina on February 17, 2004 and that she had been killed by members of the army, as the result of severe torture. The CIB has indicated that Training Centre Chief Colonel Babi Khatri, Captains Niranjan Basnet, Sunil Adhikari, Amit Pun, Sergeant Major Khadak Bahadur Khatri, and soldiers Dil Bahadur Basnet and Shrikrishna Thapa were present during Maina's interrogation and torture. The CIB also stated that the military, notably Babi Khatri, had taking steps to cover up her death by torture. He reportedly ordered Amit Pun to shoot a bullet into the back of Maina's dead body, to make it look like she had been shot while trying to escape. Furthermore, Babi Khatri reportedly ordered Amit Pun to bury Maina's body secretly and Niranjan Basnet to summon the police to prepare a report.

According to the information received, Amit Pun then ordered a member of the military called Surendra to dig a pit to the north-east of the officers' mess, some 50 to 60 metres

outside of the ‘concertina’ barbed-wire. It is reported that Amit Pun took a photograph of Maina’s body just before she was buried in the pit. For his part, Niranjana Basnet allegedly ensured that a false report was prepared by the Panchkhal Police Office concerning Maina’s death.

On September 27, 2005, the media in Nepal reported that Colonel Babi Khatri, Captains Niranjana Basnet and Sunil Adhikari had been ‘found guilty of not following the proper procedures when Maina was found dead in custody’ and sentenced to six-month prison sentences. Colonel Khatri also reportedly had to pay Rupees 50,000 (approximately US\$ 670) to the victim’s family and had any promotion blocked for two years. Captains Ameet Pun and Sunil Adhikari were each to pay Rupees 25,000 and had any promotions blocked for one year. Due to a lack of transparency of the military justice system, the AHRC and its sources have not been able to ascertain whether these persons have actually served any of their prison sentences. Regardless of this, the punishment given to these persons for having tortured a 15-year old girl to death is derisory and scandalous, both in terms of the length of imprisonment terms and of the amount of compensation. The family members have reportedly refused to accept this compensation and have the case closed, and are instead seeking justice through the civil courts. The fact that the alleged perpetrators remain in service in the military, with their prospects for promotion only slightly dented despite the grave nature of their crimes, is an indicator of the protection under which members of the armed forces can operate.

The AHRC released a statement on August 31, 2006 concerning the machinery of impunity in Nepal.<sup>89</sup> One of the issues raised is that cases of violations of civilians’ human rights by military personnel should be tried in Nepal’s civil courts, as military courts lack transparency or credibility and participate in perpetuating impunity or protection for members of the military, notably concerning human rights violations. It is vital in this case that the alleged perpetrators in question be tried for murder before an independent, impartial court and that, if found guilty, they receive punishment that is proportional to their crimes, in line with international standards. Adequate compensation must also be awarded to the victim’s family for their loss.

As part of the trial before a civil court, further investigations are required. A First Information Report (FIR) has been lodged concerning this case demanding the criminal prosecution of the perpetrators. The police are required to investigate the case and then send their findings to the public prosecutor, who then takes the case before the courts. It is reported that the military are blocking the police’s attempts to investigate these events. This is typical of the majority of all such cases, and represents a significant barrier to justice in the country. For example, the military are reportedly obstructing attempts to exhume Maina’s body. The exhumation and subsequent examination of her body are vital to the police investigation, following which her body should, at long last, be returned to her family. The Nepal Army must facilitate this process without delay or obstruction. It is understood that the victim’s family and local NGOs have requested the assistance of the OHCHR in this process, but the latter is not able to intervene as it has not received any support from the government in this regard, such as commitments to support them in their

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<sup>89</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/714/>

investigations and an invitation for them to participate in the exhumation of the body. The government of Nepal must immediately invite the OHCHR to be included in the exhumation and investigation process, or stand accused of connivance in perpetuating impunity.<sup>90</sup>

### **Six persons protesting a rape killed and 50 injured by the security forces**

The day after the historic conclusion of the April uprisings, members of the armed forces indiscriminately opened fire on a crowd of three thousand civilian protestors, killing six and injuring 50 others, following an incident of gang-rape and killing by security personnel based in the Morang District, Nepal.

On 25 April, 2006 at 8.30 pm, Sapana Gurung was reportedly dragged from her home to the nearby Nepal Telecommunications Office, Pashuhat Chauri by three security officers. At the time, 15 security personnel were stationed at the office as part of a patrolling mission under the command of Army Captain Pralhad Magar. At around 9.25 pm it was reported that villagers heard gunfire. Sapana was later found dead around 100 meters from her home. Medical reports filed by the B.P. Koirala Memorial Hospital declared that Sapana was shot after being gang-raped. The armed forces have denied the rape allegations, claiming that Sapana was killed when she failed to obey orders to halt given by an army patrol.

On April 26, a crowd comprising approximately three thousand people gathered at the Sub Police Station at Belbar-3, Morang district, to protest against the security forces' actions and demanding compensation for the victim's family and for the perpetrators to be punished. Tensions built as the protestors allegedly began chanting slogans, throwing rocks and setting logs on fire in front of the police station.

A delegation of six human rights activists representing the victim were just beginning to conduct a fact finding mission when members of the armed forces opened fire indiscriminately at the crowd, resulting in six deaths and 50 injuries.

The Army captain in charge at the time has attempted to justify the brutal repression by claiming that Maoist infiltrators were present in the crowd and were planning a raid. This claim has often been made by the security forces to justify the repression of demonstrations. Regardless of whether this is true or not, it cannot justify the indiscriminate shooting of civilians. Among the 50 injured, 39 were admitted to hospital with bullet wounds.<sup>91</sup>

### **Tackling disappearances**

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<sup>90</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1947/>

<sup>91</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1736/>

While the number of disappearances being perpetrated in Nepal has decreased over recent months compared with the last few years – in 2003 and 2004 the country had the world's worst record for this grave practice, according to the UN – many persons remain disappeared and the perpetrators of these crimes typically enjoy total impunity. The whereabouts of all persons disappeared by the State or the Maoists need to be immediately disclosed.

There is also a need for Nepal to sign the new UN Convention for the Protection of All Persons Against Enforced Disappearances and to enact a law criminalizing disappearance. The act of kidnapping can be brought to court under the normal criminal law in Nepal, however there is no law concerning forced disappearances that would permit such cases to be investigated and perpetrators to be prosecuted for their actions. The National Human Rights Commission (NHRC) shows that 532 people are still believed to be missing as the result of disappearances committed by the State.

The government has formed two committees in order to look into disappearance cases. Prior to the April uprising, a committee presided by the then-Vice Secretary of the Home Ministry, Narayan Gopal Malego, published 8 reports, altogether making public the whereabouts of 472 people. Following the April people's movement, the new government formed a one-member committee under the Joint Secretary of the Home Ministry, Baman Prasad Neupane. This has disclosed 174 people's whereabouts in a report.

It is important to note that the committee only disclosed the information concerning the disappeared based on information from the security forces, but did not itself carry out any investigations into how, why, where or by whom these persons were disappeared. The chances of having those responsible punished or adequate reparation being provided to the families of the victims seem very slim under such circumstances. Prompt, thorough and independent investigations are required into all of these cases, and all persons who are still alive should be immediately released.

On November 8, 2006, as part of the historical agreement, the seven political party and Maoists agreed to form a high level commission to investigate and publicize the whereabouts of those disappeared by the State and the Maoists. The AHRC will monitor this body closely, as this will likely represent an important test-case concerning both sides' willingness and capacity to credibly address past violations. It is feared that neither side are truly willing to break the cycle of impunity, which is perhaps the most significant human rights concern in Nepal today.

## **Impunity**

The AHRC is of the view that only by tackling impunity will a just, secure and sustainable future for Nepal be able to emerge. It is essential that justice is done and seen to be done in order for real healing within Nepal's society to be made possible. While promises of compensation to those affected by the conflict are welcomed, this should not

be used to wipe the slate clean without accountability having been established. The punishment of any and all perpetrators of human rights violations is central to the establishment of a society based on the rule of law. Democracy without the rule of law and justice does not guarantee the development of a secure society or the enjoyment of human rights. In order to ensure that these rights are respected in future, a deterrent concerning such abuses must be established, and there is only one way in which this can be done – through the punishment of persons proven to have committed crimes through a fair and transparent judicial system. The establishment of strong institutions of the rule of law, notably the police, and the separation of powers between the executive, legislative and judicial branches of government, must be guaranteed as a pre-requisite to the formation of Nepal's new governance systems, if they are to be guarded against corruption and are to stand the test of time.

All parties are also urged to ensure that prompt and impartial investigations by the relevant State-institutions are launched into all allegations of human rights violations by any and all actors in the country, and to cooperate fully with such efforts. All of these steps are vital in ensuring peace, democracy, the protection of human rights and a society based on justice and non-discrimination in Nepal.

From a human rights perspective, the issue of transitional justice and impunity remains to be dealt with. While the recently-signed peace accord details the release of prisoners, the protection of people from future abuses, and information being released about the disappeared, reforms to the institutions of the rule of law and the establishment of justice for past abuses is being ignored at present. Now that there is peace, this remains one of the main challenges that the country faces.

A 31-member "Code of Conduct Monitoring" team was formed under the coordination of Dr. Birendra Mishra, including the leaders of the seven political parties, the Maoists, human rights defenders and civil society, but it has not been working effectively to date.

### **The High-level Probe Commission**

Following the events in April 2006, on May 5, 2006, the government formed a five-member High Level Probe Commission (HLPC) under the coordination of former Supreme Court Justice Krishna Jung Rayamajhi, mandated to investigate the human rights violations and atrocities committed under the royal regime, between the coup on February 1, 2005 and the suppression of the April uprisings. The government formed the HLPC using powers provided by Sub-section (2) of section 3 of the Commission of Inquiry Act, 2026 (1969 A.D.) After its formation, the HLPC has interrogated hundreds of persons, including ministers, vice-chairmen, security chiefs, administrators and royal advisors alleged role in suppressing the April Movement. 20 people were killed and over five thousand injured as the result of the excessive use of force by the security forces during the popular uprising. The HLPC sent a set of questions to King Gyanendra on October 12, with a one week dead-line, seeking explanations concerning his role in these events, but no replies have been returned to date. The probe commission has now



reportedly completed its investigations, however the final report has not been made public yet, despite having been sent to government. Some 202 persons have been named in the report as having been responsible for abuses, but there is fear that the government is trying to cover-up the findings, as it is resisting calls for the report to be made public.

The HLPC includes: Krishna Jung Rayamajhi, former Supreme Court justice (Chairman); Harihar Birahi, former chairperson of the Nepal Press Federation; Ram Prasad Shrestha, former vice president of the Nepal Bar Association; Ram Kumar Shrestha, advocate; and Dr. Kiran Shrestha, general secretary of the Nepal Doctors Association

It has as its responsibilities and duties to:

- Investigate the facts concerning incidents of suppression of the people's movement, the destruction of property, the misuse of State funds, abuses of power and authority, and human rights violations that took place between February 1, 2005 and April 24, 2006;
- Find out who is responsible for deciding, ordering or planning the abuses and evaluating the extend of the violations;
- Submit a final report with advice, findings and recommendations to the government of Nepal concerning cases that the commission has investigated.

On November 15, the local press stated that the HLPC is implicating King Gyanendra in the atrocities committed during the April movement and for the embezzlement of State resources. According to sources, the King, as then-Chairman of the Council of Ministers, should take the responsibility for atrocities committed during the movement. However, the commission hasn't recommended any action against the King in its probe report, according to the media.

The source also said the commission had recommended murder charges against Kamal Thapa, the then-Home Minister, notably concerning the killings in Dang and Kailai districts, where witnesses said that security personnel opened fire under his direct order. The report and its findings must be made public immediately, or the government will lose any credibility it has concerning the fight against impunity.

### **Appointment of alleged human rights violator as Army Chief**

One case that underlines the continuing climate of impunity is the appointment of a known gross human rights violator to the post of Army Chief. Army Lieutenant General Rukmangat Katuwal was appointed as army Chief of Staff of Nepal on September 10, 2006, by Prime Minister Girija Prasad Koirala. Mr. Katuwal, who was set to retire before this appointment took effect, stands accused of being responsible for a plethora of human rights abuses. It is alleged that gross violations of human rights and humanitarian law were perpetrated while Mr. Katuwal was the regional army chief in Nepalganj, in command of the Mid-Western Divisional Headquarters, from 29 December 2003 to 10 September 2004. During his tenure, the mid-western part of the country experienced

systematic and gross violations of human rights. Mr. Katuwal was, at the time, under investigation for abuses committed during the popular pro-democracy uprisings in Nepal in April, 2006.

The signal that this appointment sends out to past or potential human rights violators is that impunity still prevails in Nepal, despite the hopes that the political changes had brought about. Ironically, the Prime Minister of the government that was established following the democratic uprisings has appointed Mr. Katuwal, who is accused of having suppressed this movement.

The allegations against Mr. Katuwal include the use of torture, the launching of aerial attacks that resulted in the killing of civilians, extra-judicial executions of Maoist insurgents as well as civilians, the burning down of houses, forced disappearances, death threats to journalists attempting to cover the incidents, as well as the killing of one journalist. In several instances, the killing of civilians is blamed on "crossfire" or encounter incidents.

An example that illustrates the grave nature of the alleged abuses is the case of 18-year-old girl Junkiri Thapa of Kalika VDC-4, who was reportedly arrested by the security forces on March 17, 2004, in Padnaha VDC-9, Bardiya District. She was reportedly forced to carry a spade to a local nursery and to dig a pit in the ground. She was then executed and buried in the pit that she had been forced to dig.

Mr. Katuwal was under investigation by a High Level Probe Commission mentioned above. The High Level Probe Commission was only investigating Mr. Rukmangat Katuwal's role with regard to abuses that occurred during the April 2006 popular uprising. It has been alleged that he had played a key role in ordering the suppression of demonstrations and the human rights abuses that accompanied the security forces' actions at that time. The commission in question does not have the mandate to investigate the numerous allegations of other grave human rights violations for which Mr. Katuwal is reportedly responsible, as they occurred before February 1, 2005.

In appointing a person who is under investigation for abuses of human rights, notably against the recent pro-democracy movement, as well being accused of many more abuses in the past, the government is effectively sanctioning the grave and widespread abuses that mar Nepal's past. It has also failed to create a deterrent for future violations. It is vital that the authorities immediately remove Mr. Katuwal from the position of Army Chief.<sup>92</sup>

### **Blanket impunity under the new Army Act**

The appointment of Mr. Katuwal is an example of a wider trend that indicates that impunity is being entrenched in the new system currently being created in Nepal. Another key example of this are the provisions contained within the proposed draft to amend the

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<sup>92</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/731/>

existing Army Act that was presented earlier this year. Unfortunately, the proposed draft was accepted by the government and the House of Representatives passed the new Army Act on September 22, 2006. Many of the provisions in this act are contrary to human rights principles and practices, and as such must be removed, as they continue to ensure, or even expand, the blanket impunity currently being enjoyed by members of the security forces. The provisions in question are to be found in Sections 13, 21, 54, 58, 61, 62, 90, 93, 105, and 110 of the document that has now replaced the 1959 Army Act.

Under Section 21 of the Army Act, despite whatever other laws prevail in Nepal, any member of the security forces cannot be prosecuted in any court for any actions taken while 'fulfilling his duty', even if he has caused the death of or severe injuries to another person. This amendment to the 1959 Army Act will ensure and reinforce the impunity with which members of the security forces can act. Similarly, Section 26 ensures that there cannot be an appeal against decisions by military courts, as it precludes the citizens of Nepal from having the right to seek justice in civil courts and challenge unsatisfactory decisions made by the military courts and authorities. Under Section 71 (2), military courts are to be held in closed hearings unless otherwise ordered by the court, which will lead to the continuing lack of transparency of the armed forces and their actions.

In addition, Section 13 of the Army Act deals with the disqualification of persons from serving in the military, but it fails to include necessary human rights record safeguards. Any appointment to a position within the military, from officer to Army Chief, should be dependent on the individual's human rights record and should be subject to a "No Objection Letter" from the National Human Rights Commission. Furthermore, the appointment of the Army Chief should only be made following parliamentary approval. Any armed forces personnel involved in corruption should be investigated and punished by the Commission for Investigation of Abuse of Authority (CIAA). The establishment of a public audit system is urgently required in order to ensure accountability and transparency with regard to the financial activities of the military. The other Sections listed above also provide further barriers to justice and reinforce impunity and must therefore be removed from the Army Act, despite its recently having been passed by the House of Representatives.

Inhuman treatment and other violations of human rights by military personnel involving civilians should be exclusively tried in civilian courts. This will help combat partiality and impunity. Military courts should only be involved in internal military matters. Military obstruction to investigations by civil authorities should be punished, with a new law required to deal with such issues.

Prior to the popular uprisings in April 2006, there were increasing questions being raised concerning the participation of Nepal Army personnel in UN peacekeeping forces. Unless the provisions that engender impunity within the amended Army Act are removed and unless the perpetrators of human rights violations are brought to justice, Nepal Army personnel should no longer be able to serve in international peacekeeping forces.<sup>93</sup>

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<sup>93</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/714/>

## **The need to dismantle vigilante groups**

Groups of vigilantes have been formed and armed by the King of Nepal in recent years. Known as village defence forces, these groups were allegedly created to protect villagers from Maoist attacks and armed robbers. However, as has been shown in other similar situations around the world, the arming of poorly- or un-trained civilians in order to carry out functions that the State should be responsible for, leads to human rights violations, as these vigilante groups take the law into their own hands and commit abuses themselves, including looting, rapes, destruction of houses, and other violent acts. Vigilantes have been most active in the Terai plains region of Nepal, notably in Kapilvastu, Rupendehi, Siraha, Jhapa, and Nawalparasi districts. Despite the ongoing political changes in the country, including the planned Maoist arms management plans, it appears as if these groups have not returned their arms yet and continue to abuse civilians. In the newspapers it has been said that some have returned weapons to the government, however it seems that a significant number have still not handed over weapons to date. There has been international criticism of the formation of these groups, and it is now vital that they be immediately and completely disarmed and disbanded, as they continue to pose a threat to human rights, peace and security in the country.

The urgent need for such action is best illustrated by the case of the death of a three year old child as the result of a sword injury to the head. Armed vigilantes from the village defence forces killed the three-year old son of Dharma Raj Barai, a Maoist cadre, and also injured two more of his children on June 1, 2006 in Phulika VDC-3, Kapilvastu district. Dharma Raj is allegedly a Maoists' Ward Chairperson of Ward No. 3, Phulika VDC. At around midnight, vigilantes identified as Ram Milan Kharbinad (Jalalu), Chhotai and Pappu reportedly went to Dharma Raj Barai's home and attacked his family members with swords. Dharma Raj had reportedly gone to Kathmandu to participate in a Maoists' Speech Program scheduled for June 2. When the vigilantes didn't find Dharma Raj at his home, they attacked his three children indiscriminately with swords, badly injuring three-year old boy Manjit in the head, who later died from his injuries. Dharma Raj's 18 year-old daughter received injuries to her hands and his five-year old son received injuries to the forehead and may lose the use of an eye. An eight-year old boy was reportedly also slapped several times. The vigilantes reportedly fired a gun in the air before leaving the home at around 1 a.m. Manjit Barai died at 2 p.m. and the other injured children were taken to Taulihawa Hospital for treatment the next morning. The security forces from DPO Kapilvastu reportedly took the child's dead body for a post-mortem.

The AHRC has been informed of numerous other attacks by vigilante groups, including the burning down of the home of 56-year old farmer Hanuman Prasad Barai Jaiswal, a resident of Maharajgunj VDC-7, Majha Bargadi in Kapilvastu district. The attack was reportedly carried out by 300 to 400 vigilantes and members of the security forces on February 20, 2005, due to his son having allegedly joined the Maoists. In another case, Netra Lal Bhattarai, 46, a shopkeeper and a resident of Nandanagar VDC-9, Kalikanagar

of Kapilvastu District was reportedly killed by vigilantes at Labani Bazaar on February 23, 2005 while purchasing goods for his shop at the bazaar. He was allegedly killed for being a Maoist. Members of the Kapilvastu District Police Office reportedly buried his body without his wife being able to see it. The next day, the vigilantes also burnt down his house.<sup>94</sup>

## Conclusions

As has been illustrated at length above, 2006 has been a landmark year in Nepal that has included vast popular demonstrations against the King and his government, which finally led to the government's demise and the creation of a new platform upon which progress toward peace, security and human rights could be built. During the period since the April uprisings, Nepal has been under a state of political flux, with difficult questions and situations being addressed step by step. By the end of the year, a Comprehensive Peace Accord had been signed between the Seven Party Alliance and the Maoists, bringing an end to a bloody decade-long war that claimed the lives of over 13,000 and seriously affected many more. The Maoists are in the process of being disarmed and brought into the political mainstream. If all parties stick to the commitments made as part of various agreements, notably that reached on November 8, then there is reason to hope that the country is heading into a period of sustained democratic development and peace. It is rare to see such sweeping changes in the course of one year, and full credit must be given to the people of Nepal and those actors that have made this all happen.

However, from a human rights perspective, much remains to be done. Violations continue to be committed by all sides, and this will remain the case until the culture of impunity that has accompanied the widespread abuses of the past, continues in the country. In order to ensure that impunity is dismantled, justice cannot be sacrificed on the altar of political expediency. Any and all allegations of human rights abuses committed by all sides need to be effectively investigated and prosecuted in line with Nepal's law and international obligations. Where laws are missing, they must be created. To enable this to be most effective, the institutions of the rule of law must be strengthened to allow them to cope with this sizeable task. Investigations and prosecutions need to be commenced without further delay, as these institutions can develop as they go, through practical experience, as long as there are no undue political restrictions to their actions. It is vital that an effective, credible and well resourced system of witness protection be created; otherwise the investigation and prosecution of alleged perpetrators will fail. In ensuring that persons responsible for human rights violations are made accountable, Nepal can ensure that there is a deterrent against future violations and that victims are provided with adequate reparation, which will enable a more peaceful, less fractured society to emerge. The only way to move beyond past grievances is for justice to be done. By sweeping such grievances under the carpet, in order to side-step difficult issues that may threaten ongoing political progress, there may be short-term gains, but ultimately, the door will remain open to a return to violence and insecurity, as those that profited from such a situation will remain protected, and may opt to re-offend in the future.

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<sup>94</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1780/>

While there has been significant political progress during this year, many of the recommendations that the AHRC produced last year as part of its 2005 annual report<sup>95</sup> remain to be implemented. It is hoped that the new political dynamics in Nepal will enable this implementation to now begin in earnest, although there remain significant doubts as to the Maoists and the SPA's willingness to address impunity at present.

## **Recommendations**

The AHRC urges all parties engaged in the process of bringing about a democratic government in Nepal to:

- **Ensure that all aspects of the November 8 agreement are implemented without hindrance and in a timely manner, enabling arms management, the dismantling of the Maoist People's Courts, an end to violence and the holding of free and fair elections to a Constituent Assembly;**
- **In particular, guarantee the rights of minorities, such as Dalits and women, both in terms of protection from abuse and of participation in the ongoing political developments;**
- **Publicly condemn the practices of torture and forced disappearances and ensure that such practices are immediately halted and that the whereabouts of all disappeared persons are identified without delay;**
- **Adopt legislation criminalizing torture and forced disappearances, and amend the Torture Compensation Act to bring them in line with international laws and standards;**
- **Ensure that all sections of the Army Act (passed by the House of Representatives on September 22, 2006) that consolidate impunity are removed and that the Act is brought in line with international standards;**
- **Create independent, competent bodies for investigating all allegations of arbitrary arrest, illegal and/or incommunicado detention, torture, custodial sexual violence or death, forced disappearance and summary or extrajudicial killings, and ensure that all sides cooperate fully with such investigations. Such investigations should not be limited to recent events, but should cover all allegations spanning back to the beginning of the Maoist uprisings over a decade ago;**
- **Ensure that all findings by the High-Level Probe Commission (and all subsequent investigations) are immediately made public, and that all necessary actions are taken against persons found to be responsible for abuses, regardless of their rank or status;**
- **Take legislative and administrative measures in order to ensure that witness protection is provided to all persons involved in the investigation and prosecution of human rights cases;**

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<sup>95</sup> [www.ahrchk.net/hrday2005/pdf/Dec102005-IHRD.pdf](http://www.ahrchk.net/hrday2005/pdf/Dec102005-IHRD.pdf)

- **Issue orders to the police, armed forces and Maoists to comply immediately and without exception to court orders, including those pertaining to habeas corpus writs;**
- **Immediately transfer all State-detainees to legally designated places of detention;**
- **Ensure that all persons being detained illegally, both by the State or by Maoists, are immediately released;**
- **Ensure that all detainees have access to family members, legal representation, and access to medical examinations (in the latter case, particularly at the time of arrest and release);**
- **Ensure that accessible and accurate lists are kept of all arrests and persons in detention;**
- **Abolish all statutes of limitations for complaints of acts of torture and other grave violations, such as rape;**
- **Ensure that all allegations of violations of civilians' human rights committed by the armed forces and Maoists are tried by independent, impartial and competent civilian courts;**
- **Ensure that punishments for acts of torture and disappearance are commensurate with the gravity of the offence and in line with international standards;**
- **Ensure that adequate compensation is awarded to victims or their families, and in a timely manner;**
- **Support the work of the NHRC, ensuring that its recommendations are fully implemented;**
- **Ensure that all recommendations made by UN Treaty Monitoring bodies, Special Procedures and the OHCHR's field office in the country are fully implemented, and that access is guaranteed to all international and regional human rights institutions and organisations.**



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### **PAKISTAN: The Human Rights Situation in 2006**

#### **An overview of the situation of security and human rights in 2006**

Pakistan remains in the strong grip of a military regime that began in 1999, despite having an “elected parliament” since 2002. This parliament was, however, elected through elections that cannot be considered free or fair and serve only to lend credibility to the military regime. The military controls all policy matters. There are 56,000 army officers in different civil government and corporation positions, including communications, power and educational institutions, according to information released in the National Assembly.

Although the parliament was restored in 2002, the President of Pakistan still wears a military uniform and has no plans to separate the Army Chief's office from that of the President of Pakistan. Appointments to the higher judiciary are made by the president himself – there is no question of the freedom of judiciary.

Pakistan is one of the forefront countries in the “War Against Terror,” and violations of human rights are increasingly being perpetrated as part of operations and the erosion of liberties that this so-called war entails. There is no rule of law in the country and government agencies have a free hand to arbitrarily arrest and torture anyone they wish. Who ever is tortured or killed in custody or in fake encounters are termed by the state as being “terrorists”. Forced disappearances following arrest significantly increased in Pakistan following the 9/11 attacks in the United States. Such an increase in the use of torture by the military agencies has also been witnessed. Even the country's highest civil judicial bodies are not able to search military facilities, even in cases where the existence of torture cells is suspected.

Pakistan is still under a state of emergency, which was declared 1998, under which many basic rights have been suspended, including articles 16, 17, 18 and 19 of the Constitution of Pakistan (1973), which provide for the rights of assembly, and the freedom of association, expression, and movements, amongst others. The state of emergency continues to affect these rights: on October 14, 2006 a government lawyer from Sindh made use of the fact that there is a state of emergency in the country to argue his case before the Sindh High Court concerning a ban on a teachers and professors associations. The state of emergency was passed by the country's previous parliament and the present parliament has not abolished it to date. The judiciary is working under the Army-made Provisional Constitution Order 2000, under which the judiciary were ordered to take an



oath in 2000. Since then the judiciary has not taken an oath on country's constitution despite the parliament and constitution having been restored since then. There are ongoing military operations in two of Pakistan's four provinces, as a result of which at least 3000 persons are known to have been killed since 2001.

The information collected by the Asian Human Rights Commission between January 1, 2006 to November 15, 2006 shows that human rights violations are endemic in the country and are increasing as compared with the previous years. About 415 people were killed in so-called police encounters and in only one case of over a dozen that have been tried in court concerning encounter cases have police officers been arrested, but to date not one member of the police has been sentenced or has any compensation been paid to the victims or their relatives. The Lawyers Committee for Human Rights have reported that 1319 persons have been subjected to torture in 2006, but this likely only represents a portion of the total number of actual cases. Furthermore, some 600 persons are believed to have disappeared during this year following their arrests by the law enforcement agencies.

Separately, according to the information collected by the Human Rights Committee of the Sindh Bar Council and the Lawyers Committee for Human Rights, 878 men and women were killed under the pretext of honour during the year up to September, including over 500 women, the majority of whom were married, and some 20% of whom were minors. Around 2100 women were molested. 3100 children were reportedly sexually harassed or abused. In a further indicator of the insecurity that plagues the country, some 5800 people are reported as having committed suicide owing to unemployment, poverty and depression during the first nine months of the year. In the name of the privatization of government-controlled sectors, more than 15 thousand people lost their jobs during 2006 and several trade unions were banned by the government. An estimated 200,000 fisher-folk also risk losing their livelihood to transnational bidders in ongoing fishing rights auctions. As many as 600 people have disappeared in the country, including workers of religious groups and Baloch political workers, during the year. Some 22 journalists were killed, tortured or disappeared by the state agencies and 91 cases of harassment, threats, attacks and ill-treatment of media workers have been reported during the year. Human trafficking groups have been active, under the nose of state agencies such as the federal investigation agency (FIA), the Pakistan Rangers, the Ministry of the Interior and the Anti-Trafficking Squad). During the first nine months of the year over 15,000 illegal migrants from Pakistan were reportedly deported back to the country. At least 3 FM radio stations and one Television Channel were banned by the government regulatory authority, the PEMRA.

A survey conducted by Action Aid with regard to the October 8, 2005 earthquake-affected areas in the northern parts of Pakistan and Pakistan-held Kashmir revealed that the situations in the cities of Muzafarabad, Balakot, Mansehra, and Bagh have not improved since the previous year. The death toll due to the earthquake was more than 73,000, but, due to corruption and governmental negligence, the death-toll has risen to over 83,000, mainly as a result of malnutrition, non-availability of relief and food, and the lack of shelter and adequate housing. The displacement of poor communities

continued during 2006, with more than 200,000 people having been displaced throughout the country following the forced eviction of more than 40 communities.

According to the Lawyers Committee on Human Rights, about 90,000 prisoners are being detained in 87 prisons around the country that are meant to have the capacity to hold some 38,000 persons.

Pakistan is an elected member of the United Nations Human Rights Council, but its human rights record and respect for its obligations under international instruments to which it is party are both scandalously poor. Pakistan has still not ratified the International Covenant on Civil & Political Rights (ICCPR), the Convention Against Torture (CAT), the Optional protocol to the CAT and the Rome Statute for the International Criminal Court. Pakistan has only ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, as well as having signed the International Covenant on Economic, Social and Cultural Rights in late 2004. It must be recalled that Pakistan is a member of the new United Nations Human Rights Council, and that its failure to have ratified some of the most important human rights instruments should be viewed as unacceptable for a country in such a position.

### **Failings of the judiciary and the scourge of impunity**

The judiciary in Pakistan is directly under the control of the military government and is unable to act independently. The judiciary of Pakistan has not even taken the oath under the constitution, but has instead taken the oath under the Provisional Constitutional Orders (PCO 2000) put in place by the military regime. The members of the judiciary are nominated by military generals, not through the process of recommendation by the now-defunct Judicial Commission, as should be the case.

Due to a lack of independence and to institutionalized corruption, the judiciary in Pakistan only delivers justice for the few - the rich, influential or militarily powerful. In 2000, the current military regime brought in the so-called Provisional Constitutional Order (PCO) which replaced Pakistan's 1973 Constitution. At the time, the Supreme Court and the provincial high courts sanctioned the military government by taking an oath. The oath, which is normally to be taken upon the country's Constitution, was reportedly taken on a blank document. The country's parliament was restored in 2002 and was followed by the restoration of the 1973 Constitution in 2004. However, the members of the judiciary have still not renewed their oaths upon this constitution and, as a result, are acting without a constitutional mandate. During all previous military governments and regimes, the judiciary has repeatedly failed to oppose the military dominance of the judiciary and the operation of military courts. These factors signal the judiciary's subservience to the military and its lack of intention to act to uphold the constitution.

There are more than 15,000 cases pending before the Supreme Court of Pakistan, the country's apex court. Beyond this, an estimated one million cases are pending in the over 3,500 other courts around the country. Besides these courts, there are Anti-Terrorist Courts in each district of Pakistan. Sharia Courts are also functioning parallel to ordinary courts in country, giving the country a dual legal system, which results in many violations of individuals' rights. The disposal of cases in the country is extremely slow, giving rise to the accumulation of cases before the courts and the inability of the judicial system to deliver justice in an acceptable and timely manner. The disposal of ordinary cases takes a minimum of five to six years in Pakistan's courts. If the cases go through the appeals process, they can take as long as 20 to 25 years, as each appeals court takes six to seven years to decide, and there are three to four such stages before reaching the Supreme Court.

The AHRC continues to receive an increasing number of reports of cases of torture, forced disappearances and extra-judicial killings taking place in Pakistan. The perpetrators of these acts continue to enjoy near-total impunity for their actions. For example, the Inspector General of prisons in Sindh province was allegedly responsible for the torture to death of five high profile prisoners in Karachi in 2005 and 2006, but, despite credible evidence of his responsibility and many complaints from prisoners' families, he has not even faced judicial questioning. He has since been killed by unknown persons.

In another example of a high profile case, Mr. Mir Murtaza Bhutto, the head of a major political party - the Pakistan Peoples Party - who is also the son of former Prime Minister Mr. Zulfikar Ali Bhutto, was allegedly killed along with several friends by members of the Karachi police in a fake encounter, but no police officer has been punished. The case of Mir Murtaza Bhutto's killing has been pending in court since 1996 without a decision as yet. The allegedly involved police officers have not been suspended and some of them have even been promoted to high-level posts. The Federal interior minister stated in December 2005 in the National Assembly that over 4000 persons have been detained in Balochistan province (since 2002). However, of this number, less than 200 persons have been presented before the courts, meaning that the remainder are being detained incommunicado. The military's detention facilities are effectively off-limits and the judiciary lacks the ability or will to gain access to persons being detained there. Even when family members or witnesses identify members of the authorities as having carried out human rights violations, the courts generally take the government's denial statements as sufficient evidence for the disposal of cases. Despite the high number of cases of various very grave abuses, no law enforcement or military personnel have been punished for their actions. Impunity is a key factor in enabling the ongoing violation of human rights violations and the judiciary bears significant responsibility for this situation. Please see the following statements on the judiciary for further details – AS-188-2006<sup>96</sup> and AS-181-2006.<sup>97</sup>

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<sup>96</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/683/>

<sup>97</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/662/>

## **Forced disappearances**

Article 10 (1) of the Constitution of Pakistan states that, "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice". Article 10 (2) states that, "Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest". Similarly, section 61 of the Criminal Procedure Code provides that "no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court". Section 167 does allow the police to detain in custody a person arrested without warrant for a term not exceeding 15 days "where the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded". However, the officer-in-charge of the police station or the police officer making the investigation must still transmit to the nearest Judicial Magistrate a copy of the entries in the diary relating to the case, and shall at the same time forward the accused to such a Magistrate. Further, the law permits a deputy commissioner of a local district to order the detention without charge for 30 days of persons suspected of threatening public order and safety. The deputy commissioner may renew detention in 30-day periods, for up to a total of 90 days.

There are thousands cases of disappearances and killings. In the south-western province of Baluchistan, more than 4000 people have been disappeared since a military operation started in 2001. The interior minister informed the parliament on December 5, 2005 that 4000 persons had arrested in Baluchistan but until now not one of these persons has been produced in any court. The military intelligence agencies, such as the ISI, are reportedly arresting people and keeping them in military torture camps, and their whereabouts are not being disclosed.

More than 1000 people have disappeared in the North Western Frontier Province (NWFP) of Pakistan under operations carried out as part of the "War Against Terror" since 2001. In addition to this, the government of Pakistan is known to be supporting terrorists, including members of the Taliban, following an agreement made with the latter group in July 2006.

As mentioned previously, during 2006 more than 600 cases of disappearances have been recorded following arrests by the law enforcement agencies. Their whereabouts remain unknown and the higher courts are unable to trace their whereabouts as they lack the power to search military places of detention. The AHRC urges the Pakistani authorities to ensure that courts are able to gain access to military detention facilities when investigating cases of disappearance.

An example of forced disappearance can be seen in the following cases (AHRC Urgent Appeal UG-003-2006<sup>98</sup>):

Mr. Munir Mengal, the management director of Baloch Voice, a Balochi-language television station based in Bahrain, the United Arab Emirates, went missing after arriving in Karachi, Pakistan from Bahrain on April 7. His family alleges that he was arrested by the military intelligence officers at the airport. Mr. Mengal's wife Mrs. Aziza Mengal said that the victim went to Karachi to recruit technical staff for a TV station, which was scheduled to start its broadcast from Bahrain on June 16. Mr. Mengal's whereabouts remain unknown. Reporters Without Borders showed its concern about Mr. Mengal's disappearance saying "Launching a TV station for 10 million Balochi in Pakistan and other parts of the world cannot be considered a crime." Due to the ongoing military operations in Balochistan, the Government of Pakistan has severely restricted Balochi people's right to access information. Mr. Ghulam Mohammad, a staff of the Balochistan National Movement said, "When Pakistan has electronic channels of each language, why are Balochis denied to have their own channel?"

This is not an isolated case. There have been several reported disappearance cases in Balochistan. In some cases, the courts ordered that the disappeared be produced before the courts, but these orders were ignored by the military. Some other disappearance cases are described below:

Mr. Saniullah Baloch, the brother of Senator Sana Ullah Baloch from Balochistan was arrested on July 16, 2006 with a younger brother and both were taken to a military camp in Quetta, the capital city of Balochistan province. The military released the younger brother and sent a message through him that if the family wanted Mr. Sami Ullah Baloch to be released they should produce Senator Sana Ullah Baloch before the military. The younger brother reported this to the family and media and added that both brothers were kept blind-folded and were tortured during his detention. The whereabouts of Mr. Saniullah Baloch remain unknown to date.

Dr. Haneef Shareef, a prominent poet and writer in the Balochi language has disappeared after being picked up by military intelligence officers in Turbat, Balochistan on January 15, 2006. His whereabouts remain unknown. Dr. Shareef has written articles and poetry regarding the poor economic and social conditions of the people in Balochistan. Desperate to learn of Dr. Shareef's whereabouts, his mother and relatives have staged a hunger strike in front of the Karachi Press Club for over 40 days.

Mr. Asghar Bangulzai, a political activist in Balochistan, has been disappeared for the last five years, since he was abducted by law enforcement agencies on October 18, 2001 in Quetta, the capital city of Balochistan. His young children and relatives have reportedly staged a hunger strike for one year in front of the Quetta Press Club.

Mr. Hafiz Saeed Ahmed was also allegedly abducted by law enforcement officers in 2002 in Quetta. His family members have also reportedly been on hunger strike.

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<sup>98</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1666/>

Mr. Rauf Sasuli, a member of the central committee of Jamhoori Watan party has been missing since February 2, 2006. Mr. Salim Baloch, the vice-president of the same political party, has been missing since March 10, 2006. He was arrested by the police after holding a demonstration in front of the Karachi Press Club.

Seven members of the Baloch Students Organisation (BSO), including its president, Mr. Imdad Baloch, were taken by law enforcement officers in March 2005 and detained in a secret place in Punjab province, where they were severely tortured. Three months later, three students including Mr. Imdad Baloch, who were suffering from severe medical conditions at the time, were surfaced and thrown on the street in a remote area in Dera Ghazi Khan District, Punjab province. They later told their families and the media that military officers had tortured them while asking for information about the Balochistan Liberation Army, which the students claim they knew nothing about. Meanwhile, the remaining four students are still missing and their families fear that they have been killed as a result of the torture inflicted on them.

On May 16, 2006, two activists from the Jeay Sindh Quomi Mahaz nationalist political party were arrested by a group of six to eight officers in civilian clothes at 7.30 pm near the Sarmad Hotel, Chandia Goth. Several witnesses were present and enquired about the arrest, the officials declared that they were from the Qaisabad Police and that Mr. Sikander (alias Aakash Mallah, son of Mohammad Siddiq and resident of B3 Maari Garden Qasimabad) and Mr Manjhi Khan (son of Dhani Bux and resident of Chandia Goth near Happy Homes Qasimabad) were wanted for investigation relating to demonstrations against the construction of the Kala Bagh Dam. Four people amongst the crowd followed the police vehicle and found that the two activists were being taken to the Hyderabad Sindh, a renowned military cantonment used for torture and killings. Since the incident, the two activists have not been seen and the Qasimabad Police has denied all knowledge of the arrest. Since May 2006 both these persons remain disappeared and the Sindh High court has shown its inability to ensure their recovery from military custody.

Twelve people belonging to the Shia'te sect of Islam have disappeared following their arrest in Karachi. The government, however, is denying having ever arrested these people. The government, it is feared, will try to implicate the Shia community in the suicide bombing that took place on April 11, 2006 at Nishter Park, where 49 people were killed during a large religious gathering of Sunni sect followers. In doing this, the government has, since April 24, arrested more than 12 people from the Shia community, who have now subsequently gone missing. Many others have had to go into hiding to avoid the same fate. Critics of the government claim that it has made these arrests as it was unable to capture and arrest the real culprits of the bombing, yet wanted to be seen as acting in this case by the Sunni sect. Fears are that those arrested and currently disappeared will be pressured through the use of torture to confess to their involvement in the bombing. There are several cases by victims' families against the Pakistan Army before the Sindh High Court claiming that these persons are in the custody of the army and are being held in a torture cell in Karachi, some 1.5 kilometres from the governor's house, but the court has again shown its inability to do anything about this situation.

## **The case of Abdul Rahim Muslim Dost**

Afghan national Abdur Rahim Muslim Dost was arrested without a warrant on September 29, 2006 in Peshawar. His whereabouts remain unknown and he is at risk of being subjected to torture or summary execution, as is the case with all disappeared persons. His disappearance is thought to be due to his criticism of Pakistani agencies which had earlier arbitrarily arrested, detained and unlawfully transferred him and his brother to US custody.

According to an Amnesty International report,<sup>99</sup> the Pakistani government has systematically committed human rights abuses against hundreds of Pakistanis and foreign nationals as part of its cooperation with the US in the "War on Terror". As the practice of enforced disappearance has spread, people have been arrested and held incommunicado in secret locations with their detention being officially denied. They are at risk of torture and unlawful transfer to third countries. "The road to Guantanamo very literally starts in Pakistan," said Claudio Cordone, Senior Director of Research at Amnesty International. "Hundreds of people have been picked up in mass arrests, many have been sold to the USA as 'terrorists' simply on the word of their captor, and hundreds have been transferred to Guantanamo Bay, Bagram Airbase or secret detention centres run by the USA."

The routine practice of offering rewards running to thousands of dollars for unidentified terror suspects has facilitated illegal detention and enforced disappearance. Bounty hunters -- including police officers and local people -- have captured individuals of different nationalities, often apparently at random, and sold them into US custody.

More than 85 percent of detainees at Guantanamo Bay were arrested, not by US forces, but by the Afghan Northern Alliance and in Pakistan at a time when rewards of up to US\$5,000 were paid for every "terrorist" handed over to the USA. Often, the only grounds for holding them were the allegations of their captors, who stood to gain from their arrest. Some 300 people -- previously labelled as "terrorists" and "killers" by the US government -- have since been released from Guantanamo Bay without charge, the majority to Pakistan or Afghanistan.

But still there are 450 prisoners in Guantanamo Bay and most of them arrested from Pakistan and are Pakistani citizens.

Khalid Mehmood Rashid, a Pakistani national, was handed over to Pakistani officials in South Africa on November 6, 2005 and flown to Pakistan. He has not been seen since. Despite official acknowledgements that he is being held by the Pakistani government, the Ministry of the Interior has not responded to his family's inquiries as to where he is being held.

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<sup>99</sup> <http://web.amnesty.org/library/index/engasa330512006>

Engineer Atiq ur Rehman, a scientist at the Pakistan Atomic Commission has been missing since two years, following his arrest. The mother of the missing engineer filed a petition before the Punjab High Court Rawalpindi Bench and on July 22, 2006, the bench was unable to locate his whereabouts as the military intelligence agency, known as the ISI, and the Ministry of the Interior told the court that the engineer is not being detained by them. The father of the engineer told the court that ISI officials had informed him that his son was being detained by the ISI and that he was soon to be released. His parents began making arrangements for his marriage, but he is still missing.

### **Cases of violence and rights abuses against media workers and organisations**

Journalists are prime targets of the military regime; several have been arbitrarily arrested, tortured, forcibly disappearance or subjected to extra-judicial killing by members of the armed forces. The latest case of abduction and torture is that of Mr. Dilawar Khan Wzir from Rawalpindi, Islamabad, who works for the BBC. He was abducted on November 20, 2006, allegedly by army intelligence personnel in plain clothes. He was kept blind-folded for 30 hours and was severely tortured. After international pressure and protests from journalists throughout country, and opposition parties in parliament, he was thrown into a forest still bearing torture marks. The kidnappers reportedly asked how he had received information about a US missile attack in Bajour on 30th October, and about his sources in the area. He was told not to tell anybody that he was in custody of the military intelligence. His younger brother had been kidnapped and murdered on August 30, 2006. Prior to that, he had been the target of two separate bomb explosions: at his house and at a primary school. For further details, please see AHRC Urgent Appeal UA-381-2006.<sup>100</sup>

A Bangkok-based Pakistani Television channel, the Sindh TV's transmissions were stopped on November 20, 2006 by the government, which instructed cable operators not to transmit the station's content, as the channel was very critical of the government.

Mr. Saeed Sarbazi of the Karachi Daily Business Recorder was abducted on September 20, 2006 by armed members of the Military Intelligence, when he was going to his office. The people who followed the vehicle in which he was being taken, witnessed it entering the Malir Cantonment, a place known to be a place in which torture is used. He was kept blind-folded for five days in the camp and was severely tortured. The military wanted to know about his connections in southern province of Balochistan, where the Pakistan Army has been conducting military operations since 2001. After protest from journalist community and political parties, he was released but was told by his captors not to inform anyone about his custody or treatment, otherwise his family would suffer the consequences.

According to Monthly 'Media Freedom Report' issued by Intermedia, in September, 15 incidents of violations against media were recorded throughout Pakistan, taking the total number of attacks on the press in 2006 to 88. In September one journalist was killed, four were tortured, three journalists were illegally detained by police or intelligence agencies,

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<sup>100</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/2091/>



while two journalists received death threats, the report said. It also added that the continuous trend of violations against the media has turned working conditions for journalists from bad to worse. It said that journalists' organizations are concerned about this dangerously increasing trend and media persons are under continuous threat.

Extra-judicial killings: in an incident that took place in Dera Ismail Khan (NWFP), journalist Maqbool Hussain Siyal, the bureau chief of the Online News Agency, was shot dead on September 14. He became the third journalist to be killed this year. Earlier, Hayatullah Khan in the Federally Administered Tribal Area and Mansoor Ahmed Mangi in Sindh were killed. Furthermore, Haytatullah Khan's cousin was found dead on September 22, after being kidnapped by unidentified persons.

On June 15, 2006 journalist Mr Hayat Ullah's bullet-riddled body was found after he was picked up by the military on December 5, 2005. The same day that his body was found, government officers had reassured his family that they would soon hear good news. According to his family members, Hyat Ullah was kept in a military torture camp in South Waziristan and his body was found to have many signs of torture besides the bullet wounds on his back. Other examples can be found at: UA-169-2006<sup>101</sup>; UA-132-2006<sup>102</sup>; UG-003-2006<sup>103</sup>; UA-49-2004<sup>104</sup> and FA-05-2003.<sup>105</sup>

Torture: in Lahore three journalists - Wadood Mushtaq (ARY), cameraman Nazir Awan (ARY) and Zahid Malik (ATV) – were tortured by the police at a religious congregation at Minar-e-Pakistan on September 17. Media reports say that all the three journalists received multiple fractures and Deputy Superintendent of Police (DSP) Mukhtar Shah was directly involved in beating them. Two other journalists, Mousa Khan from Mingora (NWFP) and Ashfaq Khoso from Sukkur (Sindh) were attacked by unidentified armed persons and were severely injured on 7 and 23 September respectively. Senior journalist C.R. Shamsi was beaten up by the private guards of the Minister for Labour and Manpower, Ghulam Sarwar Khan, on his instructions within the Parliament premises on September 13.

Mr Mukesh Rupeta, a reporter for Geo Tv and Mr Sunjay Kumar, a cameraman, were arrested by the military in March 2006, since which time their whereabouts remained unknown until, three months later, they were finally produced in court on June 22, 2006. According to their family members they were so severely tortured that both were nearly unable to speak or move.

**Arbitrary arrests:** Data compiled from reports in the national media show that in September alone, the police and intelligence agencies illegally arrested three journalists - Rafiq Ajiz, editor of local daily 'Chamag' from Turbat (Balochistan), Abdul Sattar Khan

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<sup>101</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1750/>

<sup>102</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1675/>

<sup>103</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1666/>

<sup>104</sup> <http://www.ahrchk.net/ua/mainfile.php/2004/675/>

<sup>105</sup> <http://www.ahrchk.net/ua/mainfile.php/2003/429/>

from Chiniot (Punjab) and Saeed Sarbazi from Karachi (Sindh – case details mentioned above).

**Harassment:** the Islamabad Police reportedly falsely implicated senior The News correspondent Shakeel Anjum in a triple murder case. The Station House Officer (SHO) of Shehzad Town police station in Islamabad, Inspector Idrees Rathore, included Shakil's name in the FIR (No 326, Sept 16, 2006), lodged in the case under sections 302, 324, 148, 149, 427, 109 of the Pakistan Penal Code and sections 6 and 7 of the Anti-Terrorism Act. It was clearly an act of vengeance against the reporter, who had been filling stories highlighting the incompetence and inefficiency of the police.

Two journalists, Haroon Rashid of the BBC World Service Urdu service, and Iqbal Khattak of the Peshawar-based Daily Times, were detained for two hours on January 14, 2006 as they were about to file their stories from Khar, the central city of the Bajaur Agency, a federally administered tribal area. They had earlier visited houses destroyed by a missile and covered a demonstration in Khar against US attacks. The two journalists were taken to the Bajaur Agency local administration office and told to hand over their materials. The political administrator told them that the media were being expelled that evening. On the same day, the authorities confiscated film from a cameraperson working for US television news agency APTN, after he had filmed the destroyed houses. When BBC correspondent Haroon Rashid wanted to return to the area on January 16 for further work, the crew was stopped at the entry point to the Bajaur Agency. Personnel at the checkpoint told them that there were clear orders that no journalists were to be allowed into to area. On contacting the Federal Information Minister on January 17, a journalist was told to “talk to the military” about access to the region.

**Media closures:** the government of Punjab on September 17 issued “verbal directives” to cable operators in the province to stop airing ARY Digital television network transmissions. These include ARY Digital, ARY Pakistan, ARY India, ARY Asia, ARA One World, QTV, The Muzik and the City Channel. The Punjab government issued the instruction when ARY repeatedly screened a scene in which journalists were beaten by the police in Minar-e-Pakistan. However, transmissions were resumed after a week. On September 26, cable operators of Taxila, Wah Cantt complained that the police had forced them to halt transmissions of the ARY TV network, and there was no ARY broadcast in Taxila, Hassanabdal and Wah Cantt on September 26 and 27.

The NWFP government on September 24 through a notification asked all the cinema houses in the province to close down during the month of Ramadan. The cinema owners said that government had forced them to accept the decision.

On August 23, the Pakistan Electronic Media Regulatory Authority (PEMRA) rejected a request for a renewal of license by the management of Mast FM 103 Balakot (NWFP) and ordered the immediate closure of the radio station's transmission without giving any reason. However, the PEMRA has extended the temporary broadcasting licenses of all other FM radio stations operating in the area. The AHRC believes that the FM 103 license was not renewed because of its program that criticized the alleged misuse of funds

allocated for the rehabilitation program carried out by government agencies in the earthquake-affected areas, especially the Earthquake Relief and Rehabilitation Authority (ERRA).

**Disappearances:** Mr. Mengal, the managing director of a Balochi language television channel was arrested by the military intelligence on April 7, 2006 and his whereabouts remain unknown to date.

Mr. Asif Baladi a Peace Publishing House publisher was arrested by armed men on June 13, 2006 and since then he has been missing. The car of a serving Army Brigadier was reportedly used in kidnapping of publisher.

### **Military operations in the southern province of Balochistan**

Throughout the year, there have been continuous military operations in the south western province of Balochistan. These began in 2001, and have been the source of numerous grave human rights and humanitarian law violations. There are numerous reports of the use of F-16 aircrafts and helicopter gunships against civilians. As the result of the Pakistan Air Force's actions against the civilian population, many people have been killed and more than 200,000 persons have been internally displaced to different provinces and districts in the country. According to the international media, more than 3000 people have been killed, including children and women, by the indiscriminate bombardments and direct firings on the citizens by the Pakistan Air Force and the Pakistan Army. Please see AHRC statement AS-204-2006<sup>106</sup> issued on September 1, 2006 for further details.

The killing of renowned politician Sardar Akbar Khan Bugti and 37 of his supporters in a mountain hideout by the Pakistan military on August 26, has thrown the country into turmoil, with further degradation of the situation only likely to be averted if there are intense international and national efforts to resolve the crisis. Sardar Akbar Khan Bugti was a former chief minister, senator, member of the National Assembly and Chairperson of the Jamhoori Watan party. As the news of the killings in Balochistan has spread, so too has violence against the administration, and between communities. The country now faces the prospect of outright war between the armed forces and the people of Balochistan, not to mention leaders and peoples in other provinces who now believe that the government deals with dissent only through bloodshed.

Although the conflict over Balochistan goes back to the time of independence, the current crisis is a direct consequence of the October 1999 military takeover. In 2001, the Pakistan Army began operations in the province that provoked armed conflict. Since then, more than 4000 persons are estimated to have disappeared following arrest in this province alone. In January 2005, when an army officer was alleged to have raped a doctor working in Sibi, Pakistan's President reportedly used his influence to save the accused man by bombarding the area, killing several people and forcing evacuations. On other occasions, the air force has been used to bomb the people of Balochistan into submission. The

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<sup>106</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/715/>

primary reason for all of this is, of course, the province's rich resources, as it supplies some 40 per cent of the country's natural gas.

Since the latest killings, Balochistan has been cut off from the world. In response to the violent reaction of thousands of alienated and frustrated youths, more than 1000 people were reported to have been arrested in the last few days of August 2006, with about a dozen persons having been killed. Four cities - including Quetta, the provincial capital - have been placed under indefinite curfew after the killing of the Baloch leader. The provincial government has all but ceased operations. Law enforcement is in the hands of the military. Soldiers are also reported to have been stationed at hospitals. The federal government has suspended train services to the province. The highways were initially closed by the government, and have now been blockaded by angered local people.

Balochistan is in serious danger. Curfews, check points and blockades are all obstacles to the movement of much-needed foods and medicines. The consequent suffering to the entire population is only further exacerbating anti-government sentiments. And under the cover of darkness and with transport links cut, the security forces are free to do as they please without fear of immediate consequences. The vacuum following the chaos is also being quickly filled by inter-communal violence.

Pakistan too is in serious danger. More than 200,000 people from the province are already believed to have fled into neighbouring provinces due to the ongoing conflict there. The latest incidents are expected to cause a rapid upsurge in their numbers especially in Sindh, provoking further instability. Meanwhile, provincial assemblies and regional leaders have learnt the lesson that when the stakes are high, the only diplomacy known to the federal government is by way of F-16s and helicopter gunships.

And South Asia is in serious danger. Some commentators are talking of a repeat of 1971, when the war with East Pakistan, now Bangladesh, caused the loss of around a quarter of a million lives and countless needless atrocities. Under the current circumstances, an outbreak of massive hostilities is conceivable. Some fear that India could take advantage of the looming instability in Pakistan and provoke a new disastrous war between the two big rivals; alternatively, current and retired military officials who have themselves blamed India for the militancy in Balochistan may find a pretext to launch attacks against India of their own accord. Whatever the case, large-scale conflict over Balochistan will undoubtedly have profound negative effects on the entire region: including the frontline of the much-vaunted "global war on terror" there.

Balochistan is the main affected province of Pakistan in terms of forced disappearances after arbitrary arrest. It is the general practice of the military intelligence agencies to arrest people and then shift them to military torture camps, while announcing that they are not being detained by the police or the military. Many people who have been released after between 6 to 12 months from military camps are revealing that they were physically tortured and kept blind-folded for lengthy periods, and were transferred from one place of detention to another.

## **Further turmoil and abuse - US involvement in civilian deaths**

There is grave situation in northern areas of Pakistan bordering Afghanistan where, in the name of "War against Terror" massive and widespread violations of human rights, notably the right to life, are being perpetrated, not only by the Pakistan military government but also by US forces. Over 1000 persons are missing since September 11, 2001 and thousands of civilians have been arrested and transferred to different military camps.

18 people were killed on January 13, 2006, when missiles were fired into three houses, where a marriage ceremony was taking place, in Damadola, Bajaur Agency. Reports indicate that "Hellfire" missiles were fired from an unmanned Predator drone probably operated by the CIA. Their intended target appears to have been Ayman al-Zawahiri, a high ranking al-Qa'ida operative, who was not reportedly amongst the dead. In a letter Amnesty International said that it was concerned that a pattern of killings carried out with these weapons appeared to reflect a US government policy condoning extrajudicial executions. Amnesty International reiterated to the US President that extrajudicial executions are strictly prohibited under international human rights law. Anyone accused of an offence, however serious, has the right to be presumed innocent unless proven guilty and to have their guilt or innocence established in a regular court of law in a fair trial.

US forces and the Pakistan Army again used the Hellfire missile to attack the civilian population in Bajaur, close to the Afghan border, on October 30, 2006, killing 82 persons, mostly children who were students studying in a seminary that was targeted in the attack. Three days later, a bomb exploded in a military training camp, killing 40 young trainees, in what is believed to be a reprisal attack. Please see below AHRC's statement, AS-272-2006,<sup>107</sup> on the US aerial bombardment on civilians in Bajaur.

## **PAKISTAN: International intervention urgently needed into Damadola killings**

The Asian Human Rights Commission (AHRC) is shocked by the October 30 air attack on a religious school that reportedly killed 82 persons at Damadola, near Khar in the Bajaur tribal district on the border of Pakistan and Afghanistan.

There are many serious questions arising from the attack. Among them, the two most pressing are:

1. Who ordered it and who carried it out? Although the Pakistan army has claimed responsibility, eyewitnesses have been quoted as saying that unmanned United States aircraft fired missiles at the school compound before Pakistani helicopters arrived. The government of North-West Frontier Province, where the attack occurred, was not even

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<sup>107</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/805/>

informed about it in advance and its assembly has unanimously condemned it and called for compensation to the victims' families.

2. Who in fact was killed? Major General Shoukat Sultan of the Pakistan armed forces said after the attack that those killed were all militants training for suicide attacks. The president, General Pervez Musharaff, the next day justified the attack before diplomats and scholars from abroad, saying that none of the persons killed were innocents. However, the AHRC has received the reports from local authorities, politicians and media personnel that the persons killed were all 10 to 25 years old, most under 20, and were simple seminarians.

The only way to answer these questions is through immediate independent inquiries. As all institutions in Pakistan are compromised by the military government and its interests, and as this may be an international incident if US-guided weapons were involved then these must also have international involvement and be subject to outside scrutiny.

The Asian Human Rights Commission therefore calls for the composition of an independent judicial inquiry within Pakistan at the highest levels with the authority to launch legal investigations and proceedings into the incident where criminal wrongdoing is uncovered.

The AHRC also calls for the UN Secretary General, UN High Commissioner for Human Rights, UN Human Rights Council and UN Special Rapporteur on extrajudicial executions all to take special interest in this incident with a view to also establishing an international inquiry into the incident and monitoring the actions of the government of Pakistan to determine whether they are aimed at revealing or concealing the truth.

Finally, the AHRC calls for free access to be given to journalists, human rights defenders, and other concerned persons within Pakistan in order that they may verify the facts for themselves.

What happened at Damadola? Both the people of Pakistan and the world demands to know.

Separately, three journalists were killed by Army intelligence agencies and several other journalists have been taken to Guantanamo Bay. The two brothers of a journalist have also been targeted to punish him. During this year, four journalists were abducted by militants and were tortured and threatened not to report their activities - two of them still are in Afghanistan.

### **Torture and disappearances following arrest**

Torture is routinely used in Pakistan by civilian law enforcement agencies, military personnel, and intelligence agencies. While acts of torture by the police are generally aimed at producing confessions during the course of criminal investigations, torture by

military agencies primarily serves to frighten a victim into changing his political stance or loyalties or at the very least to stop him from being critical of the military authorities. Suspects are often whipped to the point of bleeding, severely beaten, and made to stay in painful stress positions.

Pakistan is a signatory to the UN Human Rights Charter and according to Article 5 of the Charter: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The Constitution of Pakistan explicitly prohibits torture under article 14 (2), which provides that "No person shall be subjected to torture for the purpose of extracting evidence". Further, under the Qisas and Diyat Ordinances, the causing of hurt by any person to extort "any confession or any information which may lead to the detection of any offence or misconduct" is defined as a distinct punishable offence. Similarly, article 337 k of the Pakistan Penal Code states, "Whoever causes hurt for the purpose of extorting from the sufferer, or any person interested in the sufferer, any confession or any information which may lead to the detection of any offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore, or to cause the restoration of, any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security shall, in addition to the punishment of qisas, arsh or daman, as the case may be, provided for the kind of hurt caused, be punished, having regard to the nature of the hurt caused, with imprisonment of either description for a term which may extend to ten years as ta'zir."

Abuses by Pakistani military and civilian authorities against political opponents of the government - including extrajudicial killings, disappearances, torture and arbitrary arrests - have also increased dramatically under Musharraf's rule. Pakistan's military and its intelligence agencies have tortured and forcibly disappeared scores of people in the volatile south-western province of Balochistan, where the government has confronted an armed rebellion by tribal militants operating under the umbrella of the Balochistan Liberation Army. In Pakistan's Federally Administered Tribal Areas, an aerial attack by the military on October 30 in the town of Khar in Bajaur Agency killed 82 people, including several children. According to local and international media sources, a military spokesman claimed the dead were all militants and rejected calls for an independent investigation.

During 2006, as mentioned previously, an estimated 1319 people were reportedly tortured by the law enforcement agencies. According to the report of Human Rights Commission of Pakistan more than 1000 persons were tortured in 2005.

Pakistan's military government is in fact increasing its use of torture and military confinement of civilians. 'Torture cells' are generally found in cantonments and other military controlled areas in the country. In Karachi and Quetta these cells are under the control of the Corp Commanders. Only Inter Services Intelligence and Military Intelligence personnel are allowed to visit these cells. Military methods of torture include

forcing detainees to dance naked before an audience for several hours, forcing them to do push-ups the entire night, putting rats in their pants or pyjamas, forcing them to listen to audio and video cassettes of other torture victims, as well as stitching their lips together.

It is common practice in Pakistan for arrested persons to be subjected to physical and mental torture in order for the police to obtain a confession, other information, and extort money. Methods of torture used by the police include beating with fists, legs, wooden sticks or a piece of reinforced leather and burning the victim with cigarettes. In fact, police and law enforcement agencies are conditioned to think that it is their duty to torture suspected criminals.

For further information, please see AHRC's statement, AS-154-2006,<sup>108</sup> on torture in Pakistan, issued on the international day against torture on June 26, 2006.

### **Examples of torture in Pakistan**

1. 28 year-old Mr. Saqib was found dead in custody at Naseerabad police station, Lahore on August 16, 2006 after having had an argument with police guards at the Model Town Court. The police guards beaten him with chains and injured him with sharp knife. He was an under-trial prisoner for the previous two years in a dacoity (robbery) case.
2. On September 26, 2006, Mr. Mohammad Asif, who was sentenced to death in a murder case, was allegedly severely tortured by police in Adialla jail Rawalpindi. When his condition deteriorated, he was moved to the prison hospital. The prison authorities were reportedly reluctant to move him to a civil hospital because the torture marks he bore. During the night, his condition worsened, and he was then moved to the Rawalpindi district hospital where he died from his injuries. The case is currently before a civil court.
3. One Mr. Gulistan Khan, a suspected robber, was tortured to death by two police officers from Shahzad Town Police Station on September 26, 2006. A person accused of robbery in 2004 had subsequently named Mr. Gulistan as his accomplice, following which he was tortured in order to get a confession, as a result of which he died.
4. Mr. Hassam Gichki, a close relative of opposition political party leader, Mr. Atta ullah Mengal, was tortured to death in Karachi Central Prison in January 2006. The Sindh High Court ordered a judicial inquiry that established that the prison authorities were responsible for Mr. Gichki's death. The high court ordered the arrest of those responsible, but since January to date no arrests have been made.
5. Amjad Hussain, a worker in Pindigheb, filed a complaint with the District Session Judge (DSJ) on May 23, stating that he was detained illegally and physically

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<sup>108</sup> <http://www.ahrchk.net/statements/mainfile.php/2006statements/605/>



assaulted by head constable Wajid Khan and constable Munir of the Pindigheb police post on May 18, without any reason. Five days later, his condition deteriorated and the police set him free by taking a bribe of Rs 2,500. When the victim approached Pindigheb town headquarters hospital for treatment and medical examination, he was barred from there by police officials. District and sessions judge Attock directed the district police officer to initiate departmental action against two Pindigheb police officials, for illegally detaining and torturing a low-paid government employee. He also ordered the judicial magistrate to take legal action, as per the law, against the policemen and submit a report to him.

6. The Supreme Court on May 26 directed District Police Officer Sanghar to ensure the arrest of four police inspectors for running private torture cells in various parts of the district. The Sanghar police presented a report giving an account of the efforts made concerning the arrest of seven police officers. According to the report, Adam Khan Baloch (constable), Zulfiqar alias Kala (head constable), Rahmatullah (head constable) and one civilian Muhammad Yosaf have been arrested so far. While AHRC welcomes the arrests, it remains concerned that these police officers will likely not be brought to justice for their acts, as in many such cases in Pakistan, police officers are frequently released and even promoted in due course, as was the case in the infamous murder case of Mir Murtaza Bhutto, the son of former Prime Minister Bhutto, in which high level police officers were initially arrested, but later released and promoted to the highest levels. Impunity remains a significant problem in the country. Simple suspensions from office or even arrests for short periods of time cannot represent adequate punishment of State-actors that have committed gross abuses.
7. Muhammad Sharif, a suspected murderer, was allegedly tortured to death by Musafirkhana police station officials, in Bahawalpur on May 18. The deceased's uncle said that Sharif, along with two of his cousins - Ghulam Hassan and Ghulam Mustafa - was taken into custody by the Musafirkhana police following a complaint by Muhammad Aslam. Sharif's cousins Ghulam Hussain and Allah Rakha alleged that the three suspects were tortured during investigation by police officials, as a result of which Sharif died. His body was brought to the Bahawal Victoria Hospital mortuary for a post-mortem. When contacted, police officials denied the charge and alleged that Sharif had committed suicide by slitting open his throat with a razor.
8. Khawja Saad Rafique, a member of the Pakistan Muslim League, Nawaz Sharif Group and the National Assembly) has stated that on the night of May 15, Sub-Inspector (SI) Shafique along with some other policemen forcibly moved him from Sarwar Road police station to the Qila Gujjar Singh Investigation Headquarters, Lahore. He alleged that Investigation Senior Superintendent of Police (SSP) Chowdury Shafqaat, SI Muhammad Shafique along with other police officials subjected him to severe torture for five hours in a torture cell. He added that they abused him and forced him to keep standing for more than five hours. While torturing him physically and mentally, he said they pressed him for

the recovery of a rifle. Later he was moved to Gulberg police station. He claimed that a Superintendent of Police (SP) approached him in the Gulberg police station and apologized for the police torture. A Lahore Investigation Police spokesperson denied the torture charges and said that MNA Saad himself refused to have a medical examination to verify the allegations of torture. Deputy Inspector General (DIG) of Investigation also conducted an inquiry and found no proof of torture. The AHRC believes that the inquiry and its findings lack credibility and were biased and supposed to cover up the torture to which Khawja Saad Rafique was subjected.

9. A victim of police torture was buried after autopsy amid tight security on May 4 in Chiniot. The victim, Nazar, was being detained as a suspect in a murder case. He was arrested along with another accused person - Samad - by sub-inspector Ijaz Khan Mand in mid-April. They kept them in the lock-up without entering their arrest in the daily ledger. Eyewitnesses said that on May 2 the police removed them from their cell in Chiniot police station and took them to the compound of the police station where Nazim Khalid Asif, Naib (Deputy Mayor) Nazim Anwar Arain and two unidentified men were sitting. Station Head Officer (SHO) Sajjad and Sub-Inspector Ijaz Mand started beating Nazar with rods and fists and kicked him until he was dead. A case was registered against SHO Sajjad, sub-inspector Ijaz Nazim and Deputy Mayor Nazim.
10. Hamid, a person accused of murder, reportedly died in the Badami Bagh investigation police's custody on May 7 in Lahore. The father of the deceased, Talib Hussain, alleged that the investigation police officers killed his son after poisoning him and subjecting him to severe torture. He also filed an application against the police officials for allegedly killing his son, but no case has been registered so far. On the day of the incident, his wife went to the police station to meet her son, she found Hamid lying unconscious in the premises of the police station. When contacted, the officer in charge of the Badami Bagh investigation police was not available for comment, while Nazir Ahmad, the head constable, claimed that the police had arrested both Hamid and his brother a month before from their residence in Data Nagar. The policemen further claimed that the deceased had committed suicide by swallowing poisonous pills at his residence and that he was also a drug addict.
11. Four witnesses were heard by the First Additional Sessions Judge in Mirpurkhas Session court on April 21 in a case of torture and wrongful confinement in Mirpurkhas. The witnesses - Chaudhry Noor Ahmed, Sher Mohammad, Zulfiqar Ali and Ghulam Mustafa - said villagers panicked when Hashim Jarwar did not return home on March 26. They said that a zamindar (land lord), Zulfiqar, told villagers that Hashim had been detained by the Ratanabad police. They said that the next day when they approached the Ratanabad police to locate Hashim's whereabouts, they were told that he was being detained by the Old Mirpur police for interrogation in connection with a complaint of kidnapping for ransom. The Old Mirpur police transferred him to an unknown location. Before his

- disappearance, Hashim Jarwar recorded his statement before the judicial officer and later told journalists that he was taken in custody by the Ratanabad police, including in-charge ASI Abid Noon, on the pretext of conducting an inquiry on a complaint. He said that he had been moved to the Old Mirpur police station the next day, where he was tortured by former SHO Syed Raza Shah and then removed to the Khan police station, from where it is believed he disappeared. The other victim in this case, Naeem Arain, told journalists that the former Station Head Officer of Satellite Town, Lakhmi Chand, along with driver Yousaf and other officials, picked him up from his house in scheme No 2 Satellite Town on March 25. Hashim Jarwar was also picked up in the same way.
12. A school teacher, arrested in Mastung on April 21, died while in police custody during the night. Quetta police officer Ghulam Muhammad Dogar said Ghulam Sarwar was suspected of involvement in an abduction case and died because of a heart attack after the arrest.
  13. On April 20, District Nazim (Mayor) Narowal took exception to the registration of a 'fake' criminal case concerning the torture and humiliation of Executive District Health Officer (EDHO) Dr. Shaukat Saleem by police. The Mayor contended that the police turned violent on the direction of the District Police Officer (DPO), who wanted to settle some personal grudge he had been nurturing against the EDHO. The DPO, however, denied the allegation. The Shakargarh police claimed to have arrested EDHO Dr. Shaukat Saleem on April 11 for gambling. Dr. Saleem, after release on bail, said he was sitting in the office of the Shakargarh market committee along with Chaudhry Masood Ahmad when the police arrested them and took them to the police station. He alleged that the police humiliated and tortured him and that the Narowal Police Station SHO, besides torturing him, tried to urinate on his face. The police have reportedly added the Dr. Saleem's name to an FIR concerning a previously registered case. added the names of three proclaimed offenders.
  14. 22-year-old Roshan Ali died in the Naushehro Feroze Civil Hospital on April 16, allegedly due to police torture. He had been admitted to hospital as the result of a court order after there had been allegations of his being subjected to police torture. Around 100 people blocked the national highway a day later demanding the registration of an FIR against those responsible for Roshan's death. Taluka (sub-town) police officer Naushero Feroze reached the spot and informed the protestors that an FIR had been lodged against the responsible people. SP Gul Mohammad said an FIR was lodged against in-charge investigation Sub-Inspector Azeem Rajpar and six civilians under sections 302, 343 and 109 PPC. The Sub-Inspector was reportedly suspended, but no further actions are known to have been taken.
  15. A member of the Ismaili sect of Islam died in police custody in Multan on April 18. The man, Arif Ali, had been arrested by the Delhi Gate police on February 19 on charges of murdering a jeweller. Sources said that Ali had been tortured while

- in custody. His friend, Irfan Ali, who was also arrested, developed kidney problems in custody because of police torture. Irfan Ali stated that there was no evidence against them. The Delhi Gate police SHO Sadaat Ali, when contacted, first denied that Arif Ali was in custody but later changed his statement, saying that no evidence had been found of Arif and Irfan's involvement in the murder.
16. One Shahid Khan alias Chand, who was reportedly suspected of involvement in a ransom case, was allegedly tortured to death on April 14 by the Satellite Town Police in Sargodha.
  17. It was reported on April 4, that Iqbal Haider and his son Hammad were illegally detained at Kot Khadim Ali Shah police post for 36 hours and released after giving Rs.1000 and a cell-phone as a bribe to the Assistant Sub-Inspector (ASI). Taking serious notice of alleged torture of 55-year-old Iqbal Haider and his 13-year-old son Hammad, ASP Sahiwal Fida Hussain ordered an inquiry against ASI Abdul Hameed. It is reported that ASI Abdul Hameed was suspended for a period but has since regained his position.
  18. A police ASI was arrested in Chiniot on April 2, allegedly for sodomising a detainee after drinking liquor. Reports said ASI Shafiqur Rehman, a member of the Saddar police, took Tajamal Hussain, who was being detained having been accused of committing a crime, from his cell to a house in Garah locality. The ASI made the accused drink liquor along with him and afterwards allegedly sodomised him. On being informed of the incident, city DSP Saeed Randhawa ordered the registration of a case against the ASI, who was detained in the city police station's lock-up. The case is currently before the court.
  19. Two matriculation students were allegedly beaten up by an ASI and confined in a cell for several hours on April 1 in Okara. They were released the next day following the intervention of the city circle DSP. According to reports, Farhan Saeed, together with his cousin, went to a market where B-division police ASI Ghulam Mustafa stopped them. He took both of them to the police station where he, along with the moharrar (a record officer at police station), beat them up and detained them. On receiving information concerning this, Dr. Robina Saeed – Farhan's mother - contacted the city DSP, Syed Nazim Shah, who ordered their release. The families have applied for the registration of a case against the ASI and the moharrar. B-Division SHO Malik Tariq Awan said an inquiry had been ordered against the policemen. A case was registered against the ASI under section 342 PPC based on a report produced by advocate Naeem Iqbal. The ASI has been suspended from office and a case is currently before the courts. AHRC is again concerned that this person will not truly be brought to justice, due to the culture of impunity that prevails in the country.
  20. A petition was moved in the Sindh High Court on March 30, 2006 by Ms Zahida Leghari alleging that her 23-year-old son, Affan Leghari, was picked up by personnel of a law enforcement agency from his residence in Gulzar-i-Hijri on

October 30, 2004 on suspicion of having links with extremist religious groups. He had not been seen or heard from since. He had not been produced before a magistrate and no case had been registered against him in any police station. The police and other provincial agencies denied having arrested Affan Leghari. The court asked a federal attorney to obtain information from the federal agencies through the relevant ministry. Affan Leghari's whereabouts remain unknown. The Attorney General has reportedly released a statement claiming that he is not being held by any government agency. The High Court has reportedly ordered an enquiry into the involvement of the military, and the case remains open before the court.

21. The Hajipura police in Sialkot allegedly tortured a youth on March 28 for having demanded that members of the police return valuables that they had taken from him. Reports indicate that Muhammad Jamil of Shahabpura locality told Sialkot District Police Officer (DPO), Dr. Tariq Khokhar, that Hajipura policemen intercepted his nephew, Muhammad Tayyab Younas, and his two friends and snatched their cell phones. He said that when they demanded that they be returned, SI Fyaz Cheema and Constable Muhammad Ilyas took Tayyab Younas to the Model Hajipura police station where they tortured him. He said the youth fell unconscious and the accused police officials threw him into fields, believing him to be dead. He said the police also implicated him in fake theft and dacoity (robbery) cases. The victim was admitted to the local District Headquarters hospital where his condition was deemed as being critical. Taking note of the incident, the DPO ordered a probe against the accused officials, following which it is reported that policemen have been arrested on charges of torture, lodging a false case and attempted murder.
22. The Hajipura police in Sialkot have failed to arrest eight officials who were allegedly involved in the custodial death of 22 year-old Shah Muhammad. Reports stated that ASIs Gulzar Rana, Nawaz Tiwana and six other constables from the Hajipura police station had arrested Shah Muhammad from his house at Jandar Bazaar in late February for his alleged involvement in a dacoity (robbery) incident. The police officials had tortured him to death. The medical report confirmed the torture as well. They have since reportedly been arrested, but again there are fears that they will not be brought to justice for Shah Muhammad's death.
23. Four policemen were arrested on March 22 for allegedly torturing to death an aged storekeeper from a private company who was in their custody. Reports said 10 armed bandits allegedly took away electric appliances, from the warehouse of the company. Sahiwal police registered a case against the company sales manager and his six alleged accomplices, and took the storekeeper, Abdul Hameed, into custody for investigation. The storekeeper, who arrested at about 2 am on March 22, was allegedly subjected to torture by the police during the investigation. He was taken to the District Headquarters hospital in a critical condition and later died. The city police registered a case under section 302, 304, of the Pakistan

- Penal Code (PPC) against the following investigation cell officials: ASIs Bashir Ahmed and Masood Ahmed and Constables Muhammad Ashraf and Abdul Ghafoor. A medical board conducted Abdul Hameed's post-mortem and sent samples for analysis by the chemical examiner. The accused policemen claim his death was caused by heart failure. To date, no further progress has been recorded by the AHRC in this case.
24. Awais, a 16-year-old, was arrested from Beaconhouse School, Peshawar Road, by Investigation Officer Mian Afzal of Westridge Police Station on the request of the officer's friend, Naeem Siddique, and was tortured for six hours on March 21. Due to physical abuse, the child had to be hospitalized and treated for serious injuries. His eyesight was also badly affected. The police said that Awais had had an argument with Naeem Siddique, the owner of an Internet cafe the week before. The owner of the Internet cafe, with the help of the SHO of Westridge police station, submitted a fictitious application with the police against Awais. Taking action on this application, the police kept him in detention for six hours and tortured him in front of the complainant.
  25. Six police officials including: SI Mehmood Mustafa, ASI Muhammad Ahmad, ASI Muhammad Nazir and Constables Akbar Ali, Muhammad Rafi, Maqsood Ahmad and Zulfiqar were suspended on February 28. They were found guilty in an inquiry of Faqeer Hussain who was killed while in police custody in the premises of Model Town Courts. No further action has been taken against these persons as yet, according to latest reports.
  26. A resident of Goth Darya Khan Talpur, Matiari district has claimed that the Hala police have illegally detaining his brother. Ghulam Nabi Solangi, the son of Mitho Solangi, alleged that police had arrested his brother, Ali Anwar, on February 22, 2006. He said that his brother was being subjected to torture and that when he and others met Hala police station SHO Allan Abbassi and ASI Mir Haider Talpur, they first denied the arrest but, following the intervention of some people in Hala, the police allowed him to meet his brother. He said marks of torture were visible on his body. He complained that his brother had not been produced before any court.
  27. Two policemen were arrested on charges of unintentional murder after 25 year-old Asif Imdad, who had been arrested late in the night on February 24, died in the Manghopir police lockup on February 25. Police said Asif Imdad, was picked up from a shantytown in Manghopir allegedly for possession of drugs. He was arrested and taken to the police station where his condition deteriorated and he died. However, the City Police chief said that he had been tortured and that police officials had arrested him then subjected him to torture at the lockup. Doctors confirmed the torture after a post-mortem.
  28. 22 year-old Shah Muhammad was picked up from his house in Jandar Bazaar by Hajipura ASIs Rana Gulzar, Nawaz Tiwana and six constables, for his alleged

- involvement in a dacoity (robbery) case. They kept the accused in a torture cell, where he died on February 24. Later, the police handed over his body to his family. A large number of people staged a protest against the policemen. The officer has been arrested, but no further progress has been witnessed since.
29. Larkana DIG Akhtar Hassan Gorchani on February 6 ordered an inquiry into the custodial death of Abdul Ghaffar Shaikh. The deceased had been arrested by Jacobabad police for allegedly kidnapping and killing a boy. No further progress has been witnessed, according to latest reports.

### **Police encounters, or how to get away with murder**

"Police encounters" is a term used to justify extra-judicial killings by the police. These often result from cases of illegal detention, torture and extortion. In 2006, 415 people are reported as having been killed in police encounters.

On July 15, 2006, the Lyari Task Force police buried a young man named Rasool Bux Brohi and claimed that he was a highway robber. The police claimed that they had killed a notorious robber, Mashooq Brohi, in an encounter. However, Rasool Bux's family, on seeing his photograph in newspapers, identified him as being their son, Rasool Bux Brohi, not Mashooq Brohi. His parents said that he had been missing for many days after having come from the southern province of Balochistan. The victim's family, newspapers and members of civil society organisations protested about the fake police encounters, after which the body was exhumed and several torture marks were found on it. Rasool Bux Brohi's brother, who was travelling with the deceased, told reporters that the police had arrested him after returning from Balochistan for not paying them bribes. After several days, and the intervention of the Supreme Court of Pakistan the Lyari Task force police officers were arrested and are currently in prison. The case is still in court.

Please also see the following, taken from AHRC urgent appeal UA-237-2006,<sup>109</sup> about another case of "police encounter".

The Asian Human Rights Commission (AHRC) received information about a killing of a 14-year-old boy named Salman and the serious injuries to a 15-year-old boy named Asqhar by the Muslim Town police and the Sepoy [ordinary policemen] of the elite force stationed near the police picket at Wahdat road, Lahore City, Punjab, Pakistan on July 8, 2006. The police fired randomly at the boys and later allegedly concocted a story about the incident in order to pass it off as a police encounter. The police claim that the boys were armed and shot at the police. The officers then claim that they responded by firing back at the boys. However, according to eye-witnesses, the boys were not armed. Meanwhile, an inquiry has begun looking into the incident and a murder case has been registered against the Sepoy. However, no charges have been filed against the Station House Officer (SHO) of the Muslim Town police station, who ordered the shooting, or any other Muslim Town police officers responsible for the incident. Salman is the latest

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<sup>109</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1855/>

victim of extrajudicial killings in Lahore. According to a local report, during the first half of 2006, more than thirty persons in Lahore alone were allegedly killed by the police in custody on January 16. The deceased had been arrested on suspicion of stealing a car when he was driving his brother's car in Chitral bazaar.

The police took him to a cell, where, according to the father of the young man, he was tortured. It has been learnt that when Habibur Rehman was produced before the judicial magistrate, his condition was critical, and the court ordered that he be sent to jail. The police had been trying to keep him under their custody, but the judge reportedly ordered him to instead be sent to jail, for his protection from these officers.

However, the police took him to the district headquarters hospital, after realizing how serious his condition was. Despite this, he died in hospital. The doctor on duty said the deceased was in shock and was in a critical condition when he was brought to the hospital.

### **Proxy torture – the outsourcing of pain**

After 9/11 a new reality concerning the use of torture has been introduced, in which countries that do not wish to be seen to be engaging in the practice torture get other, less image-conscious countries conduct the torture for them and extract information before returning these persons to the source country. We refer to this as “proxy torture”. Pakistan is one such country. State-agents carry out the torture themselves on behalf of others – notably the United States – or foreign intelligence and other officials are allowed to use Pakistan as a base to conduct torture.

Article 4 of the Constitution of Pakistan provides that "to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being in Pakistan". These words must become a reality, including in the context of the "War on Terror". According to a report of Human Rights Watch, U.S. FBI agents operating in Pakistan repeatedly interrogated and threatened two U.S. citizens.<sup>110</sup>

### **Discrimination against women**

Despite claims to the contrary from the Pakistani authorities, the state of women's human rights in the country remains atrocious. Women in Pakistan are still under harsh conditions, customs and laws in the country. According to NGO Lawyers on Human Rights, in Pakistan, from 2000 to 2006, 9379 women were killed, 117 women were killed after rape, 3116 cases of rape were reported, 1260 women were gang raped, 4572 cases of honour killings were reported, and 1503 women were burned to death. The role of the State and its law enforcement agencies, particularly the police, ensure that protection of women's right is not ensured and fail to apply due diligence. The country runs a dual

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<sup>110</sup> <http://hrw.org/english/docs/2005/05/24/pakist11005.htm>



justice system which results in human rights violations. Although the Jirga (a parallel judicial system) has been declared as being unconstitutional by the country's Supreme Court and the Sindh High Court, the authorities have not taken steps to abolish this system and, in several cases, ministers and chief ministers have attended Jirga proceedings.

Women are severely victimised under the Jirga system. Men are effectively allowed to get away with raping women as part of revenge on members of these women's families. Under the Hudood Law in particular, women's rights are systematically violated; this law discriminates against women in numerous ways. For example, a woman who has been raped requires four Muslim male eye-witnesses to testify that she was being raped in order to have her complaint considered and prove her case. If a woman cannot produce four eye-witnesses when making such a complaint, she risks receiving punishment for adultery, which can include lengthy prison terms.

### **Rape cases**

In Pakistan, a vast number of cases of rape and sexual assaults are recorded every year. During 2006, more than 200 cases of rape and sexual assaults were reported, however the State has failed to protect the victims and the perpetrators enjoy impunity for their acts. In many incidents, the cases are unreported as they are considered as "dishonourable" for women as well as their entire families. Many cases are sidelined by the police, who generally ensure that the rich and influential are above the law; when such persons are involved in such crimes, the police, including high officials, refuse to lodge First Information Reports (FIR), which are necessary for cases to proceed.

Some examples of cases taken up by the AHRC as urgent appeals follow:

### **Urgent Appeal UA-297-2006<sup>111</sup>**

The Asian Human Rights Commission (AHRC) writes to inform you about the alleged kidnapping of a girl named Ghazala Shaheen and her mother who were abducted from their house at 1:00 am by the henchmen of Mr. Raza Hayat Heraj who is the Minister of State on Law, Parliamentary Affairs and Human Rights and Punjab province police of the Khanewal district on 25 August 2006. The victims were only freed after local villagers took action and stormed a house, while detaining the perpetrators on September 5.

The father of the girl was also so severely beaten by the minister's men that he could not move for two days. The girl, who has completed her Masters in Education from Baha uddin Zakarya University, Multan in Punjab province, and her mother are feared by the father that they will soon be killed once they have reported the case to the police. Local human rights organisations also fear that the kidnapped women have been subjected to

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<sup>111</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1955/>

torture in their confinement since the perpetrators are previously known to have committed rape and torture to other women in the past.

The police first refused to register the case after the arrest of one of the accused by local people who secured the release of the daughter and mother from the abductors. The police are not pursuing this case further because the minister himself and his men are involved. The police officials of the Saddar police station, Kabirwala raided the house where the women were kept and announced that there is no person inside, but the people including activists of human rights groups chased a car that the accused persons were escaping with the victims and caught three persons and handed them over to the police. The police then arrested one person and released the two other accused. Among them one was the guard of the said minister. The deputy Inspector of Police Multan range and Deputy Superintendent of Police Kabirwala Circle have also been threatening the victims, the girl and her mother, as well as the two relatives of the victims who helped catch the accused persons for dire consequences including threats to their life.

### **Urgent Appeal UP-188-2006<sup>112</sup>**

The Asian Human rights Commission has received updated information regarding systemic and constant threats and intimidation by the police and local district administration against two gang rape victims (a mother and daughter) belonging to the lower caste Batti community, who were allegedly abducted and raped by the Kabirwala police and henchmen of the Federal State Minister for Law, Parliamentary Affairs and Human Rights Mr Raza Hayat Heraj. (To see details, please go: UA-297-2006<sup>113</sup> and UP-179-2006<sup>114</sup>)

According to the latest information we have received from a reliable source, the main alleged rapists (as well as abductors) walk free in the area under the protection of Deputy Superintendent of Police (DSP) of Kabirwala Mr. Daud Hasnain, who is providing immunity to them. Meanwhile, the victim was terminated from the Sun Beam School, where she worked as a teacher without any valid reason. It is alleged that the concerned federal state minister and the local administration of Khanewal influenced her termination.

The AHRC was also informed that the DSP Mr. Daud Hasnain, who allegedly aided the escape of the alleged perpetrators during the raid on the house, where the victims were kept and raped over a period of 12 days on September 5, is still manipulating the story of the incident. He also replaced the Station Head Officer (SHO) of Saddar police station with Sub Inspector Mr. Abrar Gujjar who is the relative of Mr. Mohammad Nawaz, the main perpetrator and henchmen of the minister.

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<sup>112</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1999/>

<sup>113</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1955/>

<sup>114</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1969/>

## **Urgent Appeal UA-199-2006<sup>115</sup>**

The 17-year-old victim (whose name we withhold) was kidnapped on 6 June 2006. It is alleged that she was taken from her neighbourhood while on her way to perform a religious duty, in the car of the advisor to the Chief Minister of Sindh, Mr. Imam Din Shouquin. The time of kidnapping was 3.30pm and the car used was blue. When the car approached the victim two persons confronted the victim and overpowered her by using an unknown chemical which caused her to lose consciousness. When the victim regained consciousness some time later she found that she had been taken to an unknown place and placed in a room with six intoxicated men. She was then raped by all the men present.

At 10pm that evening the victim was dropped off at a location nearby to the village of Allahyar. When she reached her home her father and brother took her to the Tando Adam Police Station to register a case against the suspects. However, the duty officer at the police station refused to lodge a case after learning that the suspects were affiliated with the ruling parties such as the MQM, the Pakistan Muslim League Functional and Jeay Sindh.

The following day the victim and her family returned to the police station and met with the station house officer (SHO). The SHO agreed to lodge a case but upon learning that the suspects were politically connected, he said he would only do this once he conducted investigations into the allegations. In doing so, the SHO was delaying the arrest of the suspects and giving them time to devise an alibi for their whereabouts at the time of the crime. The SHO then asked the victim to return the following day so that he could issue a letter for a medical examination of her.

When they returned the following day the SHO informed them that he would only issue the letter if they promised to register the case against only several of the suspects. If, however, the victim wished to pursue all of the suspects, then the SHO said he would not help her. It was only when the victim's family threatened to take the matter to the press and human rights organizations that the police finally registered a case on June 9. However, the case was lodged naming only Khan Chan, Ismail and Israr and had failed to include Ayub Khos, Sanaullah and another person who were also involved in the crime.

The victim was taken for a medical examination at Taluka Tando Adam Hospital on June 10. Though a case was filed, to date no medical examination report has been issued and no arrests have been made.

The victim and her family have begun a hunger strike in front of the Hyderabad Press Club against the police and the political parties whose workers are involved in the rape case. No arrests have yet been made.

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<sup>115</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1800/>

## **Urgent Appeal UA-230-2006<sup>116</sup>**

The Asian Human Rights Commission (AHRC) has received information that a blind beggar's 19-year-old daughter was gang raped by three influential men for several months. Upon knowing her pregnancy, they forcibly poisoned her and killed the three-month-old fetus. Meanwhile, the police refused to protect the victim and pressed charges against her family to force the victim to withdraw her complaints against the perpetrators.

Miss. RP (the name is withheld to protect the victim's identity), the 19 year-old daughter of a blind beggar, was gang raped at gunpoint by three men about three to four months ago when she was harvesting alone on a corn farm in Goth Dur Mohammad Phawarh, Ghotki district, Sindh province, Pakistan. The three culprits named Saad Ullah (alias Soodho Phawrh), Usman Phawarh, and Abdul Karim Phawarh beat her as she cried for help. They fastened her mouth with a piece of cloth at gunpoint and all three took turns raping her. Furthermore, they threatened to kill her if the assault was reported.

Two days later, the perpetrators returned to her house knowing that most people would be away at work. They stripped her, forced her to dance, tortured her, and burned her with cigarettes before they tied her up to rape her again. Since the three men were influential landlords with strong connections and support from the local police force, they threatened that they would make sure her entire family got life sentences if she told anyone about the attack. Her fear silenced her as the rape continued daily until she was three-month pregnant.

The victim's mother told her husband about the incident and they lodged a report to the Ghotki police and subsequently a case of rape was filed on 26 June 2006 against Saad Ullah, Usman Phawarh and Abdul Karim with the Ghotki police station. But the Ghotki police delayed their response in arresting the culprits and only arrested Saad Ullah and Usman but not Abdul Karim, as he allegedly had good connections with the police. The arrests of the two men were also made only after the intervention of local journalists.

After the local hospital confirmed her pregnancy, the culprits allegedly attempted to kill the victim and her fetus. On 3 July 2006, some armed men, two of which identified themselves as police officers, attacked the victim's entire family and forced poison down her throat. They threatened the family saying that if they went to the hospital, they would attack the family again. The victim was then hospitalized at Taulaqa hospital Ghotki some hours later and luckily survived with the help of Dr. Salma, but the 3 month-old fetus was dead. During her stay in the hospital, the Ghotki police allegedly forced the hospital to release her a week early from medical care. The victim's condition still remains serious.

A case of attack was registered against local gangsters namely Ghulam Nabi Aandal, Hazoor Bux Phawarh, Yaqoob Phawarh, Sohno Phawarh, Abdullah Phawarh and Mehboob Phawarh. But no one has yet been arrested. Meanwhile, in order to pressure the family to drop charges, the rapists simultaneously filed a petty case suit for fighting in the

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<sup>116</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1846/>

Sarhad police station against the victim's blind father Allah Rukhyo, her two brothers Abdul Haleem and Abdul Jabbar, as well as her uncles Basheer Ahmed, Ali Mohammad, Ghulam Nabi, and Abdul Wahab Phawarh. Subsequently, three of the victim's family members have been arrested by the police.

### **Attempted rape of university student**

A student of law was the victim of an alleged attempted rape by the staff of University of Karachi, but the university's authorities only terminated their employment after significant pressure from AHRC and other groups. However, a case has not been registered with the police. Please see UA-258-2006<sup>117</sup> and UP-172-2006<sup>118</sup> for further details.

### **The Women's Rights Bill**

In the third week of November 2006, Pakistan's Parliament passed a Women Rights Bill to replace the "Hudood" ordinance. This has been welcomed as a means through which the rights of women will be better protected, notably in cases of rape, gang rape, and concerning the law on witnesses. However, the draconian Hudood ordinance has not been abolished and other harsh laws that discriminate against women have been kept in order to appease religious fundamentalists and extremists. Although this bill is progressive in comparison to previous ones, it cannot resolve the question of women's rights in general. Through the new Bill, the government has amended one of four laws in the Hudood ordinance, with three laws remaining intact. According to these remaining elements, if a woman is arrested for theft of an amount equivalent to only 4.4 grams of gold, her right hand will be amputated for the first theft, with her left leg being amputated for any second such theft. Furthermore, under the Hudood ordinance, a victim of rape had to produce four eye-witnesses to prove she had been raped, while under the new Bill she now needs two eye-witnesses. While this is a statistical improvement, it remains a serious concern in terms of women's rights.

### **Conditions of detention for women**

The detention conditions for women in Pakistan's jails are deplorable. Women who are under trial for adultery cases or rape remain in detention for lengthy periods and suffer further physical and sexual abuses while in detention. Many women have been forced to give birth in prison while awaiting bail. Women's prisons are overcrowded: for example, Hyderabad Jail in Sindh province has a 150 person capacity, but 820 women are being detained there. In Sukkur jail, 190 women are being held despite the jail having a 100-person capacity, while in Lahore jail 200 women are being kept in a prison meant for a maximum of 120 persons.

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<sup>117</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1889/>

<sup>118</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1945/>

## Minorities

According to the government, of Pakistan's population, 77% are Sunni Muslim, 20% are Shi'a Muslim, 1.5% are Christian and 1.5% are Ahmadis, Hindus, Zikris or others.

The Ahmadi sect is a religious minority that considers itself to be the purest form of Islam, but which has been persecuted as a non-Muslim group by Pakistan's Islamic government, which declared the sect as being "beyond the faith" – or as being non-Muslims - in a constitutional amendment 30 years ago. A Pakistani political party, the Muttahida Majlis-e-Amal (MMA), has filed a motion demanding a debate on the government's deletion of religious information from electronic passports, claiming that the removal was an Ahmadi conspiracy to circumvent a ban on non-Muslims entering Mecca. Furthermore, a Pakistani man, and recent convert to the Ahmedi sect, has been sentenced to life imprisonment for "being disrespectful to the Prophet Muhammad" under the country's draconian blasphemy laws, which Amnesty International has described as "so vaguely formulated that they encourage, and in fact invite, the persecution of religious minorities or non-conforming members of Muslim majority."<sup>119</sup>

In 1984, clause 295-C of the Pakistan Penal Code came into force – it is usually referred to as the blasphemy law. It rather sweepingly stipulates that "derogatory remarks, etc., in respect of the Holy Prophet . . . either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly . . . shall be punished with death, or imprisonment for life, and shall also be liable to fine." Six years later, the stakes were raised when the Federal Sharia Court, where cases having to do with Islamic issues tend to be heard, ruled, "The penalty for contempt of the Holy Prophet . . . is death and nothing else." So far, none of the convicted has been executed, in part because scheduling an execution can take years. But lynch mobs have killed several of the accused.<sup>120</sup>

In 2006, religious minorities in Pakistan faced another harsh year in terms of the enjoyment of their basic human rights. They were not allowed to freely perform their religious rights not only by Islamic extremist elements, but also by the State, which totally failed to protect this right and their lives. The police have been working under pressure from extremist elements. The use of blasphemy law has been the easiest method to victimise members of religious minorities, particularly Hindus, Christians and the Ahmadi communities. Several Christians were charged under the blasphemy laws, and, having been accused of burning copies of the Quran, were arrested, tortured and even sentenced to life imprisonment or death. Members of the Christian community in several cities, including Karachi, Faisalabad, Multan, Bhawal Pur, Sanghar and Jhang, have had to leave their houses because of a lack of protection from the government.

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<sup>119</sup> <http://www.religioustolerance.org> and [www.amnesty.org](http://www.amnesty.org)

<sup>120</sup> Pakistan's Blasphemy Law: Words Fail Me by AKBAR S. AHMED, The Washington Post, May 19, 2002

The minority that has suffered the most discrimination is the Ahmadi sect of Islam, which was declared a minority in 1974. They are not even allowed to live in the same neighbourhood as other Muslims. The bodies of deceased Ahmadis have been transferred from general Muslim graveyards and their mosques have been demolished. The police are working at the behest of extremists in carrying out such activities.

There are reports of the forceful conversion to Islam of Christian girls after they have been kidnapped and married under threats that their families will be killed. According to Bishop Ashaar Kamran, speaking at a protest rally on November 20, 2006, more than 350 Christian women have been kidnapped and forcibly married, and the husbands divorced most of the women shortly after their marriage, according to the "Dawn" newspaper, which quoted the leader of the Methodist Church in Multan City.

One recent incident involved a mother of five who had been kidnapped, according to the media report. Although the case had been reported to the police, no action had been taken. He called on the district government to take steps to prevent further similar cases. Other church leaders and local politicians also took part in the rally.

Some other examples of violations of minority members' rights and the use and abuse of the blasphemy law follow:

### **Urgent Appeal UA-196-2006<sup>121</sup>**

Under-trial prisoner, Mr. Abdul Sattar Gopang, was stabbed on 16 June 2006 while in the premises of the District and Session Court of Muzaffargarh. This, it is alleged, was carried out by five interns of seminary, on the orders of seminary head, Mr. Maulana Abdul Rasheed. The five attackers continued to stab the prisoner until they were certain of his death. Two policemen who tried to overpower the attackers were injured. Despite there being hundreds of policemen present at the time, none were able to capture the culprits. It was only with the intervention of bystanders that two of the attackers were captured and handed over to the police.

Mr. Gopang was a contractor of Octroi (toll tax) and worked as a collector for the union council in Jatoi town, Muzaffar Garh. Mr. Rasheed, in charge of the seminary and the office bearer of Alami Majlis Tauhafuz-e-Khatme-e Nabuwat had not been paying his toll tax and had verbally threatened Mr. Gopang when asked to do so. On March 13 Mr. Rasheed again refused to pay the toll tax and immediately went to the police and filed a case of blasphemy against Mr. Gopang. However, there was no basis to this accusation and Mr. Rasheed knew that Mr. Gopang would be released in a matter of days. He therefore began telling local men that they would go to heaven if they killed this man for having committed blasphemy.

The AHRC is deeply alarmed at the continual abuse of the Blasphemy Laws (295-B, 295-C, 298-B, and 298-C) present in the Constitution of Pakistan against innocent individuals.

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<sup>121</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/2021/>



This is happening largely because of the ready acceptance of blasphemy-related accusations. These acts are continually being carried out and illustrate an utter disrespect for people, their rights and their fundamental freedoms. Intervention is therefore essential so that this grave crime can be brought to an end.

Please also see UG-017-2006<sup>122</sup> concerning the State's behaviour in two separate incidents against members of the Ahmadi sect in Punjab province, Pakistan. In one case, the Daily Al-Fazal, which is run by Ahmadi sect, was banned by the Punjab government for disseminating "hate-literature." In another case, about 100 Ahmadis from Jhando Sahi village in Daska fled their homes due to a mob attack. The police were allegedly present but did not take any action against the attackers. Members of the Ahmadi sect have been persecuted after being declared as a non-Muslim group through a constitutional amendment 30 years ago.

In one incident, the government of Punjab Province banned a nearly-century-old newspaper, the Daily Al-Fazal, which was published by members of the Ahmadi sect and raided its office in Chenabnagar, Chiniot District, Punjab, on September 10, 2006. Chenab Nagar (Rabwah) police raided the newspaper office, arrested the printer, Mr. Sultan Dogar, and a journalist, Mr. Abdul Sattar Khan, and lodged cases against them under Sections 298B and 298C of the Pakistan Penal Code, Section 16 of the Maintenance of Public Order (MPO) and Section 9 the Anti Terrorism Act (ATA). The police also confiscated all the publications and sealed the offices. Mr. Khan was later released but Mr. Dogar is still in detention.

The Daily Al-Fazal was founded in 1911, and is one of the oldest newspapers in Pakistan. No previous ban had been imposed until this incident. According to Deputy Superintendent of Police (DSP) Saeed Tatla, the raid was a part of the government's campaign to confiscate religious "hate-literature."

According to the First Information Report (FIR), the police accused the newspaper of preaching Qadiyani beliefs and describing Ahmadis as Muslims, which is against the law. According to the local newspaper report, Inspector Muhammad Yasir, the Station House Officer (SHO) of Chenab Nagar police, said that the Punjab Additional Inspector General (Operations) had ordered them to confiscate four issues of Al-Fazal and take action against the editor, printer and publisher of the newspaper. The police reportedly conducted several raids on different houses to arrest the editor and the publisher but failed to arrest them at that time. During the raids, the police allegedly illegally detained some of the editor's relatives.

In another incident, a mob attacked Ahmadi residents in Jhando Sahi village in Daska, near Sialkot district, Punjab province on June 24, 2006, after allegations of the desecration of the Holy Quran. The incident was used as propaganda by the media in a report that stated that Ahmadi men were seen burning pages of the Quran in public. The report was published in Punjab province three times in one week. The police arrested the accused Ahmadis but the mob got together and started burning houses, shops and

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<sup>122</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1983/>



vehicles of Ahmadis in Jhando Sahi village. It is alleged that prior to the incident, Muslim clerics had encouraged a mob attack, announcing through the mosques that non-Muslims should not be allowed to live among the Muslims.

Two Ahmadis were reportedly injured and about 100 Ahmadi villagers fled their homes, where they had been living for the last 60 years. The police were present during this attack but reportedly did not take any action against the attackers. It is also alleged that the police also refused to record the complaints made by Ahmadi villagers regarding the incident. Subsequently, no proper investigations have been launched into the case.

### **Hindu temple forcibly converted into Islamic place of worship**

The recent repression of Hindu religious minorities by Muslim extremists in Karachi, Sindh province, Pakistan is also of serious concern. In particular, the local police have not only refused to record the complaints made by victims and launch investigations into the incident, but have also actively collaborated with alleged perpetrators of these crimes. No action has yet been taken by the Sindh provincial or Pakistan federal governments to correct this matter.

There is a century-old residential compound of the Hindu community in Lyari town of Karachi, Sindh province, which was constructed in 1901, and in which more than 100 houses of the Hindu community are located along with the Shiv Mander temple. This compound is exclusively earmarked for Hindus by the government of Sindh province under the Evacuee Property Act 1957. This Evacuee Property Act was produced in order to permit the transferral of property for Hindu and Muslim people who migrated to India and Pakistan following Pakistan's independence from India. The Hindu residents of the compound are paying rent to Pakistan's government under a 1958 agreement, which is administered under the auspices of the Evacuee Property Act 1957. The Act prohibits a person(s) who was granted land, from selling it.

However, with the help of Baghdadi police in Kakri Ground, Lyari town, land-grabbers have been forcibly evicting residents from this compound. As a result, only 35 families are left. Muslim extremists and the Baghdadi police are also allegedly forcing the Hindu residents to sign residential documents that subsequently give the right to the use of the land to the land-grabbers, in exchange for paltry sums of money.

In July and August 2006, a local minority seat Union Council member named Mr. Aanwal Das, who resides in the same compound, was threatened several times by the Baghdadi police and Muslim extremists to vacate the compound of its Hindu community. He contacted the higher authorities, including the Chief Minister of Sindh province, several times about the forced eviction of the community, but his efforts were in vain. To date, no action has been taken by any of the local government's authorities to address this matter.

Beside this, the Baghdadi police reportedly allow Muslims to slaughter cows inside the compound's walls, which insults the Hindu religion and scares the community. The police have also taken over the Shiv Mander temple and transformed it into a place for Muslim worship. Furthermore, whenever there are any Hindu religious ceremonies inside the compound, such as Holy, Deewali, Janam Ashtmi or the birthday of Shiva Jee, Muslim extremists throw stones and filth to stop the functions and the police take no action to stop these acts.

The AHRC has also been informed that several Hindu girls have reportedly been raped within the afore-mentioned compound, but the Baghdadi police showed no willingness to register the cases. For example, in April 2006, the Baghdadi police received a complaint regarding the kidnapping and rape of a Hindu girl, allegedly by a Muslim man named Javed Qasai. However, instead of arresting him, the police forced the girl's family to settle the matter with the perpetrator and allowed him to leave the compound freely.

### **Forced conversions to Islam of Hindu girls**

Forced conversions of religious minorities to Islam occur at the hands of various groups, notably religious fundamentalist groups, in the country. Several human rights groups have highlighted the increased phenomenon of Hindu girls, particularly in Karachi, Sindh province, being kidnapped and forced to convert to Islam. The government of Pakistan's action to stem the problems is inadequate. In fact, these incidents are taking place with the help of the country's local administrations. According to the All Pakistan Minority Alliance, some 25 girls from the Hindu community have allegedly been forced to convert to Islam in the province of Sindh in 2006. The method of choice to convert the abducted girls is to have them marry members of the Muslim community.

In one case, 3 daughters - Rina (aged 20), Oosha (aged 25) and Reema (aged 17) - of a Hindu couple residing in the Punjab Colony, Karachi, Sindh province, disappeared on 18 October 2005. After lodging an inquiry with the local police, the couple discovered that their daughters had been abducted by Muslim extremists, taken to a local madrassah (religious seminary) where they were converted to Islam.

However, the Frere police refused to register the case of abduction lodged by the parents. On 22 October 2005, with the efforts of Mr. Javed Burqi, an advocate of a local human rights organization named the Human Rights Commission of Pakistan, the father of the kidnapped girls had his case finally registered with the police as First Information Report (FIR) no. 144/2005. However, since the alleged kidnappers Mr. Jahan Zeb, Mr. Faisal and Mr. Abid had connections with the police, they had secured bail before they were even arrested and therefore were never taken into custody.

The three kidnapped girls were later forced to marry their kidnappers at a seminary called the Darul Uftad Binori. The parents were not allowed to meet their daughters. On 3 November 2005, the Judicial Magistrate South 4, Karachi ordered the Frere police to arrange a meeting between the parents and their children. The police were then allegedly

threatened by the seminary administration to desist from such actions. Mr. Javed Burqi once again filed an application of contempt of court and, on November 10, the court ordered the police to arrange the meeting or be held in contempt of court.

On 11 November 2005, the parents were allowed to meet their daughters for one hour at the Darul Uftad Binori seminary. However, when Mr. Sono and his wife went to see their daughters at the seminary with the police, the whole area was cordoned off by the seminary's armed guards, and the parents were provoked by the armed officials. The meeting was allowed for only 15 minutes, which was held under the watchful eye of 5 male and 1 female officers from the seminary and 5 policemen. At no time were the daughters allowed to talk separately with their parents. Since then, the whereabouts of the three forcibly converted women remains unknown and the police have not made any attempt to find these girls and arrest the perpetrators.

The authorities have still not inquired into these incidents, even though Hindu religious minority groups and human rights organisations have lodged several complaints. The AHRC observed that continued serious forms of discrimination and attacks against religious minorities in Pakistan are being allowed to take place due to direct collaboration with the alleged perpetrators or inaction by members of the police and local administrations. Alongside the Hindu minority, other religious minorities are being targeted with serious attacks (please refer our appeal on the recent suppression of members of Ahmadi sect of Islam in Punjab province above and in UG-017-2006<sup>123</sup>).

The above are only examples of how the blasphemy law has been abused for fundamentally malicious purposes by clerics and religious seminaries, with the collusion of the police. Owing to the nexus between area clerics and the police, together with the State's policy of promoting religious fervour and intolerance, the police are being overly receptive to and influenced by accusations made by religious persons, despite knowing that they may have no merit.

### **One Christian and one Muslim charged with Blasphemy**

On 31 August 2006, a doctor named Mr. Arshad Mehmood Khan hired Shahid Masih's brother, Mr. Farooq Masih, to whitewash his clinic, which is located at Chak no. 208, Abid Shaheed road, Madina town, Faisalabad, Punjab province, Pakistan. The doctor later complained to Farooq that his younger brother Shahid stole some medicines from his clinic. However he could not provide sufficient evidence to prove this.

Dr. Arshad went to the Saddar police station in Faisalabad on September 1 and attempted to register a theft case against Shahid and a Muslim watchman, Mr. Mohammad Ghaffar, which the police refused to accept due to lack of evidence. After several attempts, Dr. Arshad, allegedly on the advice of Saddar police, finally lodged a false case against the two men under sections 295 (B) and 308 of Pakistan Penal Code (PPC), known as the

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<sup>123</sup> <http://www.ahrchk.net/ua/mainfile.php/2006/1983/>

blasphemy law. In Pakistan, this is the easiest way to book any member of a religious minority.

On September 10, Dr. Arshad lodged a written complaint based a fabricated story to the Saddar police. In the complaint, he stated that when he came to his clinic on September 10, he found that a volume of a book - Tafseer Ibn-a-Qasser - which interprets different verses of the Holy Quran, was missing and only found its burnt cover. He also stated that he caught Mr. Mohammad Ghaffar, who confessed that he and Shahid burnt the pages. The Saddar police registered this false case under sections 295-B/ 308 of the PPC (reference number: FIR No. 1537/06).

Later the same day, Mr. Rana Umer Daraz, the then Station Head Officer (SHO) of the Saddar police, Assistant Sub Inspector (ASI) Zafar Iqbal, Police Constable (PC) No. 2980 Abdul Raouf, PC No. 4133 Mohammad Hayat and PC No. 2903 Munir Ahmed, arrested Shahid and Mohammad Ghaffar and severely tortured them.

Alongside this, after having heard the story fabricated by Dr. Arshad and the Saddar police, people in the area, who were from different mosques, attacked the houses of Shahid and Mohammad Ghaffar, and the families of both men had to flee their homes.

This case is in complete violation of the laws of Pakistan. According to Section 196 of the Criminal Procedure Code of Pakistan, a blasphemy case can be registered only after the competent authorities or a judicial magistrate reviews the case. In addition, there is no eyewitness to this case, which is required under sections 38, 39, 40, and 43 of the Law of Evidence.

The AHRC fears that there is a great possibility that the both falsely accused may be killed in prison as other prisoners are threatening to take revenge on them for insulting the Quran. Besides this, their families also have repeatedly been receiving death threats from local clerics.

## **Conclusions and Recommendations**

The human rights situation in Pakistan is worsening at present, notably due to the fact that the country is a front-line partner in “War against Terror,” which is resulting in the State ignoring many of its international obligations.

According to the Human Rights Commission of Pakistan, 900 torture cases were reported in 2004; 1100 cases were reported in 2005; and in 2006 the number had again risen to a total of 1319 torture cases. Disappearances, conducted by the military intelligence agencies and other law enforcement agencies following arrest, have reached an estimated 5000 persons since 2001. Such widespread disappearances were not known to have taken place before September 11, 2001, but now such actions are being undertaken on a large scale under the auspices of the so-called “War on Terror”. This practice is also being used in other cases, such as against political opponents to the military government. The

provinces of Sindh and Balochistan are the worst affected by the practice of disappearances, with the victims including nationalists and political activists.

The people of Pakistan are being victimised by their own armed forces, including the indiscriminate aerial bombardment of civilians and other violent military operations, forced disappearances, torture, and a lack of due diligence and protection by the State. The judiciary has become subservient to the military, and cannot provide remedies to victims. The judiciary has not even taken an oath on the Constitution of Pakistan since it was reinstated.

Pakistan is still under a State of Emergency, as the Parliament has not abolished the emergency which was imposed in 1998, as the result of which a great many fundamental rights have been suspended.

It must be recalled that, despite its tragic human rights record, Pakistan was elected as a member of the United Nations Human Rights Council in May 2006. The country has failed to ratify many of the most important international human rights instruments, and its inclusion in the Human Rights Council is continuing to discredit this body. Pakistan's powerful allies in the "War against Terror" have enabled it to become a member of the UN's supreme human rights body, but it has achieved this status on the back of numerous rights violations, rather than any credibility in the protection of such rights.

Pakistan has also earned millions of US Dollars in exchange for the arrests and transferal of "terrorists" to its allies as part of this "war". This was also disclosed by the President of Pakistan himself during a meeting with President of the United States. "Proxy Torture" has also been introduced – as part of this practice, alleged high profile terrorists are sent to Pakistan to be interrogated and tortured by the FBI and Pakistani officials.

The Province of Balochistan has been the stage of a crippling military operation since 2001, in which numerous violations of the Constitution of Pakistan and humanitarian and human rights laws have been perpetrated. Poverty is still on the increase during 2006, with an estimated 33% of the population living under the poverty line, according to the State Bank of Pakistan. Since September 11, 2001, Pakistan has received considerable foreign aid, but, due to non-transparency and corruption, most of these funds have not been used to assist the intended targets of this aid or to eradicate poverty.

## **Recommendations**

**The United Nations Human Rights Council should appoint a Special Rapporteur to monitor the human rights situation in Pakistan.**

**As a member of the United Nations Human Rights Council, Pakistan must ensure that it takes immediate actions to fulfil its pledge to the international community to uphold human rights to the highest standards. It should signal its intentions to correct its ways in this regard, by immediately beginning the process of ratification**

**of all major international human rights instruments, notably the International Convention on Civil and Political Rights (ICCPR), the Convention against Torture, the new International Convention for the Protection of All Persons from Enforced Disappearance.**

The government of Pakistan should also:

- **Locate the whereabouts of the thousands of persons that have been arrested then disappeared by State-agents;**
- **Ensure that custodial torture is abolished, by investigating all allegations of torture and bringing the perpetrators to justice;**
- **Abolish the State of Emergency in the country and restore and protect fundamental human rights;**
- **Halt military operations in Balochistan Province and Northern areas of the NWF Province;**
- **Repeal all ordinances and ensure that all laws that discriminate against are amended or removed;**
- **Ensure the rights of freedom of association and the formation and work without obstacle of trade unions;**
- **Halt all repressive against the media and journalists and ensure the freedoms of expression, speech and access to information;**
- **Protect the lives and livelihoods of the country's fisher-folk;**
- **Restore student unions, which have been banned since 1985;**
- **Implement the recommendations of 2004 Police Reform Commission.**



## **ASIAN HUMAN RIGHTS COMMISSION**

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### **PHILIPPINES: The Human Rights Situation in 2006**

#### ***Getting Away With Murder – Widespread extrajudicial killings combine with a defective system to ensure impunity and injustice***

With gross violations of human rights continuing unabated and avenues for seeking justice and redress completely lacking, the Philippine government's institutions are showing little sign of having the will or capacity to deliver justice. The human rights crisis in the country has worsened during 2006. There are numerous serious cases, in particular the shocking targeted extra-judicial killings of activists, enforced disappearance and torture, being documented almost daily. In fact, these gross violations have already become a subconsciously acceptable way of life for Filipinos. These rights violation cases only represent a fairly well-documented fraction of the reality of human rights – or the lack of – in the country.

While the government claims to have upheld human rights at home and abroad, in reality the victims of violations and their relatives are experiencing the complete opposite. The government's election to two of the United Nations main organs--the Human Rights Council and the Economic and Social Council (ECOSOC) in May and November respectively--does not exonerate the government from its bleak human rights records.<sup>124</sup> The victims have lost faith in the criminal justice system's vital pillars: the police, the prosecution and the judiciary. Should they file cases in court and with quasi-judicial bodies, expectations are low concerning the delivery of, adequate and prompt justice in most cases. While seeking justice these persons have no state-sponsored protection, no compensation,<sup>125</sup> among others. The perpetrators, on the other hand, enjoy total impunity.

What can victims expect from the Philippine National Police (PNP), when in fact they are not only entirely incapable of carrying out effective investigations, but some of their

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<sup>124</sup> AHRC Statement, AS-274-2006: Election of the Philippines to U.N. bodies does not exonerate its bleak human rights record, 4 November 2006

<sup>125</sup> AHRC statement, AS-250-2006: Witnesses and victims of extrajudicial killings and torture deserve protection and compensation too, 13 October 2006

members stand accused of having committed or being accomplices to these crimes. While the police are on occasion able to identify suspects, make arrests and file charges in court, the results of investigations are frequently being challenged or questioned by victims themselves. Police investigators likewise often make premature pronouncements as to the motive of the killings, and reject any suggestions from the victims' families that may be helpful in the investigation of the case. The police have also adopted a strange definition of what they consider as been solved cases. Even if the police's actions do not lead to the successful prosecution of the alleged perpetrators in court, and even if arrests of alleged perpetrators have not been made, they consider cases as being solved. Once the case is with the prosecutor, they reason, their job is done. What happens after that is someone else's business.

Acting on a defective and partial police investigation, the vital role of the Department of Justice's (DoJ) public prosecutors in examining the evidence submitted to is also undermined. Often, the burden of proof rests on the victims to deny the fabricated charges being laid against them by the police. In April, a labour leader who was allegedly ambushed by policemen was instead<sup>126</sup> charged with frustrated (attempted) murder. The prosecutors upheld the results of the police's investigations. In this case, the investigating policemen were colleagues with those accused of ambushing the labour leader.<sup>127</sup> How could any court of law then execute its functions with impartiality and fairness, given this flawed police investigation?

Not only in cases of violence against activists are the public prosecutors being accused of failing in their duties – they are also failing to look into complaints of torture, illegal detention and arrest allegedly perpetrated by policemen. In July, a public prosecutor recommended the filing of criminal charges against a torture victim, whose arrest resulted from a case of mistaken identity. The torture victim was denied his right to have his torture complaints investigated, was not provided with any rehabilitation, compensation and had to remain in jail.<sup>128</sup> In another case, one of the 12 torture victims who is thought to be at risk of being killed as the result of death threats is not being afforded protection. Although the prosecutor handling the case has been informed of his plight, no concrete action has been taken to secure his personal integrity. No further investigations were conducted to identify who is behind the plot to kill him.<sup>129</sup>

Although the government is a State-party to international human rights Covenants and Conventions, in particular the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), its actual implementation of the provisions enshrined within these instruments is derisory. Furthermore, the government has failed to implement most of the December 2003 concluding observations of the UN Human Rights Committee regarding the

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<sup>126</sup> AHRC statement, AS-250-2006: Witnesses and victims of extrajudicial killings and torture deserve protection and compensation too, 13 October 2006

<sup>127</sup> AHRC Urgent Appeals, UA-142-2006: Labour leader survives ambush by police in Imus, Cavite, 28 April 2006

<sup>128</sup> AHRC Urgent Appeals, UP-186-2006: Prosecutor failed to look into victim's torture claims; criminal charges of evidence taken by way of torture filed in court, 28 September 2006

<sup>129</sup> AHRC Urgent Appeals, UP-092-2006: Plot to kill torture victims in jail, 25 April 2006



ICCPR.<sup>130</sup> The unabated extra-judicial killings of activists, could have been prevented if not completely stopped had the government seriously addressed [the] “lack of appropriate measures to investigate crimes allegedly committed by State security forces and agents,” and had taken all necessary measures to improve the witness protection programme.

Amidst the crisis of human rights in the country, the role of the Commission on Human Rights of the Philippines (CHR) is being unnecessarily undermined. While the CHR is trying to carry out its functions to investigate, recommend the filing of cases and ensure the victims and their relatives are provided with compensation, despite limited human and financial resources, the government on the other hand has tried to isolate them. Instead of improving their work, President Gloria Macapagal-Arroyo issued an executive order creating another investigating body to supplant the CHR--the Melo Commission, a special panel tasked to look into the cases of extra-judicial killings. Retired Supreme Court Justice Jose Melo heads this body, which, to date, has failed to make any headway in the investigation of the rampant killings witnessed in the country.

The Melo Commission’s function is actually duplicating that of the CHR’s. Its power is also recommendatory concerning the filing of charges in proper courts. Unlike the CHR, which has a clear constitutional mandate, that ensure that it can grant immunity, guarantee protection and make use of contempt powers, the Melo Commission has none of these. As a result, the Melo Commission is duplicating investigations on cases that have already been investigated by the CHR. There are no shortages of cases in the Philippines, so this is truly wasteful. The government has in practice undermined the CHR, which runs contrary to the substance of its pledge to the UN General Assembly made in the run-up to the elections to the Human Rights Council. The government had promised to “Strengthen the independent National Human Rights Commission, which is a Constitutional body”.<sup>131</sup>

### **Widespread extra-judicial killings and their links to the military and police**

Since January 2006, 56 victims of extra-judicial killings were reported<sup>132</sup> by AHRC with source information coming from various human rights non-governmental organisations around country. This, however, is a fraction of the over-765 cases of extra-judicial killings that have been documented by human rights group Karapatan (Alliance for the Advancement of People’s Rights) since 2001. The number of cases received by the AHRC this year, however, more than doubled compared with last year, in the AHCR documented 20 cases.

The attacks against human rights defenders, political activists, human rights lawyers, labour leaders, religious leaders, journalist, peasants and others serving the poor and

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<sup>130</sup> CCPR/CO/79/PHL, UN Human Rights Committee, Concluding Observations/Comments, 1 December 2003

<sup>131</sup> The Philippines Commitment to UN General Assembly in the Human Rights Council, 9 May 2006.

<sup>132</sup> The number of victims of extra-judicial executions is based on cases received and issued with appeals by the AHRC as of 25 November 2006. See list at: [http://www.pinoyhr.net/list\\_killed.php](http://www.pinoyhr.net/list_killed.php)

defending human rights have intensified this year--with killings taking place almost daily in recent months. According to Councils for the Defence of Liberties of the Philippines (CODAL), 10 judges and 15 lawyers have been killed since the Arroyo administration took office.<sup>133</sup> Contrary to the figures given by CODAL, the Philippines National Police (PNP) Task Force Usig indicated that there were only a total of 16 judges and lawyers, including 11 judges and 4 state prosecutors, killed during 1999-2006.<sup>134</sup> According to the International Federation of Journalists (FIJ) and the National Union of Journalists of the Philippines, over 50 media workers have been killed during the Arroyo administration's time in office, and from January to July 2006 there have already been nine killings.<sup>135</sup> It is also reported that at least 23 church workers, including pastors, priests and a bishop have been killed since 2001.

There are clear patterns that often occur before victims are killed: they receive death threats, their names are included in so-called "order of battle" by the military, they are tagged as either being sympathetic to left or having "communists" ideologies, they are subjected to harassment and surveillance.<sup>136</sup> But there are other cases in which the victims had no known enemies and were killed for motives that also remain unknown. Not only are activists vulnerable to these attacks; often witnesses and the victims' families--including women and children--are also targeted.

With the absence of state-sponsored protection and security, those facing serious risks to their lives have been forced to take care of their own security. This includes activists, witnesses, the families of the dead and others who can play a role in seeking justice and redress for the violations committed against them. A group of bishops described the situation in the country in a statement after the brutal killing of Iglesia Filipino Independiente (IFI) Bishop Alberto Ramento on October 3, stating that: "No citizen in this country is safe anymore!"<sup>137</sup>

Despite mounting pressure on the government from inside the country and the international community, the police authorities have resorted to downplaying the extra-judicial killings, stating that they are not part of a "systematic and widespread" phenomenon. The police have also tried to exonerate themselves by putting the blame on the New Peoples Army (NPA) for perpetrating the killings against "enemy spies" and "counter revolutionaries."<sup>138</sup> While some cases point to involvement by rebels, the police system cannot exonerate itself from accountability for its failure to protect these people. It is the paramount duty of the state to protect the lives of its citizens. There is an entrenched bias against groups critical of the government. Instead of acknowledging the police's incapability to take credible action to halt the killings, there are attempts to discredit the efforts made by human rights groups to document and inform about the

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<sup>133</sup> Fact-finding report of the Hong Kong Mission for Human Rights and Peace in the Philippines from July 23 to 28, 2006, page 5

<sup>134</sup> Ibid

<sup>135</sup> Ibid, page 24

<sup>136</sup> AHRC Forwarded Press Release, AHRC-FP-008-2006: Law office under tight military surveillance

<sup>137</sup> AHRC Forwarded Press Release, AHRC-FP-008-2006: Law office under tight military surveillance

<sup>138</sup> Police Chief Supt. Rodolfo Mendoza, deputy director for Directorate for Investigation and Detective Management, PNP, 26 July 2006.

killings as being “propaganda”. This is the manifestation of the police’s inability to provide protection and security to its citizens. These claims cannot explain the over 765 cases of killings.

The AHRC has reported a number of cases in which members of the military were allegedly involved in the extra-judicial killings and other gross violation of human rights. In particular, retired Major General Jovito Palparan, the former commander of the 7th Infantry Division of the Philippine Army, and his men stand accused of;

1. EXTRAJUDICIAL KILLING: On 16 January 2006, 61-year-old activist Ofelia Rodriguez (a.k.a. Nanay Perla) of Barangay Divisoria, Mexico, Pampanga, was shot dead by two gunmen believed to be working for the military. Prior to the murder, 2nd Lt. John Paul Nicolas, head of the 69th Infantry Battalion, allegedly threatened to kill Rodriguez and had given a gun to her neighbour in order to carry out the killing. Earlier she was reportedly forced to state that she was a rebel leader. We are not aware of any progress in the murder investigation, or inquiries about the army's alleged role.

2. ABDUCTION & EXTRAJUDICIAL KILLING: On 31 January 2006, Allan Ibasan and Dante Salgado were found dead at a funeral home a day after they were arrested and forcibly taken to Sta. Ignacia, Tarlac, allegedly by four military men attached to the 71st Infantry Battalion. It is reported that seven other villagers were harassed, namely Glen Ibasan (17), Cesar Andaya (44), Annie Salgado, Reynaldo Reyla, Ricky Salgado, Eduardo Magallanes, Dominic Reyla. Again the soldiers are not known to have been investigated regarding their possible involvement in the killings.

3. EXTRAJUDICIAL KILLING: On 13 February 2006, 19-year-old activist Audie Lucero was found dead in Barangay Capitangan, Abucay, Bataan, near a hospital where a day earlier he was seen at a building being approached by Lubao (Pampanga) Police, and then by more than ten personnel of the 24th Infantry Battalion. Yet again, there is no known investigation into the alleged connection between his killing and the actions of the security forces that were present at the time.

4. FORCED DISAPPEARANCE & INTIMIDATION: On 14 February 2006, villagers Reynaldo Manalo (32) and Raymond Manalo (22) of Barangay Bohol na Mangga, San Ildefonso, Bulacan were reported to have been illegally arrested by elements of the 24th Infantry Battalion headed by Master Sergeant Rollie Castillo and subsequently disappeared in San Ildefonso, Bulacan. Several of their relatives, namely Jesus Manalo, his wife Ester, Reynaldo's wife Maria Leonora, and the victims' cousin Celeste and seven children were also reportedly threatened. Reynaldo and Raymond's whereabouts remain unknown. Again, there is no known investigation of the troops' alleged role in these events.

5. FORCED DISAPPEARANCE: On 6 March 2006, labour leader Rogelio Concepcion (36) was forcibly abducted and disappeared by armed men in Barangay Mataas na Parang, San Ildefonso, Bulacan. Witnesses allege that military men were in the area at the

time of the abduction, and that Concepcion was a target due to his criticism of a military deployment inside the factory where he worked as an organiser.

6. FORCED DISAPPEARANCE: On 3 April 2006, 24-year-old activist Ronald Intal of Barangay Asturias, Tarlac City, was forcibly abducted and subsequently disappeared, allegedly by armed men who were seen taking him towards a military detachment in Barangay Asturias, Tarlac City, where elements of the 70th Infantry Battalion are stationed. He has not been seen since. Those allegedly involved are not known to have been investigated.<sup>139</sup>

All these allegations against Major General Palparan and his men have not been thoroughly investigated. The police instead exonerated him and his men even before subjecting them to investigations. The peoples' distrust and loss of faith in the police's criminal investigation procedure is deeply rooted. While the victims and families of the dead are living in enormous fear, Major General Palparan meanwhile is receiving commendations from President Gloria Macapagal-Arroyo herself, for example during her State of the Nation Address (Sona) on July 24. By doing so in public, the President has indirectly already exonerated Major General Palparan of gross abuses even before an impartial investigation, effective prosecution or court's decision confirming his innocence or guilt has been completed. The President also allegedly attempted to provide Major General Palparan with de facto immunity from questioning with regard to investigations into widespread extra-judicial killings, by nominating him for appointment as deputy director for counter-insurgency in the National Security Council (NSC).<sup>140</sup> The President, as Commander-in-Chief, has therefore effectively encouraged the police and military men to continue with the type of actions undertaken by Major General Palparan without fear of being prosecuted. The culture of impunity runs deep in the government security forces.

Other military officers and their men have also been accused of committing extra-judicial killings. In March, the CHR VIII recommended the filing of murder charges against Major Lope Dagoy, the head of the 19th Infantry Battalion, Philippine Army and his men - 2nd Lieutenant Luel Adrian Benedicto, Sergeant Ruel Fernandez and Corporal Dioscoro Jamorawon. They are accused of the killing of seven peasants, including a pregnant woman, in Palo, Leyte on 21 November 2005.<sup>141</sup>

In Tagum City, on September 6, after two years, a public prosecutor filed charges of homicide against Sergeant Serafin Jerry Napoles and his men for the killing of a couple on September 2004.<sup>142</sup> On August 3, one of the alleged perpetrators in the killing of religious leader Isaias de Leon Santa Rosa (47) was identified as Lordger Pastrana, a

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<sup>139</sup> AHRC Open Letter, AHRC-OL-035-2006: Alleged rights abuses by army demand full investigations, not whitewashing, 27 July 2006

<sup>140</sup> AHRC statement, AS-211-2006: The administration of impunity- government seeking to shield alleged killings mastermind from justice, 11 September 2006

<sup>141</sup> AHRC Urgent Appeals, UP-053-2006: Commission on Human Rights (CHR) set to file charges against soldiers allegedly involved in killing peasants in Leyte, 24 March 2006

<sup>142</sup> AHRC Urgent Appeals, UA-72-2005: Prosecutor's inaction to file murder charges against military officers who killed two people, 27 April 2005

corporal in the Philippine Army. His dead body was recovered close to Santa Rosa after the latter was forcibly taken from his house and killed. Pastrana was believed to have been carrying a mission order concerning the killing of Santa Rosa.<sup>143</sup> Although the military denied involvement, no impartial investigation was conducted in this case despite the presence of allegedly damning evidence.

The killing of Dr. Rodrigo Catayong confirms claims of the existence of black-lists of persons that are to be targeted for liquidation. Catayong was with his wife Marcela when armed men attacked them at church in MacArthur, Eastern Samar on November 5.<sup>144</sup> Two months prior to Catayong's killing, an alleged "liquidation list" containing the names of 31 persons, including him, circulated all over the province. Although Ka Hector of the Samar-Leyte Anti-Communist Movement (SLACM), the leader of an alleged anti-communist group signed it, there are serious allegations that the group is connected with the Civil Relations Service of the Armed Forces of the Philippines (CRS-AFP) in the area. It is reported that the SLACM and local military unit had conducted joint anti-communists rallies and activities in the past.

Armed, hooded attackers, wearing bonnets that cover the face, have also been linked to the police. In April, labour leader Gerardo Cristobal survived an ambush by armed, masked men, who were later identified as being Senior Police Officer 1 (SPO1) Romeo Lara, Police Officer 3 (PO3) Nicanor Diaz and police informer Ador Esternon. These persons are attached to the Imus Municipal Police Station. Cristobal claimed it was the police who attacked him but the police investigators, who are the colleagues of those he accused, filed murder charges against him instead.<sup>145</sup> No impartial and independent investigation was conducted to look into the labour leader's version of events.

### **The use of hired killers and armed vigilante groups**

It is also alleged that the killings have been perpetrated by hired killers and armed groups. This nexus between the authorities and criminal elements shows the extent to which the police and the authorities in general are corrupt and unable to ensure the rule of law.

After environmental activist Elpidio de la Victoria was killed in April 12, it was learned that, prior to his death, the victim disclosed that Php 1 million (USD 19,954) had been raised to kill him by the people affected by his campaign. The identities of those who are alleged to have raised the money and paid the reward for his murder remain unknown. De la Victoria was a staunch campaigner against destructive and illegal methods of fishing in Visayan sea. His colleague, Antonio Oposa Jr., has reportedly received serious death threats. One of De la Victoria's alleged perpetrators was a police officer.<sup>146</sup> No effective

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<sup>143</sup> AHRC Urgent Appeals, UA-274-2006: Family members of slain church worker faces security risk, 18 August 2006

<sup>144</sup> AHRC Urgent Appeals, UA-369-2006: Another activist in "liquidation list" killed; two others survive attempts on their lives in separate incidents, 10 November 2006

<sup>145</sup> AHRC, UA-142-2006

<sup>146</sup> AHRC Urgent Appeals, UA-131-2006: Killing of an environmental activist and threat against another, 20 April 2006

investigations have been conducted to determine whether the authorities are engaging in financing killings.

The killing of another activist Enrico Cabanit on April 24 was also alleged to have been perpetrated by hired killers. Cabanit's daughter, Daffodil, was also wounded in the shooting but survived the attack. A reliable source connected to the victim has claimed that a hired killer was paid P150,000 (USD 2,973) to carry out the murder.<sup>147</sup> Although the police claimed to have identified one of the perpetrators, Monching Solon, the case has not progressed in court as the latter was killed under suspicious circumstances on May 26. After the suspect's death, it was impossible to identify who masterminded Cabanit's murder. While the alleged mastermind remains at large, Cabanit's family members are living in fear.

Although two of the gunmen in the murder of activist Rico Adeva on April 15 have already been identified as being members of an armed group, no arrests have been made. Adeva's wife, Nenita, positively identified her husband's attackers as Ronald Europa, a member of the Revolutionary Proletarian Army - Alex Boncayao Brigade (RPA-ABB), an armed rebel group.<sup>148</sup> Adeva's group was actually at odds with that of Ronald's. The leadership of the RPA-ABB confirmed that Europa is their member, but the authorities have not arrested him. The rebel group, however, did not categorically deny or accept responsibility of the killing.

On the other hand, the leadership of the Communist Party of the Philippines' (CPP) has declared in public its decision to set up armed partisan forces to counter-attack the operatives and masterminds of the killings.<sup>149</sup> The formation of liquidation squads to execute police, military and government security forces accused of committing gross abuses of human rights--in particular extra-judicial killings--is a cause for concern. The fact that armed groups are resorting to extra-judicial means in seeking justice is condemned, but it must also be seen as a manifestation and bi-product of a dysfunctional criminal justice system and failure of the government to put a halt to the killings.

### **Non-existent and defective Witness protection program**

Under the Philippine law, Section 3 of the Witness Protection, Security and Benefit Act (RA 6981) provides that any person who has "witnessed or has knowledge or information on the commission of a crime" can be admitted for witness protection provided:

"(c) He or any member of his family...subjected to threats to his life or bodily injury or there is a likelihood that he will be killed, forced, intimidated, harassed

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<sup>147</sup> AHRC Urgent Appeals, UP-175-2006: Flawed police investigations into killing, with no arrests made despite gunmen having been identified, 7 September 2006

<sup>148</sup> AHRC, UP-175-2006

<sup>149</sup> A Forwarded Statement by AHRC, FS-029-2006: "The Killings Must Stop", 6 October 2006

or corrupted to prevent him from testifying, or to testify falsely, or evasively, because or on account of his testimony”<sup>150</sup>

While the role of RA 6981 is vital in permitting witnesses to come forward and fully cooperate in any investigation and prosecution of cases in court, in reality, the program is severely dysfunctional. Its failure must be attributed to its implementing agency, the Department of Justice (DoJ). The AHRC has repeatedly pointed out that the absence of protection for witnesses is blocking the effective prosecution of perpetrators in court.<sup>151</sup> While the DoJ and the PNP acknowledge this fact, efforts to improve this program are lacking.

Potential witnesses, activists who are facing serious threats, survivors of attacks and violent atrocities, and the families of the dead, have thus far received no protection. In the absence of protection from the State, these people are forced to seek refuge in church sanctuaries, non-governmental organisations' safe houses or in other hideouts. They live in extreme fear of being located and being exposed to their would-be attackers.

Not only is the DoJ failing to implement the witness protection programme, in particular concerning cases of human rights violations, but the DoJ also displays prejudice and biases against the witnesses and families of the dead that are seeking protection. The department often adopts a confrontational attitude when dealing with them, blaming victims for their “uncooperativeness and distrust”. This is why, despite the appeals made by President Macapagal-Arroyo in her Sona speech - “urge [ing] witnesses to come forward. Together we will stop extrajudicial executions”<sup>152</sup> - no significant improvement in the implementation of RA 6981 has taken place. No witnesses have come forward.

The PNP, in particular the Task Force Usig, a special police investigating body tasked with conducting thorough investigation into extra-judicial killings, are also encountering difficulties in identifying and arresting alleged perpetrators and sending them for effective prosecution in court in most cases due to a lack of witnesses. In a letter received by the AHRC from Police Director General Oscar C. Calderon, responding to cases of extra-judicial killings, it was noted that:

“...the police are having difficulties in the filing of charges against the assailants due to the non-cooperation of the witnesses and families of the victim, out of fear for their lives, considering that the place of incident is categorized as a rebel infested area”<sup>153</sup>

The investigations being conducted by the Melo Commission have also been effectively halted due to a lack of cooperation with the commission by witnesses and the families of the dead. As a result, there cannot be effective and factual investigations by any

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<sup>150</sup> Witness Protection, Security and Benefit Act (RA 6981)

<sup>151</sup> AHRC statement, AS-120-2006: Task force on killings must start with witness protection, 26 May 2006

<sup>152</sup> President Gloria Macapagal-Arroyo, State of the Nation Address (Sona), 24 July 2006

<sup>153</sup> Letter of Police Director General Oscar C. Calderon, chief of the PNP and commander of Task Force Usig, 25 July 2006

investigating body unless the serious matter of protection is adequately addressed without delay. It is shocking, however, that despite the government's institutions being fully aware of this need, no effective actions have been taken to date.

The AHRC has reported on numerous cases where perpetrators have not been identified and prosecuted for lack of witnesses. Even those who had survived attacks and families of the dead who are themselves eyewitnesses to the violent death of their loved ones were either not able to or had difficulty in pursuing their cases in court due to insecurity.

This situation has been seen in the case of Daffodil Cabanit, mentioned above, whose father Enrico was shot dead by armed men.<sup>154</sup> Ofelia Bautista, whose husband Napoleon was found dead days after they were forcibly abducted in August 30 in Hagonoy, Bulacan, was freed by her captors, but her husband was not and was killed.<sup>155</sup> The abductors and killers of Ofelia's husband have yet to be prosecuted in court despite her being a survivor to the atrocity. The family of slain religious leader Pastor Isaias Sta. Rosa too who saw the latter being brutally tortured and abducted before he was subsequently killed.<sup>156</sup> The brother of slain activist Jose Doton (62), Cancio, who survived the attack in May 16 also experienced similar plight. Jose was killed while he and his brother Cancio were riding on a motorcycle. Cancio suffered a gunshot wound and survived the attack.<sup>157</sup> The perpetrators have so far escaped being made accountable for the killing.

In another case, even though peasant activist Amante Abelon survived the attempt on his life on March 20 in San Marcelino, Zambales his wife Agnes and their 5-year-old son Amante Jr. did not.<sup>158</sup> Amante can identify their attackers but has refrained from testifying in court due to a lack of protection. This situation is also similar to the killing of activist Crisanto Teodoro in March 10. His wife Lucila and their companions, although they witnessed his murder by armed men in Malolos, Bulacan, are refraining from seeking justice and redress due to a lack of protection. Lucila has lost faith in her husband's killers being arrested and prosecuted.<sup>159</sup>

### **Flawed or in-existent investigations by the police**

The investigations conducted by the PNP concerning extra-judicial killings are either completely inconclusive or unsatisfactory. The police system lacks the ability to conduct forensic investigations and professional gathering of evidence to build a strong case that

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<sup>154</sup> AHRC, UP-175-2006

<sup>155</sup> AHRC Urgent Appeals, UA-295-2006: Two more activists killed; one of six abducted activists remains missing while four others remain in detention, 7 September 2006

<sup>156</sup> AHRC, UA-274-2006

<sup>157</sup> AHRC Urgent Appeals, UA-175-2006: Three more activists killed; another priest faces serious threats on his life, 1 June 2006

<sup>158</sup> AHRC Urgent Appeals, UA-107-2006: Another peasant leader wounded and his wife and son killed by armed men in Zambales, 28 March 2006

<sup>159</sup> AHRC Urgent Appeals, UA-096-2006: Activist killed and an attempt made on another's life, 20 March 2006



will stand up in court. Their ability to secure vital pieces of evidence in solving the killing is also not satisfactory.

In fact, there is a serious concern that the PNP is unwilling to properly investigate these killings. For example, during an interview conducted by an international fact-finding team, General Avelino I Razon Jr., the head of the PNP's Task Force Usig, said that there is no government policy of politically motivated killings of opposition party-list members, journalists or activists. According to him, no members of the armed forces or the police have killed any such people.<sup>160</sup> Such a statement from the head of TFU that is tasked with investigating such killings is inappropriate before all the cases have been fully investigated. Furthermore, the current structure and operation of the Task Force causes great concern, as it shares information and intelligence with the army and other components of the authorities.<sup>161</sup> This severely undermines the independence and effectiveness of the Task Force and it should be re-structured such that its independence is not compromised.

Not only are investigations being compromised due to the police's negligence, lack of capacity and willingness to solve the cases, but there also are obvious attempts to pass the buck. The killings are often blamed on the armed rebel groups or other forces, but these claims are made without supporting evidence, which could only come to the surface if effective, credible investigations were actually being carried out.

In a letter received by the AHRC in July,<sup>162</sup> the PNP did not acknowledge their failings. Instead, they made spurious claims about their "successes." The PNP claimed to have 77 percent case solution efficiency, in particular concerning cases of slain journalists – however, this solution efficiency does not refer to actual sentencing of persons found to have committed the crimes, so has little value:

“The Philippine National Police would like to express our deep appreciation on your concern over the unresolved violence and murder of church people, human rights activists, journalists and political activists.

I have the pleasure to inform you that as per data and statistics gathered and analyzed by the PNP from 2001 to present, one hundred two (102) incidents of militants’ activists slain were recorded in which twenty five (25) cases has already been filed in court against the suspects...

Our records show that twenty (20) cases out of the twenty six (26) recorded cases of slain journalist has been filed in court while the remaining six (6) are still undergoing investigation. There are ten (10) suspects who were arrested while nine (9) more suspects are still at-large who are now the priority for police manhunt”

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<sup>160</sup> Ibid (n 4), page 15

<sup>161</sup> Ibid (n 4), page 7

<sup>162</sup> Police Chief Supt. Rodolfo Mendoza

In a number of cases the PNP are accused of ignoring the versions by the families of the dead and making premature pronouncements in absence of thorough investigations, undermining the victims' case. They have shown themselves to be negligent in securing scientific evidence. If there are arrests of suspects being made, often they are due to unnecessary pressure. On one occasion, the PNP warned their field commanders that they would be sacked from their respective assignments if they fail to make arrests following the killing of an activist in their jurisdiction – this obviously leads to arbitrary and wrongful arrests. When such knee-jerk arrests are made, the police commit violations of the suspect's rights. Once these arrests have been made and charges are filed in the prosecutor's office, the police no longer care whether they have arrested the right persons, whether the case is strong and the perpetrators are effectively prosecuted. For them, once the case is with the prosecutor, the case is solved.<sup>163</sup>

Take the case of development activists George Vigo and his wife Maricel who were killed in Kidapawan City on June 19. According to Maricel's younger sister, Maribel, the manner of the investigation by the Task Force Vigo was not thorough and was completed too quickly. The findings were also contrary to another report by local police who initially conducted the investigation. One of the victims' relatives was also made to sign an affidavit that the police had prepared, but the content of which was not properly explained to her. It was later found that the affidavit had been used by the police to file the case in court. The version given by Vigo's relatives concerning the motive of the killing was completely ignored.<sup>164</sup>

The investigation conducted into Enrico Cabanit's case was also defective. It is reported that the Panabo City Police were unable to completely secure the relevant physical evidence from the crime scene. Not all of the spent shells resulting from the gunmen's shooting were recovered. They were unable to secure photographs and sketches of the crime scene. The photographs the police investigators had taken from the crime scene were of no use, because the camera they used was later found to be defective. There was no autopsy or post-mortem examination performed on Cabanit's body.<sup>165</sup>

The police were also quick to declare the brutal killing of IFI Bishop Alberto Ramento, a prominent human rights defender on October 3, as a case of robbery and homicide. However, Bishop Ramento's family and his fellow clergy believe that his murder was methodically planned and politically motivated. Bishop Ramento himself confirmed having received several death threats before he was killed. He once told his family, "I know they are going to kill me next. But never will I abandon my duty to God and my ministry to the people."<sup>166</sup> The police investigators claimed there were missing belongings at Bishop Ramento's quarters, an indication of robbery. But Bishop Ramento's family and human rights group who conducted a separate investigation denied

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<sup>163</sup> AHRC, AS-171-2006

<sup>164</sup> UA-205-2006: A couple engaged in development work and two other activists killed in separate incidents, 28 June 2006

<sup>165</sup> AHRC, UP-175-2006

<sup>166</sup> AHRC Urgent Appeals, UA-331-2006: Killing of prominent human rights defender Bishop Alberto Ramento, 5 October 2006

the police's claim that robbery was the motive of the killing. They established that the stolen belongings had already been taken out from Bishop Ramento's convent several days before he was attacked. The police did not consider this version. They declared the case solved based on their findings.

The gruesome murder of urban poor activist Eduardo Millares (50) on October 18 in San Pablo City, Laguna was also declared by the police as having been perpetrated by gang members. As usual, the pronouncement was made before a thorough investigation had been completed.<sup>167</sup> They rejected the suggestion made by human rights groups that the killing of Millares was politically motivated and was connected to his activities with the urban poor. Not only did the police deny the victims a proper investigation, their practice of making premature pronouncements prior to conducting thorough investigations is unacceptable.

There were also alleged irregularities in the arrest of a police officer who is suspected in the killing of environmental activists Elpidio Dela Victoria. The suspect was arrested without an arrest warrant several days after the killing of Dela Victoria. In justifying the suspect's warrant-less arrest, the arresting policemen claimed that it was carried out during a "hot pursuit" operation.<sup>168</sup> Under the law, however, warrant-less arrests can only be made immediately after a crime is committed and in the case that the arresting officers have with them witnesses who can directly identify the suspect.

It is the police investigators' duty to determine all aspects of a killing and to identify the perpetrators by considering all the information available to them. Only after they have exhausted all leads in an investigation should they produce their findings and make any pronouncements (as long as these remain non-prejudicial to the prosecution of the suspect). To reject information coming from the families of the dead is totally unacceptable. This does not only manifest the police's flawed or manipulative investigative skills, it also reflects a deep-rooted bias against victims. Not only is this apparent in cases where they considered the victim as being a "leftist" – we see this bias even in cases where the person has no affiliation. The police are themselves instruments in denying the victim's struggle for justice and redress. Given the police's failure and unwillingness to acknowledge this critical concern, unless there is implementation of rigorous police reforms, the policing system in the country cannot be effective.

### **Delays in resolving cases of killings and torture**

Promptness in resolving cases of gross violations of human rights is essential for victims. Often unnecessary delays places victims and witnesses at serious risk, while giving those accused plenty time to attack or harass them. The failure of the concerned authorities to ensure that cases are promptly resolved is of serious concern. Such delays compound the problem of non-existent protection mechanisms.

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<sup>167</sup> AHRC Urgent Appeals, UA-347-2006: Gruesome killing of another activist; another one survives attack, 24 October 2006

<sup>168</sup> AHRC, UA-131-2006

For example, the Office of the Ombudsman for the Military and Other Law Enforcement Office (MOLEO), a quasi-judicial body dealing with complaints against officials of the police and military, has for example failed to resolve whether or not murder charges should be filed against two military lieutenants and several others accused of involvement in a killing. The respondents, all of whom are attached to the 25th Infantry Battalion of the Philippine Army, are accused of allegedly killing three farmers and wounding three others in Davao del Sur, Mindanao in February 8, 2005.<sup>169</sup> Almost two years on, the case against them cannot be filed in court due to delays on the part of the MOLEO. Under the existing procedure, before any complaint is filed in court the result of investigation by the public prosecutors should be submitted to the Ombudsman first for review and recommendation.

This is also the case in the killing of peasants in Palo, Leyte on 21 November 2005. Although the CHR VIII<sup>170</sup> has already recommended the filing of multiple murder and attempted murder charges against the military officers to the Ombudsman, the Ombudsman is still unable to resolve the case one year on. The case cannot be filed in court unless the Ombudsman acts on it.

The Ombudsman has also failed to promptly resolve cases concerning allegations of torture, illegal arrests and detention. No substantial progress has been made concerning the six policemen accused of brutally torturing eleven persons, including two minors, in Buguias, Benguet on February 14.<sup>171</sup> The Ombudsman's assurances that the torture of Haron Abubakar Buisan<sup>172</sup> over mistaken identity by policemen in General Santos City on 12 December 2005 would be looked into also produced no result. No investigations were conducted or any charges have been brought against the perpetrators. The torture victim remains in jail and is facing false charges against him as a result of evidence allegedly collected through the use of torture.

In another cases, the Ombudsman has also delayed replying to a court's recommendations concerning the amendment of charges against a military sergeant and his men, who were allegedly involved in the killing of a couple in Tagum City.<sup>173</sup> The Ombudsman's delayed action resulted in the non-filing of criminal charges against the perpetrators in court despite "probable cause" having been established to prosecute them. Even if recommendations concerning the filing of the case in court had already taken place, the Ombudsman completely failed to review the background of a public prosecutor, before having him deputized to handle the case. In this case, it was the same prosecutor who earlier rejected the same case for a lack of "probable cause" but whose findings were

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<sup>169</sup> AHRC Urgent Appeals, UP-153-2006: Another delay by Ombudsman prevents filing of murder charges against military men, 3 August 2006

<sup>170</sup> AHRC, UP-053-2006

<sup>171</sup> AHRC Urgent Appeals, UA-082-2006: Brutal torture of 11 persons and subsequent filing of fabricated charges against them, 3 March 2006

<sup>172</sup> AHRC Urgent Appeals, UA-251-2005: Brutal torture of a 25-year-old man over mistaken identity in General Santos City, Mindanao, 30 December 2005

<sup>173</sup> AHRC, UA-072-2005

later reversed by the Ombudsman. The families of the dead raised serious concerns regarding how the case could be effectively prosecuted under such circumstances.

It also took the CHR XII four years to take up the case of three torture victims in General Santos City. It was only on June 5, when the CHR met torture victims Jehon Macalinsal and his two companions. They were asked whether or not they are still decided to pursue their complaint.<sup>174</sup> Even though the CHR took up the case, the probability of holding the perpetrators accountable is very slim. The police officials involved leading to the arrest and detention have either been transferred or retired from service. They were never held accountable and will likely escape any responsibility. Obviously, the CHR's long overdue response did not only deny the victims the possibility of seeking redress, but also indirectly exacerbated the impunity enjoyed by the perpetrators.

### **Investigation bodies lack sufficient powers**

The governmental bodies--the CHR and the Melo Commission--tasked with investigating cases of extra-judicial killings either lack sufficient resources to perform their duties or have no power to prosecute the perpetrators in court. When President Macapagal-Arroyo created the Melo Commission on August 21, in response to local and international pressure, there was a certain amount of hope amongst the victims, the families of the dead and human rights groups that perpetrators would be prosecuted. It is the President who appointed the panel members of the Melo Commission, led by former Supreme Court Justice Jose Melo.

But months after the Melo Commission conducted their investigations, no substantial progress has been seen. Instead, the victims started to feel distrust and reluctance to cooperate with the Melo Commission. It is now widely perceived as another type of machinery created by the government to cover-up its atrocities. Given the victims and witnesses reluctance to cooperate with the body, the Melo Commission has halted its investigations. The authorities' inability to provide witnesses with protection should they cooperate and testify in court also made it difficult to convince witnesses to participate.

The Melo Commission also received criticism not only from local human rights groups but also from the CHR, for undermining its offices. The Melo Commission's work, although created by the President Macapagal-Arroyo, duplicates that of the CHR. CHR Commissioner Purificacion Quisumbing reacted sharply to the Melo Commission's gesture of sending them a "subpoena" in connection with the investigation that the latter is conducting;

“The Melo Commission was graciously invited by the CHR Chairperson [Purificacion Quisumbing] to visit the Office and be enlightened on the way the independent constitutional body handled the complaints of human rights violations including alleged killings and disappearances filed by cause-oriented

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<sup>174</sup> AHRC Urgent Appeals, UP-150-2006: Commission on Human Rights' (CHR) investigation into torture cases in General Santos City dragging, 27 July 2006

and progressive groups. ...the CHR top official intimated that the Commission is not subordinate to any branch of government and as a matter of principle should never be cross-examined in any proceedings as far as human rights issues are concerned.”<sup>175</sup>

Both the CHR and the Melo Commission do not have prosecutory powers. While the CHR has a constitutional mandate under the 1987 Constitution, its powers are restricted to the submission of findings and recommendations to concerned quasi-judicial bodies and court prosecutors. These are subject to review before a charge against perpetrators can formally be filed. Therefore, despite the CHR and Melo Commission having established a “probable cause” to warrant an indictment, the powers of decision concerning whether a case can be filed in court remains with the prosecutors and quasi-judicial bodies. Given the delays by quasi-judicial bodies and prosecutors to resolve cases involving gross violations, the efficiency and promptness of the delivery of justice is undermined. Beyond the prosecution of cases, the CHR can only also recommend the provision of compensation to victims of gross abuses.

Both the CHR and Melo Commission likewise have no existing mechanisms to provide victims, families of the dead and witnesses facing serious risk to their lives with adequate security and protection. Therefore, even if the CHR and the Melo Commission were able to establish a strong case as a result of investigations, this often ends up being meaningless, as they could not ensure the protection of witnesses and therefore the effective prosecution of the cases. This leads to the possibility that the case is dismissed for lack of witnesses.

Although there are proposals in the Senate to improve “grant [ing] it the power to prosecute cases of violations of human rights that it has investigated”, it is not showing progress and the bill remains pending. The proposal was in response to observations that “while the CHR is [faithfully] discharging its mandated task to investigate cases of political killings, abductions, torture and other forms of human right violations, these cases are hardly moving in the courts and are largely unresolved.”<sup>176</sup>

### **Poor implementation of United Nations Covenants and Conventions**

The Philippine government’s implementation of the International Covenant on Civil and Political Rights (ICCPR) is poor and insufficient. The government has failed to implement most of the concluding observations and recommendations of the UN Human Rights Committee during its periodic review in December 2003. It also failed to enact laws against torture and enforced disappearance, which it is required to do as a State party to the ICCPR.

In recent times, the Supreme Court of the Philippines’ has issued a number of landmark decisions which reject the government’s attempt to justify illegal acts. While the high

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<sup>175</sup> CHR News Release: We [CHR] are not subordinate to any government branch, 4 October 2006

<sup>176</sup> Senate Minority Leader Aquilino Pimentel Jr., 28 August 2006

court acknowledges internationally human rights law as enshrined in the 1987 Constitution, the actual protection of these rights is poor. The government's response to inquiries from the UN is also poor. In particular, the Department of Foreign Affairs (DFA) is neglecting its responsibility to respond to inquiries relating to the government's continued failure to enforce UN covenants and conventions. Likewise, the DFA neglects its obligation to reply to complaints of human rights violations, while not providing regular periodic reports to the UN.

### **Issuance of proclamations, orders and “partly unconstitutional” policies**

Excessive violations of civil and political rights also occurred following the government's declaration and issuance of Presidential Proclamation 1017 (PP 1017)<sup>177</sup>, General Order No. 5 (G.O. No. 5)<sup>178</sup> and the Calibrated Pre-emptive Response (CPR) policy. All these policies had previously been declared unconstitutional in part by the Supreme Court. The PP 1017 placed the entire Philippines under the “State of National Emergency” while G.O No. 5 was pursuant to PP 1017, directing the Armed Forces of the Philippines (AFP) to “maintain public peace, order and safety and to prevent and suppress lawless violence.”

When PP 1017 was declared on February 24, there were illegal arrests and detentions, protesters were violently dispersed, fabricated charges were filed against those critical of the government, as well as an illegal raid of a newspaper without a search warrant. Those who secured rally permits for the mobilization on the day to commemorate the 1986 EDSA revolution also saw them revoked. One of those illegally arrested--Anakpawis Representative Crispin Beltran--remains in detention and is still facing rebellion charges. The police arrested him with a 21 year-old warrant on charges that had long been dismissed by the court. The police justified their violent acts in the name of CPR policy, which replaced “maximum tolerance” in dealing with street protests. In another incident, six religious leaders and several others who had held a peaceful protest, were violently assaulted by the police under CPR policy. The group had gathered at the Malate Church in Manila on 7 April 2005. Four of them were also briefly detained.<sup>179</sup>

After petitions were filed questioning the legality of the Presidential Proclamation No. 1017 and General Order No. 5, the Supreme Court ruled;

**“WHEREFORE**, the Petitions are partly granted. The Court rules that PP 1017 is **CONSTITUTIONAL** insofar as it constitutes a call by President Gloria Macapagal-Arroyo on the AFP **to prevent or suppress lawless violence**. However, the provisions of PP 1017 commanding the AFP to enforce laws not related to lawless violence, as well as decrees promulgated by the President, are declared **UNCONSTITUTIONAL**. In addition, the provision in PP 1017

<sup>177</sup> Read Presidential Proclamation No. 1017, President Gloria Macapagal-Arroyo, 24 February 2006

<sup>178</sup> Read General Order No. 5, President Gloria Macapagal-Arroyo, 24 February 2006

<sup>179</sup> AHRC Urgent Appeals, UP-41-2005: Several protesters, including four priest, beaten by police during a peaceful demonstration in Malate Church, Manila, 8 April 2005

declaring national emergency under Section 17, Article VII of the Constitution is **CONSTITUTIONAL**, but such declaration does not authorize the President to take over privately-owned public utility or business affected with public interest without prior legislation.

G.O. No. 5 is **CONSTITUTIONAL** since it provides a standard by which the AFP and the PNP should implement PP 1017, i.e. whatever is “**necessary and appropriate actions and measures to suppress and prevent acts of lawless violence.**” Considering that “acts of terrorism” have not yet been defined and made punishable by the Legislature, such portion of G.O. No. 5 is declared **UNCONSTITUTIONAL**.

The warrantless arrest of Randolph S. David and Ronald Llamas; the dispersal and warrantless arrest of the KMU and NAFLU-KMU members during their rallies, in the absence of proof that these petitioners were committing acts constituting lawless violence, invasion or rebellion and violating BP 880; the imposition of standards on media or any form of prior restraint on the press, as well as the warrantless search of the *Tribune* offices and whimsical seizure of its articles for publication and other materials, are declared **UNCONSTITUTIONAL**.<sup>180</sup>

The Supreme Court also ruled on the Calibrated Preemptive Response (CPR) policy;

“...Calibrated Preemptive Response (CPR), insofar as it would purport to differ from or be in lieu of maximum tolerance, is NULL and VOID and respondents are ENJOINED to REFRAIN from using it and to STRICTLY OBSERVE the requirements of maximum tolerance.”<sup>181</sup>

B.) Excessive violation of Bill of Rights, 1987 Constitution<sup>182</sup>

“Section 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.”

While the Constitution guarantees that “no search warrant or warrant of arrest shall [be] issue except upon probable cause,” police and military men on most occasions arbitrarily and excessively violate this with impunity. It has become a “systematic and widespread” practice by them to execute arrests and searches in the absence of a lawful court order.

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<sup>180</sup> Supreme Court of the Philippines, G.R. No. 171396, Randolph David, et al. Vs. Gloria Macapagal-Arroyo, et al., 3 May 2006

<sup>181</sup> Supreme Court of the Philippines, G.R. No. 169838/G.R. No. 169848, Bayan, et al. Vs. Eduardo Ermita, et al./ Jess Del Prado, et al. Vs. Eduardo Ermita, et al., 25 April 2006

<sup>182</sup> Read Article III, Bill of Rights, 1987 Philippine Constitution



The law does not provide policing powers to the military or permission to arrest civilians. However, in practice it is otherwise. Often the police, as well as the military, effect arrest and search without a warrant. On instances when they make an arrest in the absence of a warrant, they justify their illegal acts on the basis of a “hot pursuit” operation. In practice, the police and military can decide when an arrest and search can be made without a warrant despite not having any legal basis.

When development worker Uztadz Kusain Abedin was arrested and subsequently detained on August 3 in Cotabato City by the military, they did not have arrest warrants with them.<sup>183</sup> The arresting officers detained the victim on the basis of an SMS they received from an intelligence asset. The informant reportedly warned them of the arrival of a person involved in making bombs. He was apparently referring to Abedin. Had Abedin’s relatives and lawyer not intervene they would have not released him without charges. In another case, eight human rights activists were also illegally arrested, tortured and subsequently falsely charged in the absence of sufficient grounds on August 22 in Catanauan, Quezon. The victims were on a legitimate fact-finding mission when the military arrested them.<sup>184</sup> There were also attempts to charge them with rebellion but the prosecutor rejected it.

Likewise, a pregnant victim named Wenifreda Marigondon was also arrested without a warrant on 25 November 2005 in Plaridel, Quezon. She gave birth at the military hospital the following month. It was not until the first week of April 2006 that she was taken to the Regional Trial Court (RTC), Branch 62, for the preliminary trial of her case. Only then did she find out that she was charged with rebellion. This victim had been in military custody for more than eight months without being properly informed of the charges laid against her or why she was being detained.<sup>185</sup> She was also not afforded with legal counsel and had restrictions on visits by her relatives at the military camp.

Another eight workers were also illegally arrested and detained in Rosario, Cavite on September 28. The victims were arrested inside a warehouse of an economic zone and had their personal belongings searched without warrants.<sup>186</sup> It was only upon their arrival at the police station that the policemen figured out what charges could be filed against them. The arrest also did not meet the requirements for an arrest without warrant-- under Rule 113 of the 1985 Rules of Criminal Procedure. The police likewise attempted to file fabricated charges of inciting sedition but were rejected by the prosecutor. Instead, they were falsely charged for trespassing. However, the workers did in fact have permission from the management to stay on the premises.

Under the 1985 Rules of Criminal Procedure, Rule 113, Sec. 5, arrest without warrant is lawful, when;

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<sup>183</sup> AHRC Urgent Appeals, UP-160-2006: Arrested development worker released, 11 August 2006

<sup>184</sup> AHRC Urgent Appeals, UP-171-2006: "Obstruction of justice" charges registered against 8 human rights activists, 5 September 2006

<sup>185</sup> AHRC Urgent Appeals, UA-346-2006: Deteriorating health condition of a female torture victim in detention, 23 October 2006

<sup>186</sup> AHRC Urgent Appeals, UA-325-2006: Eight workers illegally arrested and detained; police threaten to file fabricated charges, 30 September 2006

A peace officer or a private person may, without a warrant, arrest a person:

- (a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;
- (b) When an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it; and
- (c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.

In another case, policemen also allegedly illegally searched and harassed the convent of Contemplative Sisters of the Good Shepherds (CGS) in Butuan City on November 1. The policemen forced themselves into the convent and conducted searches without any lawful order to do so.<sup>187</sup> The police, who all were attached to the Regional Intelligence and Investigation Division (RIID) in Butuan City, were reportedly looking for a person subject to arrest but who was actually not there since the police had entered the wrong building. The sisters were extremely frightened during the illegal raid as the police were heavily armed and backed up by service vehicles.

“Section 8. The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.”

Although the Constitution and Presidential Decree 442 as amended (Labor Code of the Philippines) upholds workers rights to “self-organisation,” those who are planning to or have organised labour unions are being subjected to harassment and intimidation. In practice, the employer exerts all efforts—including the use of violence—either to discourage workers from forming unions or to disband them. The employers, such as foreign-owned companies, do not encourage and in fact warn their workers from forming labour unions. In the province of Cavite, the Office of the Provincial Government (OPG) imposed an anti-labor policy of “No Union, No Strike (NUNS)” since 2001. The policy is curtailing the workers from exercising their rights to ensure an “industrial peace” in the province. They allegedly bribe union leaders to reconsider their plans to form unions and then they either warn or discourage workers from taking protest actions—holding picket lines, they intervene into labor disputes, and allegedly hire armed goons to violently disperse strikers.

This NUNS policy is contrary to the Constitution and the provisions of the Labor Code concerning workers “right to strike” and “self-organisation”. To curtail or prevent workers from exercising their constitutionally recognized rights by using this NUNS

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<sup>187</sup> AHRC Urgent Appeals, UA-361-2006: Policemen allegedly harass and illegally search a convent of sisters after forced entry, 6 November 2006

policy by the local government is illegal and contrary to labour law. This is a serious threat to unorganised workers, and labour unions that are often targets of violence. Violent dispersal was experienced by two labour unions inside the Cavite Economic Processing Zone (CEPZ), who went on strike on September 25 following their Korean employers' refusal to negotiate on their Collective Bargaining Agreement (CBA). The CBA contain the unions' demand for salary increases, improved benefits and humane working conditions. Instead of negotiating with the workers for their CBA, the management and the Philippine Economic Zone Authority (Peza) security forces violently dispersed them,<sup>188</sup> imposed a food blockade<sup>189</sup> and illegally dismissed them from work while on a lawful strike. The Peza is a government-owned and controlled corporation.

Section 14. (1) No person shall be held to answer for a criminal offense without due process of law.

(2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf.

Section 16. All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.

Under Section 7 of the Speedy Trial Act of 1998 (Republic Act 8493), the time limit on the length of period any accused should be arraigned and subjected to trial is clearly prescribed;

“Time limit between filing of information and arraignment and between arraignment and trial. — The arraignment of an accused shall be held within thirty (30) days from the filing of the information, or from the date the accused has appeared before the justice, judge or court in which the charge is pending, whichever date last occurs”

Even though the RA 8493 stipulates the upholding of any accused person's Constitutional right to speedy disposition of their case, in a number of cases it has been reported that public prosecutors and judges are failing to meet this objective. One example is the case of three torture victims Jehon Macalinsal, Aron Salah and Abubakar Amilhasan. The local court commenced their trial only on 9 August 2005,<sup>190</sup> over two years after they

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<sup>188</sup> AHRC Urgent Appeals, UA-314-2006: Ten injured in violent dispersal of workers on strike in Cavite, 25 September 2006

<sup>189</sup> AHRC Urgent Appeals, UP-185-2006: Food blockade imposed on workers on strike, 26 September 2006

<sup>190</sup> AHRC Urgent Appeals, UP-108-2005: Court commences trial of three men due to pressure following frequent postponement, 9 September 2005

were arraigned on 26 February 2003. The reasons for the delays is due to frequent absences or seminars being attended by the presiding judge, the appointment of a new judge, a seminar of lawyers and the absence of a court stenographer.<sup>191</sup> All these do not fall under exclusions prescribed by Section 10 of the Act. On October 25, a police officer set to testify at the scheduled hearing at the Municipal Trial Court (MTC), Branch II, once again failed to appear because he had been transferred to another station assignment. It was his second failure to appear in court in recent times. Not only are police officers failing to appear in court but the recent replacement of prosecutors handling the case is further delaying the long overdue trial. The hearing was again set for March 28, 2007.

In another case, even though the prosecutor resolved that a charge should be filed in court against torture victim Haron Abubakar Buisan on July 28,<sup>192</sup> a schedule for his arraignment has yet to be set. As of October 25, the victim's relatives and legal counsel were unaware of any progress concerning the scheduled arraignment. This, however, is contrary to the provisions of Section 7 of the Act--which stipulate that a person must be arraigned "(30) days from the filing of the information" or the filing of a complaint.

Section 19. (1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted...

Section 19 (2) The employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law."

Torture and inhumane treatment is prohibited under the Constitution as stipulated by the Bill of Rights. The failure of the government to enact enabling laws without delay in order to ensure that these rights are protected has since denied victims any possibilities of seeking justice and redress. This has also encouraged the police and military to use torture as part of their criminal investigation. While the police are guilty of filing fabricated charges in court, taken by way of torture, the military consider torture as a viable method to extract information from persons under their custody. In particular, this is the case for people that they arrest for rebellion or "terrorist" acts. It is a fact of life that severe cases of torture and inhumane treatment have been reported, but not a single perpetrator has been prosecuted and punished for lack of a domestic law.

The use of torture has long been practiced by the police and military as part of the investigations that they are conduct. The tortured persons--including women and children—are forced into admitting the charges that they are being accused of against their will. They employ such methods of ill-treatment and torture as electric shock, brutal beatings, food and sleep deprivation, sexual humiliation, lengthy incommunicado or solitary confinement, harassment, intimidation, extraneous exercises, and death threats. The police and military employ torture with impunity and without fear of prosecution.

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<sup>191</sup> AHRC Urgent Appeals, UA-74-2005: Trial of three men yet to begin after three years, 4 May 2005

<sup>192</sup> AHRC, UP-186-2006

While the Constitution prohibits these brutal acts, the use of torture and inhuman treatment is systematic and widespread. These practices are deeply rooted among the police investigators and military. Those hardest hit are persons under custodial investigation either by the police or military in their respective detention centers and camps. The term “custodial investigation” or “invitation for questioning” is equivalent to the likelihood of being brutally tortured and inhumanely treated. The police likewise have resorted to justifying the use of excessive force in conducting arrests as a “justifiable degree of force.”<sup>193</sup> When criticism and condemnation over the incident of torture is strong, the police are the ones who usually conduct the investigation amongst themselves. As expected, police findings suggest that any allegation of “the accused having been brutally tortured has no basis.”<sup>194</sup> This was the police’s response into the case of torture victim Haron Abubakar Buisan.<sup>195</sup>

The police and military inflict torture and inhuman treatment in an extremely brutal form. Take the case of 11 persons, two of them minors, who were brutally tortured following their arrest in Buguias, Benguet on February 12. They were beaten on different parts of their body, exposed under the heat of the sun and had their hands tied behind their backs. They were also blindfolded, beaten in the genitals and threatened with death. Some of the victims were thrown into a pit and had soil, garbage and other matter dumped over their heads. They were electrocuted, stepped on and their fingers were squeezed with bullets inserted between them. Others were suffocated with plastic bags or had their heads forced into pails of water. Buckets were also hung from their heads and water was poured into them. They were also forced to strip naked, at which point they had freezing water sprayed on them. The police and military forced them into admitting they are rebels.<sup>196</sup>

Not only are police and military guilty of torture, even armed village militia have resorted to using brutal beatings while conducting “arrests.” On August 13, 16 year-old Don Bon Diego Ramos was severely beaten with clubs by the village militia in Pasig City. The boy was on his way home after watching a concert when the perpetrators attacked and arrested him. They falsely accused the boy of throwing stones that broke a sign and for being part of a concert that creates disturbance. When the boy asked: “Bakit n’yo ako hinuhuli (Why are you arresting me?)” he was repeatedly beaten with a wooden club instead of receiving an explanation.<sup>197</sup>

Such torture and ill-treatment by law enforcement officers breaches the ICCPR, to which the Philippines is party. Furthermore, in terms of the rights of the child rights, the government does not acknowledge the recommendations made by the Committee on the Rights of the Child (CRC). In September 2005 after reviewing the periodic report of the government, the CRC’s concluding observations expressed the Committee’s concerns,

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<sup>193</sup> AHRC Statement, AS-041-2006: To justify the use of torture is a constitutional and human rights violation, 16 March 2006

<sup>194</sup> Letter from Police Superintendent Willie Dangane, Police Regional Office 12 (PRO 12), 14 February 2006.

<sup>195</sup> AHRC, UA-251-2005

<sup>196</sup> AHRC, UA-082-2006

<sup>197</sup> AHRC Urgent Appeals, UA-269-2006: Torture of a 16-year-old boy by a village militia during arrest, 15 August 2006

“particularly for children in detention”<sup>198</sup> and urged the government to “investigate and prosecute all cases of torture and ill-treatment of children.”<sup>199</sup>

The prison conditions in detention centers and jails all over the country are generally not acceptable, as they are overly congested and lack medical and health services. In fact, three inmates have already died at the General Santos City in Reformatory Center (GSCRC) in Barangay (village) Lanton, General Santos City, in separate incidents in December 2005.<sup>200</sup> Although there are insufficient explanations concerning to the three inmates’ deaths, there is evidence that suggests that it was caused by poor medical and health facilities inside the jail.

Even ailing inmates who require medical attention are being denied adequate treatment while in detention. Two ill inmates, Elvie Apolona and Samuel Lagulao, were denied adequate medical treatment. In April, Apolona was denied treatment for his post-Meningitis-TB condition at the Provincial jail in Prosperidad, Agusan del Sur, following his arrest on February 10.<sup>201</sup> He was arrested at the Butuan Doctors Hospital in Butuan City while receiving treatment. In May, another inmate Lagulao, did not received treatment for his injuries at the provincial jail in Iloilo.<sup>202</sup> Lagulao was arrested by the police and military while being treated for injuries to his spine at the hospital.

These cases, however, only represent a fraction of those actually occurring all over the country. While the government is completely aware of the poor and inhumane conditions of its jails, no adequate measures have been taken to improve the country’s prison conditions. Instead of acknowledging the problem, their failure to address the worsening prison conditions is being justified as a result of slow progress in court cases, an increasing number of criminal offenders and the lack of resources. Detention centers and jails have been described as hell by prisoners. The proposals to improve prison conditions are yet to be adequately implemented.

### **Absence of law on torture, disappearance denies victims of redress**

The absence of an enabling law on torture and enforced disappearance is denying victims and their families the possibility to seek justice and redress. Torture victims cannot file charges in court against the perpetrators, they do not received compensation, are not admitted for adequate rehabilitation and counseling, and often have to face false charges in court based on evidence taken by way of torture. The burden of proof concerning the fact that the victims were tortured lies with the victims themselves, not with the perpetrators. On the other hand, the families of disappeared victims do not get any

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<sup>198</sup> Committee on the Rights of the Child, Concluding observations: Philippines, CRC/C/15/Add.259, 21 September 2005, Para. 38

<sup>199</sup> Ibid, para. 39

<sup>200</sup> AHRC Urgent Appeals, UP-01-2006: Two more inmates died at the General Santos City Reformatory Centre in Mindanao, 2 January 2006

<sup>201</sup> AHRC Urgent Appeals, UA-149-2006: Sick inmate denied adequate treatment, 5 May 2006

<sup>202</sup> AHRC Urgent Appeals, UA-153-2006: Another sick inmate denied adequate treatment after being falsely charged, 11 May 2006

assistance from the government. No government agencies exist to help them to locate their loved ones. No existing mechanism exists to help them with resources, logistics and other means. The police authorities also have either no jurisdiction or lack capability to investigate disappearance cases. Only when a dead body is recovered or a disappeared victim surfaces will they consider investigating.

Often relatives of disappeared victims have sought help from human rights non-governmental organisations (NGOs), religious groups and local officials in. When NGOs assist them, they are either harassed or not welcomed by police and military when they go to police stations and military camps to inquire as to whether they are holding missing persons in their custody. Often, the police and military deny holding disappeared victims. In one case, five men who were forcibly abducted and went missing for three days in Tagaytay City on April 28,<sup>203</sup> were later found in police custody.

Although Republic Act 7309, an Act creating a Board of Claims under the Department of Justice for victims of unjust imprisonment or detention and victims of violent crimes, provides compensation, in practice most victims do not receive this;

Section 3, (d) any person who is a victim of violent crimes. For purposes of this Act, violent crimes shall include rape and shall likewise refer to offenses committed with malice which resulted in death or serious physical and/or psychological injuries, permanent incapacity or disability, insanity, abortion, serious trauma, or committed with torture, cruelly or barbarity.

Victims of violent crimes reported by the AHRC have not received any compensation as provided for by RA 7309. None of the twenty-one persons reported to have been forcibly abducted and subsequently disappeared this year have been found.<sup>204</sup> Their whereabouts remain unknown. None of the 40 victims of torture, six of whom were either found dead or were subsequently killed, have received compensation as provided for by law. Although there are efforts by the Department of Social Welfare and Development (DSWD) to provide counseling and assistance to victims of violent dispersal in Rosario, Cavite, they have been found to be insufficient. The assistance that has been provided to a woman who had had a miscarriage in January,<sup>205</sup> during the dispersal was also insufficient, while another woman who had a miscarriage during dispersal last September has yet to receive any assistance.

This is also the case concerning 11 torture victims, nine of whom are still in detention.<sup>206</sup> When one of the victims, Rundren Berloize Lao, was able to escape from police custody he went to DSWD to ask for help. Instead of providing him with the medical assistance

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<sup>203</sup> AHRC Urgent Appeals, UA-143-2006: Five missing persons are allegedly being detained in the army camp in Lipa City, 30 April 2006

<sup>204</sup> This figure is according to cases received and issued with appeal by the AHRC from Center for Trade Union and Human Rights, KARAPATAN, Task Force Detainees of the Philippines and other independent sources

<sup>205</sup> AHRC Urgent Appeals, UA-115-2006: Three workers injured in a violent dispersal in Rosario, Cavite, 6 April 2006

<sup>206</sup> AHRC, UA-082-2006

he urgently required, he was turned over to the National Bureau of Investigation (NBI). The NBI likewise turned him back over to his torturers. His allegations of torture were not recorded and his need for medical attention and counseling was not addressed. Even when there was an alleged plot to kill five of them inside the jail, including Lao and Jefferson De la Rosa, in April,<sup>207</sup> no measures were taken to ensure their security. The jail warden merely assured “that we are doing best to secure inmates, Rundren Lao, Jefferson De la Rosa and their Co-accused; and all other detention prisoners for that matter.”<sup>208</sup> On July 28, torture victim Jefferson Dela Rosa survived an assassination attempt by an inmate named William Pangan, who is believed to have been hired to kill him.<sup>209</sup> Pangan had also been previously investigated concerning a plot to kill other torture victims.

Despite repeated appeals, no compensation, medical attention or trauma treatment were afforded to torture victim Haron Abubakar Buisan<sup>210</sup> who is detained at the GSCRC in General Santos City. Although the CHR XII had already decided to take up the complaint of torture victims Jehon Macalinsal and his two companions, no recommendations for them to receive appropriate compensation and rehabilitation have been made. While the victims have shown signs of progress, there are concerns that they may still experience side-effects of the torture since they have not received appropriate medical treatment.

There is also inadequate help for the families of disappeared victims Reynaldo Manalo and his brother Raymond. The victims were forcibly abducted and subsequently disappeared on February 14, 2006 in San Ildefonso, Bulacan. Although their relatives tried to seek help from the military to locate the victims--despite having suspicions the military could be involved-- they only told them: “not to worry and that they would coordinate with those [military] who took custody of the Manalo brothers.”<sup>211</sup> The victims however have not been seen since. Their relatives also went into hiding, fearing for their lives.

In another case, Marissa, the wife of labour leader Rogelio Concepcion, who was forcibly abducted and disappeared on March 6, is living in total insecurity. After Rogelio’s abduction, Marissa and her family noticed the suspicious movement of persons not known to them and believed to be closely watching them. Despite the high security risk she and her family are facing, she did not get any protection or security.<sup>212</sup> There has also been no help from the authorities to help locate her husband. Rogelio has not been seen since he was abducted. As a result, the family lives in permanent fear.

There is also the case of journalist and activist Joey Estriber who was abducted and forcibly disappeared on March 3, 2006. At around 6:20 pm, Estriber was on his way home, when he was dragged towards a tinted maroon van parked nearby by four armed

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<sup>207</sup> AHRC Urgent Appeals, UP-092-2006: Plot to kill torture victims in jail, 25 April 2006

<sup>208</sup> Letter from James C. Simon, Provincial Jail Warden, La Trinidad, Benguet, 22 May 2006

<sup>209</sup> AHRC Urgent Appeals, UP-152-2006: Attempted stabbing of a torture victim; continuous threats on torture victims and legal counsels, 1 August 2006

<sup>210</sup> AHRC, UA-251-2005

<sup>211</sup> AHRC Open Letter, AHRC-OL-035-2006

<sup>212</sup> UP-052-2006: Missing labour leader abducted and feared dead, 24 March 2006



men.<sup>213</sup> The getaway van had no license plate number. As in previous cases, his whereabouts and fate remain unknown and his family has had difficulty finding assistance from government agencies.

The disappeared victims' families can file habeas corpus petitions, but they cannot indict perpetrators in court for the crime of disappearance despite strong circumstantial evidence showing the involvement of either the military or the police. Take the case of two student activists Sherlyn Cadapan and Karen Empeño, and peasant Manuel Merino who were abducted on June 26 in Hagonoy, Bulacan.<sup>214</sup> Cadapan was pregnant at the time. Although the Supreme Court has granted the victims' families petition for habeas corpus, requiring retired Major General Palparan and others to produce the victims, no substantial progress has been made so far regarding the whereabouts of the victims. Those alleged to have been involved have remained unpunished. In another case, when Ronald Intal<sup>215</sup> was seen being forcibly taken by armed men in Tarlac City on April 3, the perpetrators were subsequently seen heading towards a military camp. While the military denied having him in their custody, no impartial and independent investigation took place to determine whether or not this is true. Ronald has not been seen since.

In August and October, six people were forcibly abducted by unknown persons and disappeared in separate incidents in Mindanao.<sup>216</sup> One of them was later found dead with brutal torture marks on his body, while another was freed by his captors. This is the latest string of disappearances in the area. Sitti, the wife of disappeared victim Cadir Malaydan, was with her husband when he was forcibly abducted by armed men in Monkayo, Compostela Valley on October 19. There has been no police investigation and no assistance for her in locating her husband. Another victim, Ustadz Habib Darupo, was released a day after he was abducted in Banaybanay, Davao Oriental on October 24, but only after being tortured by his captors. After his release, no security protection was afforded to him and no effort or assistance was made available to help him recover from extreme trauma that he experienced. Again, no effective investigation was conducted to identify the perpetrators. Although Ali Barabato's body was found three days after he was abducted in Davao City on August 28, the whereabouts of his two other companions remain unknown. Barato's family heard in the media about the discovery of a dead body—which was later confirmed to be his. No mechanism exists to help relatives of the disappeared to locate their loved ones and they are left to monitor media reports in the hope that they will report on the whereabouts of their missing loved ones—whether dead or alive. Often, they also visit funeral parlors and morgues to check for unclaimed bodies.

Even though torture is outlawed by the 1987 Constitution, torture remains widespread and perpetrators enjoy total impunity. There is no way for victims to lodge complaints or obtain redress as envisaged by common article 2 of the International Covenant on Civil

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<sup>213</sup> AHRC Urgent Appeals, UP-048-2006: Forcible abduction and disappearance of an activist in Baler, Aurora 17 March 2006

<sup>214</sup> AHRC Urgent Appeals, UA-245-2006: Two female student activists and a peasant forcibly abducted and disappeared; one of the victims is pregnant, 20 July 2006

<sup>215</sup> AHRC Urgent Appeals, UA-127-2006: Missing activist could be in military's custody, 18 April 2006

<sup>216</sup> AHRC Urgent Appeals, UA-363-2006: Disappearance of four persons; one of two torture victims found dead in separate incidents in Mindanao, 8 November 2006

and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment--both of which the government of the Philippines claims to uphold. A 2005 bill to introduce the Anti-Torture Act (HB 4307) has yet to be approved. The failure to enact a law to criminalise torture violates the government's international obligations, especially under the Convention against Torture.<sup>217</sup>

On the other hand, as the Philippines is a signatory to the Declaration on the Protection of All Persons from Enforced Disappearance where it recognised the principles contained in the 1992 declaration.<sup>218</sup> In view of the fact that state agents and others acting on their behalf in the Philippines are known to routinely abduct and disappear persons, there should also have been a far greater sense of urgency in enacting this domestic law. The government, however, has continued to fail in this regard. The proposed law, House Bill 1556, “an Act Defining and Penalizing the Crime of Enforced or Involuntary Disappearance”, is yet to be approved. No substantial progress on the part of the government has been made to push for the enactment of this law without delay, as required by the ICCPR.

## **Gross violation of rights on land reform and labour**

### **1. Attack against farmers seeking land reform**

Targeted attacks, both by government security forces and armed groups, against farm beneficiaries seeking genuine land reforms have also resulted in extra-judicial killings, violent attacks, the filing of fabricated charges, massive displacement and deprivation of source of livelihood for villagers. The violent attacks are often a result of strong opposition by land owners to land redistribution or having their land holdings covered under the Comprehensive Agrarian Reform Law (CARL) of 1988 (RA 6657. Section 2 of RA 6647 upheld that it is the “right of farmers and regular farm workers, who are landless, to own directly or collectively the lands they till.” However, while farmers are asserting these rights, they are being subjected to violent attacks and harassment.

In July, sixty-eight farmers and their families were forced to flee their homes in Bondoc Peninsula, south of Luzon.<sup>219</sup> This was after an influential landowner arbitrarily filed a string of criminal cases against them in court leading to the issuing of arrest warrants. In October, 21 families of farmers in Balasan, Iloilo<sup>220</sup> were violently attacked and forced to leave their villages after an influential land owner employed armed thugs to attack them. In these two cases, it was either the public prosecutor or the court judge who recommended the filing of criminal charges against the villagers--for offenses such as

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<sup>217</sup> AHRC statement, AS-043-2006: No law to address persistent forced disappearances in Philippines denies the possibility of redress, 20 March 2006

<sup>218</sup> Forwarded appeal, FA-016-2006: Alleged continued harassment by landowners, rebel group against hundreds of villager over land dispute, 10 August 2006

<sup>219</sup> AHRC Urgent Appeals, FA-016-2006: Alleged continued harassment by landowners, rebel group against hundreds of villager over land dispute, 10 August 2006

<sup>220</sup> UA-350-2006: Alleged use of armed goons in attacking villagers; one leader seeking land reform killed, 26 October 2006

trespassing, theft and robbery--and by taking undue jurisdiction over criminal cases. The provision of Section 57 of the Act stipulates that:

“The Special Agrarian Courts shall have original and exclusive jurisdiction over all petitions for the determination of just compensation to landowners, and the prosecution of all criminal offenses under this Act. The Rules of Court shall apply to all proceedings before the Special Agrarian Courts unless modified by this Act.”

The October 11 incident in Iloilo is the latest violent attack against farmers. It occurred after one of their leaders, Hernan Baria, was brutally killed by armed men alleged to be policemen on July 23, 2005. On October 30, another leader was wounded in a shooting days after armed thugs of an influential landowner violently attacked the farmers' village. In these cases, the public prosecutor and court judges' hearing of agrarian related cases has resulted in the unjust prosecution of farmers seeking genuine land reform. The actions by defiant landlords who file criminal charges against the farmers in court, instead of the Special Agrarian Courts, has become a tool to persecute farmers and deny them of their rights to own land. The government's failure, in particular the Department of Agrarian Reform (DAR), to adequately intervene is denying the farmers the possibility to seek justice and redress.

### **Civil labour disputes treated as criminal offences**

Union members' last resort to assert their rights is to declare a strike. This often comes as the result of the employer not honouring lawful orders. Take the case of two labour unions of a garment factory inside the CEPZ. Even though the Secretary of the Department of Labour and Employment (DoLE) has issued a final and executory order to two foreign companies to begin negotiations for the CBA proposal, they refused to do so. Instead, they filed several motions and appeals in court one after the other in an effort to delay the proceedings. The CBA contains proposals for increased salaries, improved benefits and human working conditions. The management however used the armed security forces of the Peza, the local police and security guards, to violently disperse the lawful strike.<sup>221</sup>

Although the DoLE order is self-executory, the companies are refusing to implement it, citing the pending petitions they have in court. Under the rules, however, the DoLE's final and executory decision can only be restrained by a lawful order—a Temporary Restraining Order (TRO). But in this case, the companies are defiant in the absence of the TRO and the government is failing to impose sanctions on them for labour law violations. These are obvious attempts by employers to delay the proceedings by treating labour disputes as criminal cases. A company's refusal to implement a lawful order could drag on for years, given the delays in resolving cases in regular courts and in the quasi-judicial bodies in the country.

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<sup>221</sup> AHRC, UA-314-2006

## **Conclusion and Recommendations**

The ongoing human rights crisis in the Philippines indicates a collapse of the rule of law in the country. While the government claims to uphold human rights and democracy before the international community, including the United Nations, at home there is no possibility for most victims of gross abuses of human rights to get justice and redress. The culture of impunity, including state and non-state actors, is so rife that victims have already lost faith in the government's criminal justice system. There is extreme fear amongst the victims that exacerbates the deep-rooted culture of silence and unwillingness to fight back, in the country. Those victims who dare to fight back or even to encourage and serve others to assert their own rights are subjected to torture, death threats, disappearance or extra-judicial execution.

There is a pattern of targeted attacks not only against progressive groups critical of the government, but also against those who simply assert their rights. The worsening human rights crisis has also been exacerbated by the unwillingness of those in government and its security forces--the police and military—to address the legitimate grievances of victims through the legal system. This is reflected in the authorities' public statements, in which they automatically deny any problems and exonerate themselves of any accountability. Both the civilian government and the security forces are either indirectly or directly complicit in the human rights crisis in the country, without fear of being prosecuted

There is also a critical failure of the system, which currently is not functioning concerning the prosecution of members of the police, the military and militiamen allegedly involved in cases of human rights violations. One key failure is the justice dispensation system, which needs to be improved, notably concerning its methods of police investigation, the prosecution system and the judicial system. The inefficiency of these core elements of the criminal justice system prevents victims from getting justice and redress and perpetuates a culture of impunity. The existing systems are defective and inefficient, and the absence of enabling laws to prosecute perpetrators of human rights violations--in particular concerning torture and disappearance-- have reinforced the culture of impunity concerning even the worst forms of abuse. The government has so far attempted to suppress international criticism of its bleak human rights records with pretences, half-truths, and downright deceit, instead of attempting to resolve the problems that its people face.

Instead of adequately addressing the human rights crisis, the government downplays legitimate criticism as merely being “propaganda” and attempts to discredit groups pursuing the victims' fight for justice as being “destabilizers”. The authorities' paranoia that those involved in the protection of human rights are “communist fronts” has already undermined the government's role of serving its citizens. The government has not yet seriously acknowledged the obvious failings of its criminal justice system; instead it is in complete denial of the scale of the problems that it faces.

Most of the actions the government has taken are merely gestures –for example the creation of Melo Commission and Task Force Usig—and do not respond to what is really required to meet the victims and their families’ needs. In practice, these bodies are being exploited to justify the government, however, the perpetrators are not being prosecuted and justice remains elusive for victims and their families.

Although the abolition of the death penalty in April indicates in theory indicates the respect for “right to life,” the government's failure to stop the ongoing unabated targeted killings has put the country’s sincerity in serious question. The abolition of the death penalty will have no meaning to the victims of extra-judicial killings and their families.

The government is failing to effectively address the extra-judicial killings. It is also failing to ensure protection for those asserting their rights concerning labour issues and land reforms. While protection exists for labour and land rights--the Labour Code of the Philippines and the Comprehensive Agrarian Reform Law respectively--the government and its agencies are failing to confront the abuses and exploitation committed by the influential and powerful, who are manipulating these laws to suit their interests. The loss of faith in the government and its agencies to effectively implement these laws is deep-rooted and entrenched. In fact, the government agencies are perceived as being engaged in covering up atrocities against people attempting to assert their rights.

The implementation of the international Covenants and Conventions to which the government is a state party is extremely poor. The non-implementation of the Concluding Observation and Recommendation of the UN Human Rights Committee on December 2003 following its periodic review is a stark example. The government’s election to the UN Human Rights Council and UN Economic Social Council (ECOSOC) has no meaning for the victims of human rights abuses in the country. In fact it is an insult to them. The country does not deserve to sit in these two UN bodies. The UN General Assembly should reconsider the country’s appointment to these bodies as the result of the current crisis.

Prior to the elections to the Un Human Rights Council, the Philippines pledged to uphold human rights to "the highest norms and standards” – however, this must feel like a very sick joke for most of the country's people. There is a need for a rigorous campaign to have those in the international community--in particular the UN--to deeply understand what is going on in the country. Unless these false claims and pretences by the government are not confronted and dispelled, the culture of impunity and attacks on human rights and democracy in the country will only continue. The country could be dragged even further into a disaster. There must be a concerted effort from the international community and Filipinos at home to make the authorities accountable for their misdeeds.

The AHRC urges the government to take the following measures without fail or delay:

- Create an independent body to investigate the systematic extra-judicial killings, forced disappearances and other abuses. This body should be able to receive and

launch investigations concerning criminal cases as well as initiate criminal proceedings against individuals. The appointment of its members must be conducted through the legislature. The Commission on Human Rights (CHR) must likewise be actively engaged in this process. It must be ensured that this special body does not undermine the CHR's work.

- The investigation body should conduct investigations for the purpose of launching prosecutions, with the body's performance being evaluated based on the extent to which such prosecutions are conducted and result in the sentencing of those found responsible. Implied in this is that investigators are aware that they are responsible only to the prosecutory and judicial authorities and only in the manner recognized in the law on due process within the country. Any interference in the body or its activities must be an offence under the law.
- The CHR's role and functions must be improved in accordance with the government's pledge to the UN General Assembly in May. Its implementation must be thoroughly reviewed to ensure that it serves its purpose.
- The investigation body must have authority to afford protection, ensure safety for the victims, the families of the dead and witnesses, until the case is completed in court.
- There must be a thorough investigation into the alleged involvement of the government's security forces in orchestrating the extra-judicial killings and other gross abuses of human rights. Those allegedly involved, including retired Major General Jovito Palparan, must be tried in an independent and competent court for their crimes.
- The implementation of the Witness Protection, Security and Benefit Act (RA 6981) must be thoroughly reviewed. The recommendations made as a result of this review must be sent to the legislative body to amend the provision of this Act in order to ensure that it is "proactive". Should it be found out that there is inaction by the implementing agencies—for example the Department of Justice (DoJ)--they must be held accountable.
- The government must guarantee that all perpetrators found guilty of having carried out or ordered extrajudicial killings or forced disappearances receive adequate punishment, in line with domestic law and international law and standards.
- The government must guarantee adequate reparation to the victims or their families, in line with international standards.
- Rigorous reform in the Philippine National Police (PNP) to improve the country's policing system must be imposed without delay. Methods of investigation must be improved to include forensic methods, and there must be "performance pledges" concerning how long it takes to complete investigations. Corrupt police and other State-personnel must be removed and prosecuted.
- Task Force Usig should be restructured to ensure that its independence is not compromised and to appear independent to the public, so as to ensure that witnesses or family members will report their cases to the Task Force.
- The PNP must reject their practice of classifying a case as being "solved" once it has been filed in court. The solution of cases must be based on the rate of convictions as the result of fair trials.
- The Department of Justice's (DoJ) prosecution system must also be improved; the number and quality of public prosecutors and lawyers must be increased to cope with

the ever-increasing number of cases and victims needing legal assistance. The government must exhaust all resources to improve the prosecution system.

- The public prosecutors must be involved in counter-checking the police's manner of investigation and submission of evidence, to avoid the filing of fabricated and false charges in court. The prosecutors must also be held administratively accountable for their failure to dispense their duties effectively and promptly, notably if there are violations under the Rules of Court and the Speedy Trial Act (RA 8493).
- The public lawyers--Public Attorney's Office (PAO)--must take a "proactive" role in providing assistance to victims requiring legal assistance. The number and quality of public attorneys must also be increased. This is to avoid backlogs, to decrease the number of cases handle by each individual and to ensure that the legal service rendered by each PAO lawyer is qualitatively improved.
- There must also be rigorous reforms imposed within the judiciary as provided for by the Supreme Court's long overdue Action Program for Judicial Reform (APJR).
- The number and quality of court judges must be increased, as well as the number and quality of quasi-judicial officers hearing cases on labour and agrarian-related cases (for example labour arbiters, hearing officers in agrarian special court officers). They must also have performance pledges as to the length of completion of cases.
- The government must ensure that laws and policies violating the protection of rights are removed; including the "No Union No Strike policy" in Cavite, the Calibrated Pre-emptive Response (CPR), the imposition of guidelines for the police and military in connection with counter-terrorist activities, the action by prosecutors and judges of taking undue jurisdiction over labour and agrarian related cases.
- Improve the prison and jail conditions all over the country to ensure that they are more humane, with adequate health and medical facilities, in accordance with international norms, standards and recommendations.
- Government officials, the police and members of the military must be sanctioned should it be proven that they have committed human rights violations in accordance with the law and international human rights law and standards.
- The government must retract public statements that are prejudicial to the victims and the course of justice, and ensure that this practice is halted.
- Domestic laws on torture and enforced disappearance must be enacted without further delay, in accordance with the ICCPR and other international laws and standards.
- Members of the UN General Assembly must consider reviewing the country's human rights records and its implementation of the international Covenants and Conventions and reconsider the country's membership in the UN Human Rights Council and ECOSOC.
- The government--in particular the Department of Foreign Affairs--must be held accountable for their failure to respond to the UN complaints mechanisms and Special Procedures concerning complaints of human rights violations.
- The government must live up to its pledges to the international community and cooperate fully with the United Nation's human rights mechanisms, ensuring that it responds fully and in good faith. It must also issues standing invitations for all of the UN Special Procedures to conduct visits to the country, in particular the Special Rapporteurs on extra-judicial killings, on torture, on the independence of lawyers and

judges, as well as the Working Groups on arbitrary arrests and detention, and on enforced disappearance.

- The government must without delay become a signatory to the International Convention for the Protection of All persons from Enforced Disappearance and ensure the full implementation of all other international instruments to which the country is party.
- The government must effectively implement the Concluding Observations and Recommendations by the UN Human Rights Committee.





## ASIAN HUMAN RIGHTS COMMISSION

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### SRI LANKA: The Situation of Human Rights in 2006

A new year's wish list published in a daily newspaper by six Sri Lankan groups in early 2006 stated the following:

**New Year 2006  
Wish List**

**IMMEDIATE** appointment of the members of the Constitutional Council, enabling the National Police Commission, Election Commission and other Constitutional Commissions to function.

**CREATE** an effective witness protection programme and a fund for victims.

**STOP** torture and extra judicial killings.

**TAKE** effective action to end delays in the administration of justice.

**THOROUGHLY** improve the prosecution system. .

**ENSURE** disciplinary control in the policing system.

**INITIATE** prompt, independent and effective investigations into all crimes, including those allegedly committed by state officers.

**GUARANTEE** freedom of expression and association and protection to all journalists and human rights activists.

People Against Torture, Families of the Disappeared, Right to Life Human Rights Center, Setick, Wayamba Human Rights Forum, The Citizen's Committee for Human Rights - Kandy, The Citizen's Committee for Human Rights - Kalutara, Gampaha Human Rights Front, Rule of Law Center, Dambulla Human Rights Institute, Kandy Human Rights Forum, Organization for Human Rights - Galle, Organization to Safeguard Democratic & Human Rights, Media Center - Kandy, Human Resource Institute-Polpithigama, Asian Human Rights Commission, Hong-Kong, Janasansadaya, 81/2, Arthur V. Dias Mawatha, Panadura. Tel/ Fax: 038 22 35191

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Immediate appointment of the members of the Constitutional Council, enabling the National Police Commission, the Election Commission and other Constitutional Commissions to function; create an effective witness protection programme and a fund for the victims; stop torture and extrajudicial killings; take effective action to end delays in the administration of justice; thoroughly improve the prosecution system; ensure disciplinary control in the policing system; initiate prompt, independent and effective investigations into all crimes, including those allegedly committed by state officers and guarantee freedom of expression and association and protection to all journalists and human rights activists.

As we reach the end of the year it is sad to note that none of these wishes have been fulfilled. In fact the human rights situation in the country has taken a turn for the worse. The trend of human rights in Sri Lanka as discussed below have developed over many

years and the state has not shown any determination to take steps to improve the situation. The absence of will on the part of the state to deal with the extremely grave situation of human rights violations is the major obstacle to the protection and promotion of human rights. The attempts by the international community acting through UN agencies and others have not produced any positive changes. If some decisive steps are not taken by the Sri Lankan government, 2007 may bring in even more dismal news about gross human rights violations in the country.

The wish for 2007 has to be that of an awakening on the part of the state to the catastrophic human rights situation in the country and cooperation by the state with the UN and other agencies to take some bold decisions to put their house in order. A failure to take steps in that direction may mean the country's rapid degeneration towards an even greater catastrophe.

## **1. Impunity**

***1.a. The following statement made by Amnesty International on November 17, 2006 sums up the situation of impunity in the country and highlights the only effective way to deal with this situation.***

"In light of decades of impunity for perpetrators of violations of international human rights and humanitarian law in Sri Lanka, characterised by the failure of the authorities to investigate and prosecute such perpetrators effectively, only an international and independent Commission would have the credibility and confidence of all parties to the conflict and sections of society to be able to conduct meaningful investigations, obtain critical testimony or information from witnesses and gain the acceptance of its recommendations by all relevant parties. To this end, members of the body conducting the inquiry should be international experts, chosen for their recognised impartiality, integrity and competence. Crucially, they should be, and be seen to be, independent of any institution, agency or individual that may be the subject of, or otherwise involved in, the inquiry, including the Government of Sri Lanka. Amnesty International does not believe that an independent group of eminent persons observing an essentially national inquiry can serve as a substitute for the independence, real and perceived, of the Commission of Inquiry itself."

### ***1.b. The causes of impunity: Presidential impunity***

Section 35 (1) of the Constitution (Immunity of President from suit) reads as follows:

While any person holds office as President no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

The Court of Appeal in its judgement in CA Application 66/2006 held that the violations by the president cannot be challenged in any court of law. The following statement made by the AHRC outlines the implications of this judgement:

**SRI LANKA: Implications of Court of Appeal judgment on 17th Amendment of the Constitution**

FOR IMMEDIATE RELEASE

June 9, 2006

AS-139-2006

A Statement by the Asian Human Rights Commission (AHRC)

SRI LANKA: Implications of Court of Appeal judgment on 17th Amendment of the Constitution

The judgment of the Court of Appeal on the application of two citizens regarding the recent appointments to the Police and Public Service Commissions by the President of Sri Lanka [CA Application 66/2006] raises some fundamental problems regarding the implementation of the Constitution of Sri Lanka.

The issue raised by the petitioners was that the Commissioners to these two Commissions have been appointed by the President, contrary to the provisions of the Constitution, which requires that the nomination of the candidates to be appointed to these Commissions should be done by the Constitutional Council and the President would thereafter appoint them. In the court this obligation of the President was questioned and the court relied on Article 35 (1) of the Constitution which provides for presidential immunity, from any proceedings in any court for his actions or omissions, whether they are official or private. Article 41 B (1) of the Constitution states as follows: No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendation of the Council...

These two provisions of the Constitution were examined before the Court of Appeal. The issue then was which Article was to prevail over the other. To answer this the court relied on Article 35 (3) which places only one limitation to Article 35 (1). Article 35 (3) reads as follows: The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) [relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament:]. Thus, the essence of the judgment is that the violation of Article 41 B (1) by the President cannot be challenged by any court of law.

Flowing from this judgment is the conclusion that if the President by his act or omission violates any provision of the Constitution other than under three articles mentioned in the above paragraph [Articles 44 (a), 129 (2) and 130 (a)] he will not be liable to be questioned before a court of law. Under the Constitution of Sri Lanka everyone is equal before law. It means that any person who violates the Constitution is liable for action in an appropriate court of law. However, the position as of now is that if a President violates the Constitution then the President is not liable for any action before court. Thus, Article

12 (1) of the Constitution which reads all persons shall be equal before the law and entitled to the equal protection of law has no effect at all as far as the President is concerned. Thus, the President is above the jurisdiction of courts except regarding the three Articles of the Constitution mentioned above. He is thus entitled to remain outside the jurisdiction of courts when he violates the rights enshrined in the Constitution.

Article 19 of the Constitution reads ... the national language of Sri Lanka shall be Sinhala and Tamil. If the President by an act or omission violates this provision no action will lie against the President in a court of law. This also applies to other provisions regarding language in Chapter IV of the Constitution.

Chapter V of the Constitution is about citizenship. Under this chapter, the basic provisions of citizenship have been defined. If the President, by any act or omission violates the provisions of this Chapter no action cannot be brought against the President in a court of law. Chapter VI is the Directive Principles of State Policy and Fundamental Duties. If the current President decides to replace Mahindachinthanaya in place of Chapter VI of the Constitution, this too cannot be challenged before a court of law. For example, if a President prefers to deal with welfare in a particular part of the country (for example the President's home constituency), as against the rest of the country, this too cannot be challenged in a court of law.

Chapter VII of the Constitution is on the subject 'The President of the Republic'. Suppose the present or a future President decides to confer powers and privileges on the President which are not recognised in this Chapter, again, the same situation will follow. Sri Lanka has had one instance when a former President was awarded a piece of land by the present cabinet and later due to this being questioned in court, the gift was withdrawn. Suppose, the gift was given by the President himself, directly, to the former President, this cannot be challenged in a court of law. Suppose a president gives himself an award of land or any other state property, this too cannot be challenged before a court. In many countries there have been allegations of corruption committed by heads of state while in office, and inquiries have been held into the matter and sometimes actions have been taken in courts. This cannot be done in Sri Lanka in terms of the interpretation of Article 35 of the Constitution taken by the Court of Appeal.

Chapter VIII of the Constitution is on the executive. Under this, the President is responsible to the parliament for due exercise and performance and discharge of his powers, duties and functions under the constitution and other laws including public security laws. Suppose a president decides that he shall not be responsible for the parliament and makes orders directly in any manner he wishes, this too cannot be challenged in a court of law. There are whole series of judgments where immunity of state agents signing documents under the public security law had been given immunity under some laws or emergency regulations, the courts have interpreted such immunities in a very limited way, thus safeguarding the basic rights of the people. However, if any of these orders were directly made and signed by the president himself, then this too cannot be challenged before any court of law. Under the same chapter, there are such matters as cabinet ministers, deputy ministers, the prime minister, secretaries to the ministers and

the like. In any of these matters the president can violate any part of the constitution and the consequence as far as actions in courts are concerned is the same as stated above.

Chapter IX of the constitution is on the public service. It deals with such appointments as that of Attorney General, Head of Army, the Navy, the Air Force and the Public Force. Suppose, the president violates any of the provisions in the Constitution or in any other law or the best practices that have been traditionally followed in these matters, even such actions cannot be challenged before a court of law. If a person with no legal qualifications is appointed as the attorney general on the basis of a preference which a president may think it is to his advantage, there is nothing that can be done before a court of law on that matter too. In fact, on the issue of public service the president has already contravened the constitution as amended, and the court has held that they do not have jurisdiction to go into the matter.

The next section of the constitution is on legislature. It deals with parliament, official oath or affirmation, speaker, deputy speaker and chairman of committees, secretary general of the parliament, vacation of seats, privileges, immunities and powers of parliamentary members, allowances of members and power of parliament to act upon new vacancies. In any of these matters if the President by any of his acts or omissions violates the provisions of this chapter no action can be brought against him in a court of law. Article XI is on legislature covering subjects as sessions of parliament, adjournment, voting, quorum, standing orders, legislative power, delegation of legislative power, duties of attorney generals in regard to publication of bills and passing of bills of resolutions, certificate of speaker, when bill becomes law, expulsion of members and imposition of civic disability. The legal status of all these provisions is the same as far as action against the president in court in violation of any of these is concerned. Suppose, a president removes the civic abilities of the leader of opposition or for that matter any other member of political party, by his direct action, for example signing a paper directly stating such removal of such civic ability, such actions cannot be challenged before a court of law.

Chapter XII is on amendment of the Constitution. This covers subjects as amendment or repeal of the constitution, which must be expressed for approval of certain bills of a referendum and bills inconsistent with the constitution. In any of these matters the President may violate the constitutional provisions and no court will have power over it. For example, if Article 83 which prohibits the extension of the term of office of the president or duration of the parliament is violated by the president by his direct action or omission, say for example making a written declaration by him that he had extended his time of office, or time of duration of the parliament beyond six years, regarding this matter too no court will have jurisdiction to undo the action of the president.

Chapter XIII is on referendum and chapter XIV is on franchise and election. These are all very fundamental provisions of any constitution. Even on these the court has no jurisdiction if the president violates the constitution. For example if the issue of proportional representation is changed by the president directly through his action, for example a presidential decree, this too is a matter on which the courts will have no jurisdiction. Further if a person who had not been qualified to be elected as a member of

parliament in violation of Article 100 of the constitution, with direct approval of a President, this too will be outside the jurisdiction of the court.

Chapter XV is on the judiciary dealing with such matters as establishment of courts, public sittings, independence of judiciary, appointments, removal of judges to the supreme court and the court of appeal, salaries of judges of the supreme court and the court of appeals, acting appointments, performance or discharge of the function of judges, appointment, removal and disciplinary control of judges of the high courts, commissioners of the high courts, judicial service commission, secretary to the commission, fiscal for the whole island, appointment of other judicial officers, interference with the judicial service commission, interference with judiciary and immunity of members of the commission. Suppose a president was to establish courts outside those recognized by the constitution so far, for example starting courts of appeal in places other than Colombo, and the president does so with a presidential decree, this too cannot be challenged in a court of law.

Chapter XVI is on the Supreme Court. It covers such topics as general jurisdiction of supreme court, constitution of the supreme court, constitutional jurisdiction of the supreme court, ordinary exercise of the jurisdiction in respect of bills, special exercise of constitutional jurisdiction in respect of urgent bills, determination of supreme court in respect of bills, validity of bills and legislative process not to be questioned, constitutional jurisdiction in the interpretation of the constitution, fundamental rights jurisdiction and its exercise, appellate jurisdiction, right of appeal, consultative jurisdiction, jurisdiction in election and referendum petitions, in respect of parliamentary privilege, sittings of the supreme court, appointment of ad hoc judges, right to be heard by the supreme court, registry of the supreme court and the office of the registrar, the rules of the supreme court, court of appeal, its jurisdiction, powers of appeal, power to issue writs other than writs of habeas corpus, power to issue writs of habeas corpus, power to bring and remove prisoners, power to grant injunctions, parliamentary election petitions, inspection of records, sittings of the court of appeal, registry of the court of appeal and the office of the registrar. On any of these matters if a president decides to act contrary to the constitution, no court will have jurisdiction to adjudicate on the matter. For example, if the president by a presidential decree grants a magistrate court, the power of writ jurisdiction, there is nothing that can be done to prevent it by way of an action before a court.

Chapter XVII of the constitution is on finance. It covers such important matters such as control of parliament over public finance, consolidated fund, withdrawal of sums from consolidated fund, the contingencies fund, special provisions as to bills affecting revenue, auditor general, duties and functions of auditor general. It is well known that there had been considerable problems created by some agents of the present regime against the auditor general. Suppose a president decides to appoint an auditor general ignoring the provisions of the constitution in the same manner a supreme court judge and two appeal court judges have been appointed ignoring the 17th amendment, this matter too cannot be challenged, in any court of law. If a president decides to remove the control of parliament

over public finance and does so by a presidential decree, this too will fall within an action of the president under article 35 (1) of the Constitution.

Chapter XVII A is on provincial councils going into such issues as establishment of provincial council, governor, exercise of powers of the governor, membership of the provincial council, term of office, board of ministers, status of provincial council, assent, public security, failure to comply with directions, failure of administrative machinery, parliamentary confirmation of provincial powers to the president, financial instability, high court, function, powers, election etc. of the provincial council, finance commission, special provision enabling provincial council to exercise powers under this chapter and transitional measures. The legal situation is the same if a President acts in contrary to this chapter, it shall be no different to acting in contravention to the 17th amendment as far as the jurisdiction of courts are concerned.

Chapter XVIII is on public security. Chapter XIX is on the parliamentary commissioner for administration. Chapter XX is on entitled general, which covers such subjects as international treaties and agreements, prohibition of violation of territorial integrity of Sri Lanka. Article 157 states that no executive or administrative action shall be taken in contravention of the provisions of a treaty or agreement. However, this article is no different to the articles of the 17th amendment and will not be protected specially by the courts, if a president decides to contravene it. Regarding prohibition against violation of territorial integrity, if a president is acting contrary to this provision, again no action shall lie against him.

Chapter XXI is transitional provisions, XXII on interpretation and XXIII on repeal of the earlier constitution, XXIV is the promulgation of the constitution and there are schedules giving names of administrative districts, national flag, national anthem, the affirmations and several other incidental matters. On any of these matters to any action done by a president in contravention any of the constitutional provisions has the same status as violations of the 17th amendment.

There is a further issue arising from the court of appeal judgment. It is that if the appointments to the supreme court, court of appeal and commissions such as public service commission, police commission and the national human rights commission cannot be challenged in a court of law, then, dismissal of any persons of the supreme court, court of appeal and any of the commissions under the 17th amendment or under any other provisions of the constitution is done by the president no action shall lie against such action in a court of law. This should have a chilling effect on anyone who is holding any office in these institutions. For example, a Supreme Court judge can be removed only by way of a resolution, passed in parliament by the 2/3rd majority. However, if a president were to decide to do so and does any action for that purpose, such action will be covered within Article 35 (3) of the Constitution.

***1.c. The absence of a credible mechanism for investigating human rights abuses by way of criminal justice inquiries***

The Asian Human Rights Commission has extensively reported on the absence of proper criminal justice inquiries in recent times into even ordinary crimes, but more glaringly into gross abuses of human rights. The capacity for investigations by way of competent and experienced persons does exist, although their numbers may not be adequate. The real reason for proper inquiries not being held is political. Various pressures are brought on the investigators through their own superiors as well as from outside not to engage in serious and professional criminal justice inquiries. In sensitive cases heavy moral pressure is exercised on the investigating officers to ensure that the investigations stop before identifying the perpetrators and credible evidence through a charge before court.

Even on some criminal matters which may not be directly political, such as investigations into drug abuse officers who engage in serious inquiries have faced threats and on some occasions they have even been assassinated, as demonstrated in the case Douglas Nimal and his wife.

When serious allegations are made against the government for failure to investigate it sometimes tries to pass this burden unto presidential commissions appointed under the Commissions of Inquiry Act, No. 17 of 1948. These inquiries are often fact finding inquiries and nothing more. They can never be a substitute for investigations into crimes, as envisaged by the Criminal Procedure Act of Sri Lanka. Often the appointment of these commissions has no other purpose than to create a false impression about a possible inquiry, when in fact no such inquiry takes place. The AHRC has drawn attention to this fact constantly throughout the year.

The absence of witness protection and a witness protection programme is a fundamental defect affecting criminal inquiries and prosecutions. There is a general reluctance in the country for people to come forward to provide information to the police or any other agency on crimes. This is due to a widespread perception that the police are either complicit in crimes or, are unable to protect witnesses. Witnesses suffer from assassinations, threats of assassination and other forms of harassment. Furthermore there are also various methods by which witnesses are brought over. The result is that the conviction rate in serious crimes is only 4%. The very prospect of finally ending a case successfully is so slim that it prevents many victims of crime from coming forward to seek justice. This prospect may also have a serious demoralizing effect on the investigators, prosecutors and judges themselves. The situation is even worse when the alleged perpetrators of an offence are police, military or other state officers. The very making of the complaint brings the complainants, their families and anyone who supports them into serious risk. The traumatic effect of horrendous repercussions creates a heavy toll on even the most determined complainants and their families.

Added to all this is the impact of the slow process of justice. Every area of justice such as the taking down of complaints to the final adjudication in courts goes through such a



slow process that takes years. The sheer mindlessness of such delays is one of the major obstacles to addressing the matter of impunity in the country.

The impact of several decades of instability on the Sri Lankan policing system has been thoroughly documented in a number of reports by the AHRC. Article 2, Vol. 1, No. 4 (<http://www.article2.org/mainfile.php/0104/>) and Vol. 3, No. 1 (<http://www.article2.org/mainfile.php/0301/>) and a 300 page book entitled 'An Exceptional Collapse of the Rule of Law' which have provided extensive documentation on this issue.

### ***1.d. The failures and weaknesses of the Attorney General's Department as the prosecutor***

The Attorney General's position remained much weakened due to political undermining. It has also has problems of being understaffed and lacking in resources.

When the Executive President made appointments to the Court of Appeal and the Supreme Court, ignoring the constitutional requirements that the selections be made by the Constitutional Council, he clearly ignored the advice of the Attorney General.

The Attorney General had advised, months ahead, that all appointments that come under the 17th Amendment must be done through the Constitutional Council. The Attorney General's advice to the government on this matter has been well publicised and is known to the whole nation. The President has neither reputed this advice nor explained why he chose not to follow it. The highest legal officer in the country has been ignored and humiliated.

Neither the rule of law nor the independence of the judiciary can survive when this type of neglect and bypassing takes place. The Attorney General is the Chief Legal Advisor to the government and ranks in precedence in the legal sphere to the Chief Judge of the Highest Appellate Court. He may communicate directly with the president, ministers and head of departments. He is the head of the Bar and has precedence over all Presidents' Counsel. The Attorney General's Department was established in 1884 and it is the boast of this department that it has long established traditions of playing a pivotal role within the legal system of Sri Lanka.

However, the President's action of completely ignoring the Attorney General has been preceded by other actions that have brought down the authority and the prestige of this important institution. We quote below from the book, Disorder in Sri Lanka, by former Supreme Court judge K.M.M.B. Kulatunga, who was also a long time member of the Attorney General's Department and who rose to the post of Acting Attorney General:

*No Government will lightly disregard the opinion of the Attorney-General and advise itself wrongfully. If it did so, that would lead to wrong decisions which would in turn*

*discredit it in the public eye. It may thus be true to say that in a particular situation the stability of the Government may itself depend on the correctness of the opinion tendered by the Attorney-General. As such he will not rest his advice on mere expediency.*

*(Attorney General as advisor to the government and as guardian of public interests)*

#### *The role of the Attorney General*

*It has been our experience that every administration wishes the judgements of the court to be in its favour. Perhaps we cannot fault politicians for this, But the Attorney General should be able to advise the Executive and explain the legal basis of most judgements which have gone against the State. When I was Acting Attorney General I was asked by the President whether the Supreme Court could review a Cabinet decision and whether a particular judgement was right. I sent him a letter defending the Supreme Court Judgement, in the context it was given. Perhaps the Attorney General is no longer free or strong enough to advise the Executive. But this will not give a licence to Executive or Members of Parliament to make insinuations against the judgements of the court or to offer advice to judges at public functions as to how they' may discharge their duty.*

*(Independence and dignity of the judiciary)*

*I have observed a gradual decline in the independence of the officers of the Attorney General's Department. They are unable to tender correct advice to the State for fear of incurring the displeasure of the executive. State officers do not appear to accept Attorney General's advice. The cause of this situation is the fear psychosis created by politicisation. Police officers are subject to political interference. They are not being trained in scientific methods of criminal investigation. Some of them are skilled in unlawfully detaining suspects and torturing them. Recently the police applied to be given the power to detain a suspect for 72 hours. To my knowledge no police officer who has been ordered by the Supreme Court to pay compensation for torture has been punished. On the other hand, a recent judgment of the Supreme Court has approved promotion of such officers.*

*(Functioning of the judicial system (administration of justice) in Sri Lanka)*

The damage done to the Attorney General's Department by persistently ignoring the Attorney General's advice on the all-important issue of the 17th Amendment to the Constitution is irreparable. While society at large will see that the department has been thoroughly ignored by the all-powerful Executive President, the demoralisation that will follow to the members of the department will also be enormous. The unscrupulous ones will look forward to making compromises with powerful politicians to enhance their own personal situations.

However, under these circumstances, the Asian Human Rights Commission congratulates the Attorney General for offering the correct advice to the government and parliament on this matter, and hopes that the department will fight to retain its integrity as the highest legal office in the country.

***I.e. The serious limitations of the judiciary in ensuring competent and speedy trial and winning the confidence of the people in the judicial process***

The judiciary in Sri Lanka has been undermined from outside forces as well as from within. Under the Executive Presidency it became a norm to have the judiciary subordinated to the president. Gradually this situation led to a total considerable cooption of the judiciary to the Executive Presidency, particularly during the period of the presidency of Chandrika Kumaratunga. There have also been serious concerns expressed about the internal handling of appointments, promotions, transfers and the disciplinary process of the lower ranks of the judiciary. Two senior Supreme Court judges resigned who were part of the three-member Judicial Service Commission complaining of matters of conscience and no inquiry has yet been held into this matter. (Please see our statement SRI LANKA: Judges' resignations demand a response from the president – the full text of this statement may be found at: <http://www.ahrchk.net/statements/mainfile.php/2006statements/436/>. The AHRC has documented various aspects of this crisis on different occasions. We reproduce below some of the observations:

**Some basic stages in the undermining of the judiciary**

The following extract from a recently published book, *Disorder in Sri Lanka*, by a former Supreme Court judge, K.M.M.B. Kulatunga, helps us to understand the action of undermining the judiciary, the author traces a series of interferences by the executive over the years which resulted in the politicisation of the system of justice. (*Disorder in Sri Lanka*, published in Sri Lanka in August 2005).

We are also reproducing a section from an article "Constitution for Dictatorship" written by the late Colvin R. De Silva, from a collection of his essays written between 1977 and 1988. You will find these essays at:

[http://www.srilankahr.net/modules.php?name=Content&pa=list\\_pages\\_categories&cid=75](http://www.srilankahr.net/modules.php?name=Content&pa=list_pages_categories&cid=75)

From *Disorder in Sri Lanka*

*Soulbury Commissioners in recommending the establishment of the Justice ministry said that this was without prejudice to the performance of the duties of the Attorney General and the Solicitor General. There was no interference of the functioning of the duties of the judges; and the Judicial Service Commission consisting of the Chief Justice and the next two most senior most judges were in charge of the appointment and the disciplinary control of Original Court Judges. However, during a period of over 50 years of independence, there has occurred a decline in the administration of justice mainly due to the progressive and total politicisation of the life of the community. Illustrations of this situation follows:*

*In 1947 Sir Alan Rose (Legal Secretary under the Donoughmore Constitution) was made Attorney General on the recommendation of Prime Minister D.S. Senanayake. At the same time the Attorney General was placed next to the Chief Justice. In 1948 Basnayake who was in the Attorney General's Department was appointed to the Supreme Court from where he returned to the Department as Attorney General.*

*In 1955 Basanyake was appointed Chief Justice on Prime Minister Sir John Kotalawala's recommendation. The same year Sir John Kotalawala overlooked T.S. Fernando Q.C. who was Solicitor General and procured the appointment of H.N.G. Fernando Legal Draftsman to the Supreme Court during the Bandaranaike Government.*

*In 1966 A.C.M. Ameer was appointed as Attorney General overlooking Victor Tennakoon Q.C. Solicitor General. It is said that this was a decision influenced by J.R. Jayawardena. Tennakoon was appointed to the Supreme Court, a position below the Attorney General on the precedence table. The new Government in 1970 appointed Tennakoon as Attorney General overlooking the claims of L.B.T. Premaratna Q.C. Solicitor General, Acting Attorney General.*

*From 1972 - 1974 several persons who were associated with pro-government political parties were appointed to the Supreme Court. Appointment of judicial officers and public officers was vested in the cabinet of ministers and its delegates. Appointments of Crown Counsels and the Solicitor General were taken over by the Secretary Justice. I was a crown Counsel in 1970, when Felix Bandaranayake Justice Minister visited the Department and directed that henceforth law officers should assist in implementing government policy. While other officers were silent. I remarked that our duty had always been to assist in implementing the policy of the law.*

*The new Government elected in 1978 established a Supreme Court and a Court of Appeal and reappointed some of the then judges to the Supreme Court, demoted some to the Court of Appeal. Some were retired. New judges were appointed to the Supreme Court from different sources including conservative judges. Samarakoon Q.C. was appointed Chief Justice over the most senior judge Samara Arickrema Acting Chief Justice. As Mario Gomis comments in his book "In the Public Interest" judges were generally pro executive and conservative.*

At the very inception of the 1978 Constitution the late Colvin R. De Silva made the following observations:

*The President's power over the judiciary is not inconsiderable although it is declared that the judicial power of the people shall be exercised by Parliament through courts and tribunals created and established, or recognized by the constitution, or created or established by other written law. The appointments to the Supreme Court, the Court of Appeal and the High Court are in his exclusive hands. So also, the creation and establishment of courts by other written law is in his control as head of Cabinet.*

### ***1.f. The weakening of the legal profession***

#### **Inability and unwillingness of lawyers to challenge legal wrongs**

With the subjugation of the courts to the dictates of the executive since the 1978 Constitution, Sri Lankan lawyers have been facing tremendous angst. Over the past 28 years they have endured significant pressure, which has forced them to withdraw from undertaking their professional duties. A frame of mind has developed whereby they feel unable to discharge basic duties for their clients, particularly in disputes against the state. As well as being unable, lawyers are equally unwilling to undertake such pursuits. This has led to the absence of any will to fight, which is a key trait of the legal profession.

Today's legal profession is one from which persons have withdrawn completely or partially. Those who have withdrawn partially are active only as persons trying to make a living. There is no longer any pride or conviction of belonging to a noble profession. A researcher interviewing lawyers recently was left with the impression that lawyers are willing to adjust to anything, and will not protest any inconvenience or humiliation the courts may expose them to, for instance attending a court in which a judge will arbitrarily choose the time of sittings. The official time may be 9:30am but the judge may begin at 1:30pm. Or lawyers may accept without protest when evidence in a case is taken for 15 minutes and thereafter the case is postponed for several months. In fact, lawyers are unwilling to push for speedier hearings for fear that this may cause the case to be postponed for an even longer period. 'Wiser' lawyers may tell their client that his cause is better served by accepting any whims of the judge.

Similarly, most lawyers are unwilling to take on cases of public law where the judge may be placed in the embarrassing position of making judgments against the state. Pressing for such a judgment may antagonize the judge. Again, 'wiser' lawyers will therefore advise against such assertion; it is seen as futile and even counterproductive.

The prevailing feeling among the legal profession today is that to be too serious over one's obligations to clients or the public is only a trait of someone who does not understand 'reality'. The accepted principles by which most lawyers conduct their duties are cynicism, accepting the various whims of judges and an avoidance of serious social or political issues. For this reason, if lawyers are asked to represent a client challenging the president's recent appointments to the Court of Appeal and the Supreme Court on the grounds of unconstitutionality, the common response would be negative. Lawyers are concerned that they may appear before the same judges on other matters. Another response made by lawyers is that whatever applications are filed, and whatever their validity, the ultimate outcome will be negative for extraneous reasons. Other lawyers respond that the cases will not be resolved speedily and the issues themselves may cease to be relevant by the time a judgment is given.

The attitude of the legal profession has a direct impact on the justice system. At present the courts are unable to maintain the rule of law, and lawyers are not contributing to the revival of confidence in the courts. In fact, there is an overwhelming consensus that neglected courts may better protect the interests of powerful individuals in the state and society. According to a study conducted by the Ministry of Justice in 2004 on court delays, a primary cause of the delays is the non-compliance of state officers, particularly the police, with their obligation to attend court.

President Rajapakse's authoritarian appointments to the senior judiciary, in violation of the 17th Amendment, will reinforce the paralysis of the legal profession. By accepting the state's blatant attempts to dominate the court process, lawyers are demonstrating their extraordinary capacity to adjust and adapt, as well as their lack of professional pride and integrity. In fact, many lawyers may take advantage of the situation for unscrupulous gains, which under normal circumstances would result in disciplinary action. Under the present circumstances however, there can be no such thing as disciplinary action according to the rule of law. This is therefore a time when the unscrupulous can thrive.

The case of Elmore Marsh Perera who is facing the threat of a Rule being issued against him thereby removing him from the list of lawyers, is an illustration of the problems faced by lawyers in Sri Lanka. A statement issued by the AHRC on this matter provides information on this case

**SRI LANKA: Show cause notice on lawyer Elmo Perera has no basis in law and is an attempt to silence critical voices among the legal fraternity pursuing public interest issues**

A senior lawyer who has appeared in many issues of public interest in recent years is now facing the threat of being removed from the roll as a lawyer due to a fundamental rights application he filed raising questions regarding the constitutionality of some issues relating to the judiciary that he pleaded adversely affects his capacity to function as required by his profession as a lawyer.

Elmore Marsh Perera (73 years of age) was a senior civil servant holding the posts of Surveyor General of Sri Lanka and Additional Director, Training & Evaluation of the Civil Service. Later he became a lawyer and took a great interest in public interest issues and in safeguarding the independence of the judiciary and the integrity of the legal profession. The action that has been initiated against Mr. Perera has shocked lawyers as well as the public. A people's forum has been formed by a number of persons to ensure justice for Mr. Perera as well as to defend the independence of the judiciary and the rights of the people. This forum, in a statement says "he is a lawyer who did not charge anything for appearing on legal issues on justice. Such an honourable person is now facing a threat of destruction of his dedicated practice."

The story about this case is as follows: Mr. Perera filed a fundamental rights application bearing number SCFR 108/2006 stating that his fundamental right to practice as a lawyer has been infringed for the following reasons:

- a. Two members of the Judicial Service Commission (JSC) have resigned quoting reasons of conscience and no inquiry has been initiated to find the reasons for these resignations.
- b. In the past there has been precedence that when the Chief Justice of the Supreme Court is out of the country the next senior most judge of the court is appointed as

- the acting Chief Justice. However, when recently the Chief Justice was out of the country a far more junior judge of the Supreme Court was appointed as the acting Chief Justice.
- c. Two judges have been acting as members of the JSC as if appointed as members of the Commission while in fact no appointments as required by the Constitution have been made.

This petition has been filed on the 9th March by Mr. Perera citing himself as the petitioner. It came up on 21st March for supporting in open court before three judges of the Supreme Court. One of the judges was among the two people who were functioning as members of the JSC although not constitutionally appointed for that post.

Mr. Perera objected to this judge being a part of the bench in a case where he was an interested party to the matters to be adjudicated. However, when this objection was taken the presiding judge replied that the particular judge that was referred to was present on the bench only as a passive member and that it would be the other two judges who would decide the case. At this stage the presiding judge overruled the objection. Mr. Perera made a further objection to the presiding judge being part of the panel hearing this case and this objection was also overruled. Thirdly, he made another objection to a two judge bench hearing this case as the case raised matters of grave constitutional importance. This objection was accepted by the court and the case was adjourned to the 31st March for fixing the case before a larger bench.

Subsequently Mr. Perera came to know of two newspaper reports which mentioned comments of the presiding judge to the effect that he, as the lawyer, had made remarks in court that were rude and that this demonstrated the extent to which the courts in the country has degenerated. As he was totally unaware of any such remark by the judge he believed that the journalists misinformed themselves. On the next date (31st March) of the case he brought to the notice of presiding judge the remarks that were attributed to the court and printed in the said newspapers. At this stage the presiding judge confirmed that such remarks had been made and in fact written in the case record.

Subsequently Mr. Perera heard that a rule had been issued by the Supreme Court in which he was asked to show cause as to why he should not be removed from the roll of being an Attorney-at-Law in Sri Lanka. Although he had learned about this issuing of this rule from some sources he did not receive any official notice of it or the date on which this matter is to be called before the Supreme Court. Fearing that the rule may be issued before he received notice he went to court on his own on the 2nd October and came forward when the case was called. The court was presided over by the Chief Justice Sarath N. Silva. Mr. Perera informed the court that he had not received any notice about the matter and that he was unaware of the content of the matter before court. At this stage the Chief Justice handed over the case docket bearing number SC Rule 1/2006 and asked Mr. Perera to read it.

Upon reading from the docket Mr. Perera found that there was no complainant mentioned in the Rule. He further discovered that the grounds on which he is asked to show cause were as follows:

WHEREAS you filed S.C. Application No.108/2006 (FIR) describing yourself as a practicing Attorney-at-Law of this Court and supported the application for Leave to Proceed on 31.03.2006

AND WHEREAS in your submission you:

1. Continued to read each and every averment in the Petition, despite a specific given that the Bench was in possession of the contents of the Petition and that you should not unduly take the time of Court by reading each and every paragraph but that you should make your submissions relating to the specific matters of law and fact, relevant to the in issue. Despite the said direction you in disobedience and defiance of said direction continued to read the said paragraphs in the Petition in disobedience of the specific orders of Court;
2. That in the course of the said proceedings when the Bench required you to address Court on certain issues for the purpose of clarification of questions of law that arose for consideration, you rudely and insolently refused to answer any questions despite repeated requests and you contemptuously told Their Lordships that they could look it up themselves, if they so desired.
3. That you used intemperate language and made gesticulations to bring the proceedings of Court into ridicule and contempt. That thereby, you engaged in conduct prejudicial to the administration of justice; failed to assist in the proper administration of justice and/or permitted your personal feelings to influence your conduct before Court in breach of Rules 50 and 54 of the Supreme Court (Conduct and Etiquette for Attorneys-at-Law) Rules 1988 amounting to misconduct and malpractice as an Attorney-at-Law.

On the matters mentioned above he is asked to show cause as to why action should not be taken against him under section 42 (2) of the Judicature Act (Act No. 2 of 1978) which reads as follows:

*Every person admitted and enrolled as an Attorney-at-Law who shall be guilty of any deceit, malpractice, crime or offense may be suspended from practice or removed from office by any three judges of the Supreme Court sitting together.*

The Asian Human Rights Commission finds it completely incomprehensible as to why a show cause notice for a rule should be issued on the grounds mentioned above against a lawyer. Clearly the matters mentioned as the grounds on which Mr. Perera is asked to show cause do not fall within section 42 (2) of the Judicature Act. Trying to extend this section of the Act in such a frivolous and elastic manner will not only have a chilling effect on the legal profession but also make it impossible for the rational practice of law. None of the matters mentioned in this case fall within the meaning of the definitions of deceit, malpractice or crime and offense.



A judge/lawyer relationship is not one of the feudal master/servant relationships. It is one in which a lawyer participates to represent his clients on the basis of rights and privileges which are well established globally and which have remained part of the tradition of the relationship of bar and the bench in Sri Lanka. A lawyer is not expected to blindly obey directions or orders given by a judge while he is making his representations to court on behalf of clients. The lawyer is at liberty to reply to the court of his disagreements on the courts' questions in dealing with his submissions. He cannot perform his function as a professional without the liberty to make his presentation in the manner he chooses best so long as he performs such duties within the usual norms of rational discourse. The question of disobedience as raised as the very first ground does not stand to reason or the best practices of the tradition of the profession. Lawyers do not owe obedience to court but only mutual respect on the basis of recognition of the dignity of the bar as well as the bench.

The second ground is equally irrational as the lawyer may point to relevant sections of a petition if the questions raised by the court are in fact answered in those sections of the petition. The answering of questions by a lawyer does not follow like a question and answer session in a contest or as it happens in cross examination. It is a lawyer's right to choose the manner in which he answers the questions from court. To treat a lawyer in the manner some feudal teachers treat primary school students is against the very nature of a learned profession where judges are expected to conduct the proceedings in higher traditions of rational discourse.

The third ground on which the show-cause notice is given is completely vague and will not constitute a proper charge even in a criminal case or a labour dispute. The lawyer is not shown as to what language amounted to contempt of court and what the gesticulations constituted misconduct and malpractice were. It is a basic principle that anyone who is charged on any matter should be given the details which in fact constitute what amounted to misconduct and malpractice. The proceedings of the 22nd March referred to above do not also show any detailing of facts on which this third allegation is based.

The Asian Human Rights Commission further points out that Supreme Court bench presided over by Sarath N. Silva the Chief Justice sentenced Tony Fernando, a lay litigant, for one year's rigorous imprisonment for talking loudly in answering to the court. The United Nations Human Rights Committee held this sentence to be a violation of the International Covenant on Civil and Political Rights (Communication No. 1189/2003, please see [http://www.alrc.net/doc/mainfile.php/un\\_cases/351/](http://www.alrc.net/doc/mainfile.php/un_cases/351/)) and further stated that Sri Lanka should take action to prevent a future happening of similar nature. Now, the attack on the right of representation in fair and rational manner has been extended to a rule against a well known lawyer.

Many human rights groups have constantly pointed out the atmosphere of intimidation that has begun to prevail in the Supreme Court in recent years. Many statements from human rights organisations including the AHRC have pointed to the refusal of senior

lawyers to accept briefs to appear before the Supreme Court due to such intimidation particularly by the Chief Justice.

Mr. Elmo Perera kept on appearing before this court despite of the many adverse judgments he had received on his applications which were most of the time matters relating to public interest. The matters raised in his fundamental rights application regarding the JSC were matters of constitutional importance and issues that the nation is very much interested in. Removing him from the roll of lawyers would prevent him from pursuing this fundamental rights application and that case from coming up before a larger bench can be prevented in that manner.

In the defense of human rights courts are the last resort in a democracy. However, in Sri Lanka this last resort has been lost to a very great degree in recent years. The deliberate attempt to close the doors of justice is taking place in the country when in all quarters of the state corruption is increasing in an unprecedented manner. Stilling and freezing the voices of people who air public interests including human rights groups and lawyers has proceeded to a great degree in the country.

The transformation of court of justice into courts of vengeance is frightening. We call upon everyone to defend the rights of this lawyer and to treat this as a matter of the highest social importance. If this voice is also stilled what may happen is reflected in the well known words of Pastor Martin Niemoller, "When the Nazis came for the communists, I remained silent; I was not a communist. When they locked up the social democrats, I remained silent; I was not a social democrat. When they came for the trade unionists, I did not speak out; I was not a trade unionist. When they came for me, there was no one left to speak out."

The latest situation of this case is that it was called before the Supreme Court on the 20th November. According to newspaper reports the Chief Justice was quoted as saying that the Supreme Court is of the view that a rule should be issued against the lawyer and that one member of the Supreme Court thinks that the lawyer's conduct amounts to contempt of court. It should be noted that the matter is only at the inquiry stage and such a statement would amount to prejudging the issue. President's Counsel, H.L. de Silva, appearing for the respondent raised a preliminary objection that the ruling is not in compliance with the Supreme Court Rules 79(5) which contemplates that a list of witnesses and documents shall accompany the said ruling. According to the newspaper report the Chief Justice overruled this objection on the basis that since the matter before court is something that has happened within the premises of the court this requirement on the basis of the Supreme Court rules will not apply.

The court also wanted to issue an interim order suspending the lawyer from practicing until the end of the inquiry. The president's counsel for the lawyer objected to it on the basis that there is no legal provision under which the court can make such an order. However, the Chief Justice overruled this objection also and suspended the lawyer from practicing law.

***1.g. The fear psychosis in the media ensuring censorship by direct and indirect means***

The media in Sri Lanka functions under heavy pressure. There have been many journalists killed during this year as well as in recent times. There have also been instances where even when senior editors were dismissed because of articles they have written in their papers. It is alleged that one editor was dismissed for getting the date of President Rajapakse's birthday wrong.

The practice of the intimidation of journalists has gone on for several decades now and in none of the cases of assassination, or other forms of intimidation, has there been any successful prosecution of the offenders. As an initial reaction to public criticism after such killings inquiries are promised, but at the end nothing ever happens. A recent book by a veteran journalist in the country, Victor Ivan, entitled 'Choura Reagina' (Rogue Queen) lists a series of cases where journalists and other activists have been assassinated and his book also exposes plans relating to the assassination of two editors.

In the government media there is a policy line of supporting the 'war' which means that any matters relating to criticism of the military or the police is actively discouraged.

There are particularly greater problems in reporting the matters relating to the north and the east. Access for journalists is limited.

There were also allegations against the LTTE and other armed military groups of being engaged in assassinations and harassment of journalists who appeared to be opposing them.

**2. The present situation since the virtual breakdown of the ceasefire agreement.**

In its 2005 report the AHRC made several observations regarding Sri Lanka and the situation at the end of 2006 has degenerated beyond the dismal situation that existed in the previous year. Two factors have contributed to the worsening of the situation.

They are:

- a. The faster dismantling of the institutions of democracy and rule of law by gross abuse of power and open disregard for constitutional safeguards;
- b. The virtual breakdown of the ceasefire agreement despite of the formal agreement remaining in force.

The features of the present situation are as follows:

- i. That there is intense violence perpetrated by the Sri Lankan military, the LTTE and the other armed groups. The violence in this regard is subjected to

no restrictions of any sort and many acts that have happened during this period may constitute crimes against humanity and gross abuses of human rights in terms of the definitions of such crimes accepted in international law. The AHRC has pointed out in its earlier statements that all sides to the conflict believe only in military victory against its opponents, and the search for negotiated settlement has been deliberately undermined by each, despite of rhetorical assertions of the pursuit of a settlement by peaceful means. The numbers of those killed in the recent violence has been estimated by some at over three thousand. There is no sign so far, that such killings may be reduced or brought to an end in the immediate future. The demands by the Co-Chairs, the Sri Lanka Monitoring Mission, local civil society organisations and the international community have not yet received an adequate and satisfactory response from the government, the LTTE or the other armed groups.

- ii. Disappearances and abductions have resurfaced in all parts of the country including the capital Colombo, itself. The Human Rights Commission of Sri Lanka (HRCSL) in the middle of 2006 gave the number of the disappeared from the Jaffna peninsular since December last year as 419. These abductions and disappearances are attributed to the military, the LTTE and other militant Tamil groups. Since this number was published there have been reported cases of further abductions and disappearances. The abductions in Colombo have increased and the alleged reason for several of these disappearances is to obtain ransom. For the first time in the protracted internal conflict in Sri Lanka, in the south as well as in the north and east, this is the first time that the rich and the affluent in Colombo have felt the threat of such abductions in their own midst. The situation regarding abductions and disappearances has been characterised by several observers as a situation that has gone out of control. As demonstration of the manner in which abductions take place we reproduce at the end of this section one of the statements on this issue and a further comment by a long-time activist, Jayanthi Dandeniya of the Families of the Disappeared.
- iii. There has been rigorous local and international pressure to bring this situation under control. However, the government has not taken a single effective step to achieve that end. The government first appointed a one-man commission to look into the matter and later appointed an eight-member commission to inquire into abductions and disappearances. The government announced that this commission will have a component of international observers. However, so far Amnesty International, which was invited to nominate eminent persons to the observer's team, has informed the government of their decision not to participate. The reasoning of AI on this matter can be found at the end of this report. The demand by many local and international groups supported by several authoritative sources within the UN system of human rights has been for international monitoring of the human rights in Sri Lanka and the familiar model that has been suggested is the one in Nepal which was developed in the aftermath of King Gyanendra's in February 2005. However, the government has resisted this move strongly. Under these circumstances no effective measures have yet been envisaged to deal with the present situation.

SRI LANKA: White vans without number plates; the symbol of disappearances reappear

FOR IMMEDIATE RELEASE

AS-213-2006

September 13, 2006

A Statement by the Asian Human Rights Commission

SRI LANKA: White vans without number plates; the symbol of disappearances reappear

In Sri Lanka a white van without a number plate is a symbol of terror and the disappearances that occurred in all parts of the country. Commissions on Disappearances in the South during the last few years of the 1980s have documented at some length how armed men, travelling in white vans without number plates abducted thousands of people who were never seen again. These reports are available at [www.disappearances.org](http://www.disappearances.org).

Now such vans have reappeared and do so frequently in the Jaffna peninsular. A report from one family states "the fear of the white van in the day and specially in the night is killing everyone [with fear] in the peninsular."

What the men who come in these vans do is the same as what happened in the South (in the time of terror). A story from one of the families in the Jaffna peninsular gives a first hand account of what happens when armed men travelling in these vans appear.

On September 11, 2006 early in the morning about 12:15 am 15 men fully equipped with heavy weapons jumped into the premises of a house. The owners had two fierce dogs and they were barking loudly. In a few minutes the dogs became silent. They may have been hit by heavy weapons or sprayed with some chemical to become unconscious. There were a number of people at home all of whom were sleeping. Suddenly the inmates were woken by the abnormal barking of the dogs. They thought thieves were entering the house. One adult said remove the wedding rings and all the gold jewellery, which everyone did. These were thrown under the bed. These days Jaffna peninsula is ravaged by thieves and killing contractors at night who abduct adults and students and then kill them.

The armed men broke open the main door of the house and forcefully entered. They wore black trousers and black shirts. Some of them wore shorts and T-shirts. The inmates shouted at high pitch in one tone "thieves." All of them who were in the rooms came out and stood along the corridor. As the inmates saw the men with heavy weapons they immediately told them to take away all they had and leave them unharmed. The gunmen had a very powerful torch with them. The family members had only two kerosene lamps. During this time the curfew was in effect. Since August 12, 2006 up to September 2 there was no electricity at night in the peninsular. Thereafter electricity was restored and was available until 11:00pm. The night after 11:00pm is when most of such incidents, as in this case, happen.

The inmates did not suspect that the armed men came to arrest anybody until one 30 year-old man was pulled by his shirt. The family cried that he was an innocent and responsible family man.

The inmates were unable to identify the faces of the armed men due to the powerful torch flashed in their faces. With the help of their torch the armed men thoroughly checked the house while the family members were standing along the corridor. The men came out of the rooms and threatened them at gun point. The gunmen told them that if they shout they would wipe them all out. The armed men began to question the adults. They questioned both the men and the women. Then again they started to inquire of the man his name, age, occupation, etc. Then they again questioned him. The men spoke irregular and unfamiliar Tamil but fluent Sinhala. All of a sudden they pulled him by the shirt he was wearing.

His mother hugged him strongly. She asked them not to take her son. She was pulling her son back against the men who were dragging him by his shirt. The armed men hit the mother on her head with a weapon. She received a head injury and was bleeding. She fainted immediately. Another family member was also hit on her chest by a gun. In fact several family members suffered injuries in trying to save the young man. The men hit him on his chest with the gun and he fell down. Then they dragged him by his leg. His shoulders and the back of the head were crashing against the rough ground. They dragged him nearly 50 meters by his leg. The men had parked their vehicles 45 meters away from the main gate along the roadside. They broke the pad lock at the gate and dragged him towards the vehicle. The family members rushed to the main gate. The armed men threatened the inmates at gun point. The gunmen thrust a gun into the young man's face and continued to threaten them that if they followed them they would kill him. The men had come in a van and on two motor bikes.

The abducted person has not been seen or heard of ever since although the family members have made complaints to the police and all other authorities. Will he become one more statistic to be added to the hundreds of disappearances that have been reported in the recent months from the North and the East and also a few in Colombo (according to the Human Rights Commission of Sri Lanka about 30 persons)? Also will he be an addition to the tens of thousands of people who have disappeared in Sri Lanka in the recent decades?

The Human Rights Commission of Sri Lanka (HRCSL) gives the number of the disappeared from the Jaffna peninsular since December last year as 419. Not all these disappearances are attributed to "armed men coming in white vans without number plates", which usually means the military. The LTTE and other militant Tamil groups alleged to be working with the military have also been accused of such abductions which end up as disappearances. International human rights groups have accused the LTTE and other militant groups also on that score.

However, in cases such as the one quoted above, the suspicion of the family members is that such occurrences are done either directly by the military or with its approval. Such

complicity will not come as a surprise to anyone who is aware of the extent of the disappearances that have taken place in Sri Lanka in recent decades. The reports of the Commissions appointed to investigate these earlier disappearances place the responsibility squarely on the shoulders of the state agencies.

In Sri Lanka causing of forced disappearances has been treated by the state as a legitimate means by which to deal with 'terrorism'. The failure to investigate and to take appropriate legal action is also evidence of the state's involvement in such matters. The fact that the opponents of the government at various times, like the LTTE and the JVP, have taken to violence is used a legitimate reason for the state carrying out forced disappearances and similar modes of the use of extreme violence; that the poison must be killed with poison and that the violence of terrorism must be dealt with by equal or more ferocious violence is an unquestioned part of the state ideology, regardless of which government is in power. A former Deputy Minister of Defence, Ranjan Wijeratne, was known in the latter part of the 80s as a leader who openly advocated and carried out this policy. The disappearances during that period officially amount to about 30,000 while the other non-state sources have given much larger numbers. It is today not challenged that except for a handful of cases, the victims of these disappearances were not hard core insurgents. This of course does not mean that even hard core insurgents can be killed after securing arrest. The reports of the Commissions of Disappearances mentioned above have demonstrated that most cases of disappearances have happened after securing arrest which often takes the form of abduction.

For Ranjan Wijeratne and others (political leaders as well as some military and police officers) disappearances were the most practical method of dealing with insurgency. Disappearances help to do away with the necessity for arrest and detention which can create many legal problems, the keeping of political prisoners, which is again a complicated problem, having trials which requires security arrangements and similar problems which in turn create practical problems for state agents. Disappearances also help to erase all evidence as secret abductions often end up in the secret disposal of bodies. If in the use of this easy method some mistakes are made in the arrest of innocent persons, even if they far outnumber any "culprits", that is unavoidable and Ranjan Wijeratne called such acts mere excesses. Talking to parliament he said that these things cannot be done through legal means as that will take too much time. This same ideological position has never been clearly repudiated by any of the Sri Lankan governments.

Within Sri Lanka at the moment there is no government authority with the capacity to efficiently investigate the disappearances like the one in the case mentioned above. The HRCSL may record some facts of such disappearances but it does not have the capacity to investigate them in any manner that could be called a credible, criminal investigation. The assurance of some state authorities to the effect that if soldiers are found to be guilty of such acts they would be punished is a mere rhetorical gesture in the face of heavy criticism from local and international sources. There is no state machinery to give credibility to such assurances.

The Asian Human Rights Commission has been pointing out for several years now the deep impasse in the state's criminal justice system which makes it impossible for any gross abuse of human rights to be credibly investigated or prosecuted. There have been no attempts to cure this situation. Instead with time this situation has degenerated even further. Now after the virtual collapse of the cease fire agreement the country is entering into a further period of terror in the name of counterinsurgency. The local and international agencies including the AHRC has called on the United Nations to ensure a strong human rights presence, as in the case of Nepal during the last year to ensure that this situation is brought to an end and that the state will be willing to respect its duty to protect the lives of its citizens. We once again reiterate this basic demand which has been repeated by many.

Posted on 2006-09-13

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SRI LANKA: The launching of a signature campaign by victims of past disappearances to demand authentic investigations and against sham commissions

FOR IMMEDIATE RELEASE

AS-278-2006  
November 8, 2006

A Statement by the Asian Human Rights Commission

SRI LANKA: The launching of a signature campaign by victims of past disappearances to demand authentic investigations and against sham commissions

Ms. Jayanthi Dandeniya, the coordinator of Families of the Disappeared based at Raddoluwa, Seduwa, has announced the launching of a signature campaign by the victims of past disappearances to demand authentic investigations into the present spate of disappearances and to have them stopped.

"Our experience regarding the disappearances in the late eighties clearly demonstrates that fact finding commissions into abductions and disappearances are useless and that without serious criminal investigations within the framework of the law nothing positive will come out of such commissions," said Ms. Dandeniya who lost her fiancé and two of her brothers in the disappearances which took place in the late 1980s that claimed the lives of about 30,000 people. "We tried hard to get justice. We went before those fact finding commissions. Despite of all that no justice of any sort happened," she said.

Ms. Dandeniya spoke about the annual event of the gathering of the families of the disappeared at a monument which exhibits the pictures of about five hundred disappeared persons and said, "this year we had this commemoration on the 27th October as usual. When we discussed with the parents and others who had lost their loved ones in



those days and told them that about 686 disappearances have taken place in recent months in Sri Lanka these family members were shocked and could not believe it. When we told them about the white vans which come without number plates and take people from their families that reminded them of what happened to their own children and how they were taken away. And then they said, 'we thought it would never happen again.'"

She explained that many parents of past disappearances agree that not enough was done to get justice for those cases and that it is because of that that these disappearances are recurring now.

She emphatically states, "You cannot get justice from fact finding commissions. You must have thorough criminal investigations through persons competent in conducting such investigations and who will have the independence to conduct them."

Ms. Dandeniya further said, "This is just not fair. The victims and the families of past disappearances were cheated. Cheated by fact finding commissions; the government did not provide proper investigations and then the Attorney General's Department says we cannot prosecute because there is no evidence. This is what happened to the case of my fiancé who was a young trade unionist. We worked hard and for a long time to get the case investigated and prosecuted. We even gave the names of some persons whom we thought were behind the disappearance. We had strong reason to believe that on the instructions of a manager in a company one senior police officer at the time got my fiancé killed. But there was no result, no justice."

Ms. Dandeniya urges everybody to take a more active part to avoid the same type of mistakes being made this time, saying, "We did not get justice but at least this time let these people who are facing the same problem get justice."

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This statement represents the views of the AHRC and the following organisations based in Sri Lanka: People against Torture - Ekala, Janasansadaya - Panadura, The Home for Torture Victims - Kandy, SETIC - Kandy, Right to Life - Negombo and the Rule of Law Centre - Colombo.

Posted on 2006-11-08

### **3. Torture**

#### ***3.a. Torture - custodial deaths***

Custodial deaths in Sri Lanka have increased dramatically during 2006. There are two types of extrajudicial killings taking place, mainly through the police and these are extrajudicial killings after the arrest of criminals. In this first category there are reports of several deaths, almost every week in the newspapers, with a short announcement that a person who had been arrested police custody and, as a result of the ensuing conflict he had been killed. The AHRC has reported a policy line that has been growing gradually in

Sri Lanka where the police are in some way encouraged to get rid of alleged criminals by the use of such methods. The former Inspector General of Police defended such a position, even in radio interviews, and described an alleged criminal who had a previous conviction and continued to engage in further crimes. Such discourse on the permissible limits on extrajudicial killings ridicules the entire discourse of the rule of law and blurs all the lines around which law enforcement officers are permitted to carry out their functions.

In several instances magistrates after initial inquests make orders stating that several such deaths amount to a justifiable homicide. This is clearly outside the powers of the magistrates when conducting inquests.

The following sections of the Criminal Procedure Code of Sri Lanka are relevant to the issue of the conduct of inquests by magistrates.

Sec.369 - An inquest of death shall not be made except under the provisions of the Code; Sec 370 (1) - Every inquirer on receiving information that a person; Sec.370 (1) (c) has died suddenly or from a cause which is not known, shall proceed to the place where the body of such deceased person is and there shall make an inquiry and draw up a report of the apparent cause of death; Sec 370 (3) - If the report (which is forwarded to the magistrate) discloses a reasonable suspicion that a crime has been committed the magistrate shall take the proceedings under ch. XIV and XV of the code.

Deaths in custody of police are dealt separately in Sec. 371 of the code: Sec 371 – (1) When a person dies in the custody of the police or in a mental or leprosy hospital or prison .... Forthwith give information to the magistrate..... Forthwith hold an inquiry into the cause of death. (2) For the purpose of an inquiry under this section a magistrate shall have all the powers which he would have in holding an inquiry into an offence.

Section 9(b) (iii) deals with the Magistrate's jurisdiction to inquire into cases of death by violence, accident or sudden; sections 114 and 115 of the Code deals with situations where evidence against a suspect is deficient and well founded. Under section 114 if evidence is insufficient or no reasonable ground to justify suspicions, the inquirer (or the magistrate) may release the suspect on bail on the conditions the person may appear before the magistrate.

None of these provisions authorize the magistrate to discharge a suspect at the stage of an inquest.

If the police claim, as has happened in many cases, that they have taken a suspect to a particular spot where they had been told that some illegal arms are being stored and that when being taken to the location the suspect attempted to take up arms and tried to attack the police, and that as a result the police shot him dead, the duty of the Magistrate is to record all these statements and to forward his report so that further inquiries can be made by the police and the prosecuting authorities on this issue. The police version on such occasions can be verified by forensic evidence and the like. In many instances when a

further inquiry has been requested the matter is usually referred to a Special Investigating Unit so the version of the police themselves can be seriously scrutinised. Once all this is done in the duty of the Attorney General to decide as to whether there is sufficient evidence to prosecute. It is at that stage the validity of self defense put forward by the accused will be examined on the basis of available evidence by the High Court judge who will conduct the trial. The High Court judge's decision on this matter may even be challenged by way of appeals. All such legal process is subverted when a Magistrate makes a finding of justifiable homicide based on the version given by the police at the very initial stage. All such decisions should be reviewed by the Attorney General and requests must be made for further enquiries to be carried out into such incidents.



The second category is death after arrest of those in police custody, mostly due to torture. The pattern of cases clearly shows the breakdown of supervision at the time of arrest during detention and in some instances even in prison custody. The case of Lalantha Fernando (shown at left) was an instance where it is alleged that a young nephew of a person that a police officer had a personal conflict with was arrested in an attempt where the intention was to arrest the uncle. Within hours of the arrest

Lalantha Fernando was brought to hospital by the police where he succumbed to his injuries.

Mudalige Sunil Fermin Perera was arrested on mistaken information that he had made a hoax telephone call and was ordered to be remanded. In the remand prison he and his friend were severely assaulted by the prison guards. A short time later Mr. Perera succumbed to his injuries. The police admitted that the arrest was not well founded. In both of the above cases despite of severe public outrage and international interventions requesting inquiries, no such inquiries have taken place.

The following are cases taken up by the AHRC with the Sri Lankan government on deaths in police custody including one case which occurred in prison custody.

**3.a.1. Name of the victim: Nallawarige Sandasirilal Fernando**, 36 years old, a mason by occupation, married with three children; two sons aged 17 and 14 and a daughter aged 11; all studying at the Baudhaloka Maha Vidiyalaya, Wekaeda, Panadura, Wife currently employed abroad

**Name of perpetrator:** A police officer attached to Panadura Police Station (can be identified by the victim's family)

**Date of incident:** 27 March 2005

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2005/1037/>

**3.a.2. Name of the victim: Don Wijerathna Munasinghe**, 49 years old  
**Address of the victim:** No. 05, Pasal Mawatha, Niwanthidiya, Piliyandala, Colombo, Sri Lanka  
**Alleged perpetrators:** Police officers attached to the Maharagama Police Station  
**Date of incident:** 10-11 April 2005

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2005/1052/>

**3.a.3. Name of the victim: K.A. Ganga Kalpani**,  
**Address of the victim:** Galwandguwa  
**Alleged perpetrators:** Officers of the Embilipitiya police,  
**Date of incident:** 30 April 2004

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2005/1071/>

**3.a.4. Name of the victim: Helwala Langachcharige Susantha Kulatunga**, 30, single father of four (wife deceased), resident of RajaMahavihara, Athgalawatte, Atakalampanna, Madampe, Sri Lanka  
**Alleged perpetrators:** Police personnel attached to the Rakwana Police Station  
**Place of incident:** Rakwana Police Station  
**Date of incident:** 20 April 2005

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2005/1091/>

**3.a.5. Name of the victim: Lelwala Gamage Nandiraja** (53), of Ambana, Kahaduwa in Elpitiya in Southern Province in the District of Galle  
**Date and place of arrest:** 29 May 2005 at 8:30p.m in Ambana, Kahaduwa in Elpitiya  
**Police who took victim into custody:** Weliveriya Police Station, about 30 km from Colombo in the District of Gampaha, Western Province  
**Alleged perpetrators during the arrest:** Unnamed policemen from the Weliveriya Police Station and Pitigala Police Station. Two of them wore police uniforms while the others wore civilian clothes

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2005/1111/>

**3.a.6. Name of the victim: Kosma Sumanasiri**, 41 years old, unmarried and a casual labourer by occupation  
**Address of the victim:** 19, Panvila, Mavadavila, Ratgama, Galle division, Southern Range, Sri Lanka  
**Complainant:** K Leelaseeli and Vitharana Varalieshamy (the victim's elder sister and mother).

**Alleged perpetrators:** Police personnel attached to the Ratgama Police Station  
**Date of incident:** Arrested on 20 May 2005, allegedly tortured by the Ratgama police while in custody and died on 27 May 2005

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2005/1147/>

**3.a.7. Name of the victim: Hettiarachchige Abeysiri**, 52 years old, married with one child

**Address of the victim:** 506/1 Delgahawatte Wanawasala, Kelaniya

**Period of arbitrary detention and torture:** 13-14 July 2005

**Case status:** The victim died on 14 July 2005 after being brutally tortured by the Peliyagoda police

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2005/1173/>

**3.a.8. Name of the victim: R. Damikka Dissanayake** of No. 294, Mahara Prison Road, Ragama

**Name of the Complainant:** Kara Dissanayake (father of victim)

**Alleged perpetrators:** Police officers attached to the Kadawatha Police Station

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2005/1177/>

**3.a.9. Name of the victim: A.D. Lalantha Fernando** (23), living in Meegaswela, Koswatte

**Date and place of incident:** 10 October 2005 in Meegaswela, Koswatte

**Alleged perpetrators:** Sub Inspector Nilanga Perera and other policemen attached to the Koswatte police station

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2005/1316/>

**3.a.10. Name of victims/deceased: Ariyadasa (49) and A.H. Sudath Udaya Kumara** (29) of Palana Weligama.

**Name of complainant:** Ms. Kamala Mallika (widow of AH Ariyadasa and mother of Sudath)

**Name of alleged perpetrators:** Policemen attached to the Weligama police station.

**Dates of incident:** Ariyadasa was arrested, detained and died in October 1999. His son Sudath was arrested on 24 October 2002 and died on 7 December 2002.

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1632/>

**3.a.11. Name of the Victims:** 1. **Mudalige Sunil Fermin Perera** of 55 1/A Pitakotte Kotte, aged 55, a father of three sons, the employee of Oxygen Company and made a living providing Helium balloons (killed). 2. Linton Gamini Munaweera of Makola, aged about 35, a father of two children (injured)

**Alleged Perpetrators:** Some prison guards of Kuruwita prison for torture and some officers of the Ratnapura police for illegal arrest

**Date of incident:** Illegally arrested on 28 June 2006 and allegedly tortured between June 28 and July 3.

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1832/>

**3.a.12. Name of deceased: Sinnappan Abraham Kiragory**, 41 years; married with 3 children aged 12, 11 and 7. Wife: V Pushpaleela. Address: Hemingford Estate, Parakaduwa (Now at Weheragoda, Wellampitiya); Occupation of deceased: trader in clothes (pavement hawker) in Colombo at the time of his death.

**Name of perpetrators:** the OIC and 10 policemen attached to the Eheliyagoda police station including policemen Perera, Abeygunawardena and Nishanka.

**Date of incident:** 13 to 15 August 2006 and continuing.

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1959/>

### *3.b. Torture – extreme cases*



In delivering the judgement in Gerard Perera's (shown at left) case the Supreme Court observed that credible complaints against torture are increasing and there is no sign of any change for the better. Now at the end of 2006 it can once again be stated that torture at police stations in Sri Lanka is continuing as usual.

Both the number and the extent of injuries caused to persons remain a matter of grave concern. Meanwhile the usual remedies proposed against torture such as filing of fundamental rights applications, institution of prosecution under the CAT Act, No. 22 of 1994 and complaints to the Human Rights Commission of Sri Lanka have failed to produce any form of effective intervention, either to stop the trend of torture or to bring any relief to the victims.



In yet another case Rohitha Upali Liyanage (shown at left) who with his friend, Sarath Bandara Ekanayake, was so severely beaten by police officers that his right leg was fractured, was more inhumanly treated when he was chained to his hospital bed.



## Fundamental rights before the Supreme Court

Fundamental rights cases before the Supreme Court have suffered greatly this year due to the following factors. Many of the lawyers, who in previous years have undertaken fundamental rights cases on behalf of victims, and who have acquired the knowledge and the skills needed in the pursuit of such applications, are now refusing to undertake such cases as they feel that the increase of harassment in their pursuit has reached intolerable levels.

Being exposed to heavy levels of intimidation, many of these lawyers feel that it is both unfair to the victims and to themselves, to undertake such cases, which in all likelihood will lead to unpleasant experiences and also are unlikely to produce a satisfactory result, despite of the justifiability and the gravity of the complaint. They manifest a 'once bitten, twice shy' approach with regard to the pursuit of such applications.

The number of complaints also is declining despite of the fact that the political climate and the level of violence in the country have taken a turn for the worse. Under the present circumstances the number of fundamental rights applications should in fact have increased. In 2004 the total number of fundamental rights filed was 626; in 2005 it was 517, thus 109 less than the previous year. By the end of November 2006 the number of applications filed is 342, 175 less than in 2005 and 284 less than in 2004.

The rejection level of the applications at the time of granting leave has also increased in a remarkable manner. The hurdles to overcome in getting leave by way of extra requirements have increased a great deal. In cases where leave to appeal is refused no reasons are generally given. Many lawyers for the victims complain that they are compelled to come to some form of settlement during the court hearings. Even in instances where the lawyers do not expressly agree they sometimes find recorded in the court file that the applicant's lawyer seeks leave to withdraw the applications.

While the number of successful cases is becoming fewer, even in successful cases the extent of compensation has been reduced to risible sums even in despite of heavy



physical or mental injuries suffered by the petitioners. In 2003 and 2004 there had been cases where compensation awarded was around Rs. 800,000 which is around US\$ 8,000. Such compensation was paid in the cases of Kottabadurage Sriyani Silva (SCFR 471/2000) decided on 8 August 2003 and the case of Gerard Mervyn Perera, (SCFR 328/2002) decided on 4 April, 2003. However, in more recent times the compensation has been reduced to Rs. 25,000 or Rs. 15,000 and similar. In the case of B.A.S. Sunrange Wijewardene (SCFR 553/2002) decided on 27.5.2005 the compensation was Rs. 15,000 to be paid by three respondents, each having to pay only Rs. 5,000. In the case of Korale Liyanage Palitha Thisa Kumara (SCFR

211/2004) (shown below at left) where the Supreme Court itself came to a finding of extensive physical injuries caused on the petitioner, the court ordered compensation and costs amounting to Rs. 25,000. In the application made by D.A. Nimal Silva Gunaratne against ASP Ranmal Kodituwakku (SCFR 565/2000), decided in November 2006 the court held that the allegation of the petitioner relating to illegal arrest, illegal detention and torture which resulted in the loss of the use of one eye had been proved. However, the court exonerated the 1st Respondent, ASP Ranmal Kodituwakku on the basis that he had provided documentation to show that on the day of arrest he had been engaged in other duties. However, the arrest was carried out by the ASP who headed the unit named as the QUICK RESPONSE UNIT. For all the violations of rights including torture which caused the loss of an eye the compensation ordered amounted to Rs. 50,000 by the state (to be paid by the Inspector General of Police) and Rs. 5,000 by the 4th Respondent who was held to have caused the injury to the eye and the costs of Rs. 20,000. The court rejected the claim that Article 14(1)(g) of the Constitution which relates to the loss of employment and income for his inability to engage in a lawful occupation was not proved. The fact that the petitioner had lost his eye due to torture was not considered as a matter relevant to his capacity to engage in lawful employment.

Given the gravity of torture as a human rights violation and the need to attach serious consideration of standards in granting compensation, the practice of the Sri Lankan Supreme Court in recent years falls far short of what is required by the application of international norms and standards on this matter. The issue of compensation is not just a matter of insignificance. The Convention against Torture requires that the state pays adequate compensation to the victims of torture. The development of legislation in this area remains an urgent need as part of the discharge of state obligations as well as being a reflection of pursuing a policy to discourage and eliminate torture.

### **The prosecutions under the CAT Act.**

The number of cases filed under the CAT Act on complaints, particularly made during 2002 to 2004 has increased. Such filing of complaints was made possible by the operation of a Special Investigation Unit which was developed to deal with complaints of torture. However, as for the years from 2005 to 2006, though allegations of torture have increased, the number of cases filed in High Courts on such complaints is very few so far. There seems to be a shift from the policy of prosecuting such cases that prevailed between 2003 and 2004. More cases are being assigned to the senior police officers of local areas, who are also the superior officers of the alleged perpetrators.

Even in cases that have been filed in the High Courts there are serious shortcomings due to the failure to ensure speedy trial. Victim complainants of torture suffer many harassments and at least one, that is Gerard Perera, was assassinated while pursuing his case in court. There are many instances where victims have reported to human rights organisations how they and their families have been exposed to severe pressures by the police officers who are facing accusations in court. Often the victims are compelled to give affidavits stating that they do not wish to pursue their cases. According to a number



of victims the reason for giving such documents to accused police officers is to avoid being exposed to prolonged harassment.

A further problem that has arisen is the absence of understanding of the law relating to torture as found in the CAT Act, No. 22 of 1994 by some High Court judges. At the High Court of Kalutara the trial judge came to the following conclusion at the end of the trial in the case of Korale Liyanage Palitha Thissa Kumara:

".....Even though it appears that when considering the number of injuries the accused has used some force beyond that which was necessary that does not prove the charge against the accused in this case."

Kalutara HC 444/2005

In other cases it has been held that the police officers beating of the victim has not been for the purpose of obtaining a confession and therefore does not fall within the torture act.

In yet other instances the courts have given consideration to the fact of the mandatory sentence of seven years as a relevant consideration when considering the guilt or innocence of the accused.

### **The Human Rights Commission of Sri Lanka**

Many victims who have gone to make complaints regarding torture to the Human Rights Commission of Sri Lanka (HRCSL) find that the whole exercise has brought on further frustration upon them. The commission does not have a competent and efficient service for recording complaints; it does not have any form of capacity for being engaged in the preliminary stages of investigations into allegations of torture. The final inquiries it conducts follow the same model as adopted by Rent Boards and the like where both parties are directly questioned by an investigating officer. Although in recent times the qualifications of such inquiring officers have improved, this mode of conducting inquiries, where the burden of proving the charge lies on the complainant himself is not a suitable model for dealing with violations relating to torture. It is not within the capacity of victims of torture to bring all the evidence that is required, such as the police books, the relevant officers who have information about the incident, documents relating to police inquiries such as inquiries of the SIUs and the like. If there is a prosecuting officer on behalf of the HRCSL at these inquiries such an officer can call all the necessary documents and evidence and assist a proper inquiry. Where the HRCSL acts as a neutral party, as it has done at the inquiries at its office, there is a clear failure of the commission's duty to engage in thorough investigations into such grave abuses of human rights such as torture. Thus the model followed in the conduct of inquiries at the HRCSL should change radically.

**3.b.1. Name of the victims: S. D. Kodituwakku, A. B. Abeywardena, A. Ruwantissa, W. Shantha and Sujeewa Kodituwakku**

**Alleged perpetrators:** The Officer-in-Charge (O.I.C.) of the Dickwella police station and several policemen attached to the Tissamaharama police station

**Date of incident:** 28 February 2005 and several subsequent dates

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1437/>

**3.b.2. Name of the victim: Amila Prasad**

**Date of incident:** 20 December 2005

**Alleged perpetrators:** Some officers from the Thanamalvila Police Station (Moneragala)

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1436/>

**3.b.3. Name of alleged victim: SA Akila Chaturanga, 22, unmarried; Occupation: farmhand**

**Names of alleged perpetrators:** The Officer-in-Charge of Horana Police Station, Sergeant Kaldera and Police Constables R 1768 and 31288.

**Date of alleged incident:** 22 December 2005

**Place of alleged incident:** Horana Police Station

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1441/>

**3.b.4. Name of the victim: Navinna Arachchige Manjula Prasad (27), a baker living at 476/30, Sagarsirigama, Epamulla, Pamunugama.**

**Alleged perpetrators:** Four police officers attached to the Pamunugama Police Station in the Assistant Superintendent of the Police (ASP) Division of Negombo

**Date of the incident:** 18 December 2005

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1442/>

**3.b.5. Name of the victim: M.H. Priyantha Minipura (25), single and a farmer by occupation living in Ayagama**

**Alleged perpetrators:** Sub Inspector (SI) Jayatissa and other policemen attached to the Ayagama police post

**Date of incident:** 24 December 2005

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1446/>

**3.b.6. Name of victims: Nihal Kithsiri, 30, married with one child, occupation - casual labourer; and Kumara and Sumith Haputhatri, friends of the victim.**

**Alleged perpetrators:** Policemen including Bandara and Kaldera of the Horana Police station

**Date of incident:** 7 December 2005

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1453/>

**3.b.7. Name of the victim: P.K.G. Jayawardena** (46), married, Rajanganaya Gemunupura

**Alleged perpetrators:** Sub Inspector Mendis and three policemen attached to the Thambuththegama police station (near Anuradhapura)

**Date of incident:** 23 December 2005

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1451/>

**3.b.8. Name of the victim: D.A. Gayan Rasika** (24), married, a resident of Kalavila, Beruwela. He is presently detained at the Kalutara remand prison.

**Alleged perpetrators:** Two policemen attached to the Welipenna police station and personnel at the Kalutara prison

**Date of the incident:** 7 January 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1462/>

**3.b.9. Name of victim: R.D. Kanishka Gayan**, 21-years-old, unmarried;

**Occupation:** mechanic;

**Address:** Wewala, Horana.

**Name of alleged perpetrators:** Sergeant Rajapakse, PC Chandraratne and others from the Horana police

**Date of incident:** 5 January 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1461/>

**3.b.10. Names of victims: 1. Mr. D Indika Wasantha**, aged 28, businessman, of Owakanda, Rathgama, Sri Lanka. 2. **Mrs. H.L. Kumudini Malkanthi**, 8 months pregnant, Mr. Wasantha's wife

**Names of alleged perpetrators:** 1. Mr. Jayarathne, Inspector of Police (IP) of the Rathgama Police Station 2. Police Constable No. 63063 of the Rathgama Police Station 3. Around five other officers attached to the Rathgama Police Station, who can be identified by the victims.

**Time and date of incident:** At around 5:30pm on 16 February 2006

**Place of incident:** Rathgama Police Station

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1571/>

**3.b.11. Name of victim: Mr. E. Gnanadasa**, 39-years-old, farmer, married with a two-year-old child, Pingala Hill, Kalavana

**Name of alleged perpetrators:** Two policemen from the Kalavana police station

**Place of incident:** Mr. E. Gnanadasa's home in Pingala Hill, Kalavana, as well as Mr. E. Siripala's home in Kalavana

**Time and date of incident:** 10:30am on 12 March 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1587/>

**3.b.12. Name of victim/complainant: Chintaka Kumara Welivitagoda Hevage**, 21-years-old, living with his parents.

**Name of alleged perpetrators:** Policemen Indika and Chaminda and the Officer-in-Charge (OIC) of the Poddala police station

**Date of incident:** 17 February 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1602/>

**3.b.13. Name of victim: V.M. Duminda Jayawardena**, 24-years-old, married with two children; occupation: labourer; address: Polhunnawa, Ambagas-handiya, Batapola

**Name of alleged perpetrators:** Two policemen from the Mitiyagoda police station

**Date of incident:** 11 March 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1618/>

**3.b.14. Name of victim: OKD Kithsiri Dhanawardena**, 32-years-old, unmarried; occupation: three wheel cab driver; address: Thanthiriwatte, Ganegoda

**Name of alleged perpetrators:** Trainers and trainees attached to the Ketapola police training college

**Date of incident:** 27 March 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1645/>

**3.b.15. Names of victims: 1. W Sunil**, 31-years-old, married with one child; occupation: farmer; address: higher Kihimbiya, Galle 2. **Wasanthi Sunil**

**Names of alleged perpetrators:** The Sub-Inspector and policemen attached to the Wanduramba police station

**Date of incident:** 17 March 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1681/>

**3.b.16. Name of victim: E. P. Dharmasiri**, 45 years old; married with 2 children; Occupation – Mason; Address – Kanaththeruwa, Kurunegala.

**Name of alleged perpetrators:** Policeman Pushpakumara and others of the Katupotha police station

**Date of incident:** 8 to 10 April 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1688/>

**3.b.17. Name of the victim: Kariyawasam Peradorapage Tsuitha Ejith**

**Name of the alleged perpetrator:** A Police Constable and other police personnel from the Ja-Ela police station

**Date of incident:** 10 October 2005 and 23 February 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1687/>

**3.b.18. Name of victim: Kodey Thuwaku Walter Thilakarathana**, resident of No 18, Dunhinna, Werapitiya, Sri Lanka

**Name of alleged perpetrators:** SI Rasika, Police officer Allakoon, and other police officers attached to the Teldeniya police

**Date of Incident:** 29 to 30 April 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1730/>

**3.b.19. Name of victim: Indika Kulasekara (27)**, Bus driver

**Name of alleged perpetrators:** PC Sarath, Balagolla Police and Teldeniya Police officers

**Date of incident:** 7 April 2006

**Place of incident:** Near Digana-Madarwala bus shelter

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1746/>

**3.b.20. Name of the victim: Amitha Deepthi Kumara**, aged 22, unmarried, mechanic by occupation, residing in Welapahala, Meegahathenna, Sri Lanka

**Alleged Perpetrators:** Officers attached to the Meegahathenna Police Station

**Date of incident:** from 8:30am on 28 June 2006 up to now

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1821/>

**3.b.21. Name of the victim: D Chamara Lanka**, aged 24, unmarried; a three wheel driver by occupation, resides in Puttalam Road, Kurunegala, Sri Lanka

**Alleged Perpetrators:** Officers attached to the Kurunegala Police Station

**Date of incident:** 27-30 May 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1826/>

**3.b.22. Name of the victim: B Nimal**, aged 43, a mason by occupation, married with four children, resides in Hiralugoda, Bataduwa, Sri Lanka.

**Alleged perpetrators:** Officer-in-Charge (OIC) and other officers attached to the Wanduramba police station

**Date of illegal arrest and detention:** Arrested on 18 December 2005 and remanded in a prison for about a week for allegedly fabricated charges by the Wanduramba police. Next court hearing is set for 18 September 2006 but the victims are still not aware of the details of their charges due to the inaction of their lawyer

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1853/>

**3.b.23. Names of the victims: 1. Dhanuka Tisara**, aged 19, unmarried, labourer by occupation, resides in Pinwatte, Panadura, Sri Lanka 2. **Don Dhanushka**, Dhanuka's brother.

**Name of alleged perpetrators:** Policemen attached to the Kalutara South police station  
**Date of incident:** Dhanuka Tisara was brutally tortured and later released on 2 July 2006 and Don Dhanushka was illegally arrested on the same day and later remanded due to the alleged fabricated charges by the Kalutara South police  
**Place of incident:** Kalutara South police station

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1861/>

**3.b.24. Name of victim: Suppaiya Saundarajan**, resident of Hapugollawatta, Vilanagama, Kandy, Sri Lanka; occupation – Mason, single.  
**Names of alleged perpetrators:** 1. Mr. Hettiarachchi (Sub Inspector of Police of Alawathugoda Police Station), 2. Mr. Kulathissa (driver)  
**Place of incident:** Vilanagama  
**Date of incident:** 9 July 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1870/>



**3.b.25. Name of victim: Hevamarambage Premalal (32)**, married with three children  
**Name of alleged perpetrators:** Sergeant Samaranayake and other officers from the Wanduramba Police  
**Place of incident:** Wanduramba Police Station  
**Date of incident:** 11 July 2006

For full details please follow this link:  
<http://www.ahrchk.net/ua/mainfile.php/2006/1869/>

**3.b.26. Name of the victim: Mr. Suddage Sirisena**, aged 50, married with two children. Farmer by occupation, residing in Millewa, Maradankadawela, Sri Lanka  
**Alleged perpetrator:** Officers attached to the Kekirawa police including policeman No. 47934 (prime culprit)  
**Date of incident:** 24 August 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1936/>

**3.b.27. Name of victim: Mr. Illukumbura Mudiyanse**; A 49-year-old trader and resident of Thalathuoya, Kandy district III, Kandy division, Sri Lanka  
**Alleged perpetrators:** 1. Owner of the local "Sugath Timber Mills" in Thalathuoya  
2. Officer-In-Charge (OIC) of the Thalathuoya police station in Kandy  
3. Police Sergeant Thushara attached to the Thalathuoya police station  
4. Other police officers attached to the Thalathuoya police station  
**Date of incident:** 9 June 2006  
**Place of incident:** Thalathuoya police station

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1994/>

**3.b.28. Name of victim: 1. Mr. P. Gnanasiri;** a 44-year-old local fisherman, now resident of the Weligama camp for internally displaced persons (IDPs) of the 2004 tsunami 2. Ms. Chandralatha, the victim 1's sister-in-law 3. Ms. Mallika, the victim 1's wife 4. A twelve-year-old daughter and a nine-year-old son of the victim 1

**Alleged perpetrators:** 1. Officers attached to the Weligama Police Station in Matara district II, Matara division, Sri Lanka 2. Unidentified resident of the Weligama camp for IDPs with whom Mr. Gnanasiri had had a disagreement

**Date of incident:** 13 September 2006

**Place of incident:** Weligama camp for IDPs and Weligama Police Station

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/2002/>

**3.b.29. Name of victim: Mr. Suddage Sirisena;** fifty-year-old farmer, married with two children

**Alleged perpetrators:** 1. PC Jinadasa; one of the two alleged torturers, and who was later suspended following Mr. Sirisena's formal complaint 2. Sergeant Keerthi; falsely arrested Mr. Sirisena as part of an intimidation ploy 3. Unidentified security guard of local politician 4. Officers of the Kerikawa police station

**Date of incident:** Tortured on 24 August 2006 and arbitrarily arrested on 22 September 2006

**Place of incident:** Kerikawa Police Station, Anuradhapura district, Anuradhapura division, Sri Lanka

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/2013/>

**3.b.30. Name of victim: Pasquelge Don Dudley Mervyn** from Seeduwa, Negombo Division, Sri Lanka

**Alleged perpetrators:** Police officers attached to the Seeduwa police station, Negombo District II, Negombo Division, Sri Lanka

**Date of incident:** 27 October 2006 to 3 November 2006

**Place of incidence:** Seeduwa police station

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/2081/>

### ***3.c. Torture against children***

One of the most dismal aspects of torture in Sri Lanka as shown in cases for several years now is that police officers do not spare children and often engage in severe forms of cruelty with a view to obtaining information.

While many cases have been reported in recent years hardly any have been taken with the seriousness they deserve by the investigating and prosecuting authorities.



Further, the use of physical punishments, although forbidden in law, is continuing to happen in the educational institutions in Sri Lanka. Once again the machinery for redress does not seem to function within any sense of efficiency. The list of cases below illustrates this aspect of the problem.

**3.c.1. Name of victim: UG Isani Madushani**, eight-years-old, grade 4 student of the Mahabodhi School

**Name of alleged perpetrator:** Sarath, a grade 4 class teacher of the Mahabodhi School

**Place of incident:** Mahabodhi School, Panagala Galle

**Date of incident:** 22 February 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1582/>

**3.c.2. Name of the victim: M Rukman Asanka Perera**, 18-years-old, grade 13 of the Jayanthi Navodya School

**Names of the alleged perpetrators:** 1. Hiriwewe Gnaneswara, a Buddhist monk who teaches Buddhism 2. MD Ariyadasa, the principal of the Jayanthi Navodya School.

**Place of incident:** Jayanthi Navodya School, Nikaveratiya

**Date of incident:** 9 March 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1590/>

**3.c.3. Name of victim: D.K Ranjith Kumara** (12), a student at Nivithigala Junior School, Nivithigala. (Son of D.K Gunawardena a labourer)

**Name of alleged perpetrator:** Saman Iddamalagoda, teacher of the Nitithigala Junior School.

**Date of incident:** 19 October 2005

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1599/>

**3.c.4. Name of victim: Manoj Tillakaratne**, a 14-year-old, grade 9 student of the Bombuwela Senior School; Address: Batakuluketiya, Bombuwela.

**Names of alleged perpetrator:** The sports master [Physical training Instructor], A.D.C. Renuka of the Bombuwela School.

**Date of incident:** 31 January 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1612/>

**3.c.5. Name of the victim: Nimalka Marasinghe**, 8 years, a grade 4 student of the Parakrama School, Rambukkana. (Father's name: Jayantha Marasinghe, a three-wheel cab drive also of Rambukkana)

**Name of the alleged perpetrator:** Mrs. Ranasinghe, a teacher of the Parakrama School, Rambukkana

**Date of incident:** in 17 March 2006



For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1620/>

**3.c.6. Name of victim: Name withheld**

**Names of alleged perpetrators:** 1. Thushara, owner of a flower business, 2. Panadura police

**Date of incident:** 29 April 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1732/>

**3.c.7. Name of victim: Victim's name withheld**, 13 years; grade 7 student of St. Anthony's College Panadura.

**Name of alleged perpetrator:** Mr. Wijesiri, a teacher of St. Anthony's College, Panadura.

**Date of incident:** 17 July 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1880/>

**3.c.8. Name of the victim: D Dilan Samaranayake**, aged 15, student of Sri Sumangala Boys' School, Panadura, Sri Lanka

**Alleged Perpetrators:** Sub Inspector (SI) Neville attached to the Panadura (South) police station

**Date of incident:** 2 August 2006

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/1897/>

**3.c.9. Name of victim: Miss B.T.F** (only the victim's name initial is quoted for her privacy), aged 16, the grade 11 student at the Panadura, Prime Minister's Girls' (Agamethi Balika) School, daughter of a 45-year-old senior manager of the Metropolitan Company, Panadura

**Alleged perpetrator:** Ms. Nandani Jayasundara, Principal of the Prime Minister's Girls' School, Panadura

**Date of incident:** 20 October 2006

**Place of incident:** Within school premises; inside Principal's office

For full details please follow this link: <http://www.ahrchk.net/ua/mainfile.php/2006/2058/>

#### **4. The 17th Amendment**

The 17th Amendment to the Constitution was brought about in 2001 due to a common realisation that a fundamental crisis had arisen in all the basic public institutions due to decades of politicisation of these institutions and the loss of a credible system of command responsibility.

A Constitutional Amendment, which was passed almost unanimously, gave powers of appointment, transfer, dismissal and discipline of public authorities to independent

commissions, whose members were to be appointed by the Constitutional Council created by this amendment. However, some of these commissions were never appointed such as the Election Commission. The National Police Commission and Public Service Commission faced crises when the terms of office of the commissioners expired at the end of 2005. To appoint the new commissioners the Constitutional Council had to exist and this Council ceased to exist due to the non appointment of members since November 2004.

In the Judicial Service Commission two of the three members resigned complaining of matters of conscience as reason for their inability to continue as members of that Commission.

The president appointed members to the National Police Commission, Public Service Commission and the Human Rights Commission of Sri Lanka without selection having been made by the Constitutional Council as required by the Constitution. These appointments are therefore ultra vires to the Constitution. The president also appointed judges to the Court of Appeal and the Supreme Court also violating the provisions of the Constitution. When an attempt was made to challenge the appointment to the National Police Commission by way of a writ, the Court of Appeal held that no legal action may lay against the president due to Article 35 (1) of the Constitution. Thus, a constitutional crisis of a very fundamental nature continues to exist in Sri Lanka which puts into question the legitimacy of many persons holding power without being properly appointed as required by the Constitution.

This crisis of legitimacy is also a crisis of authority. Thus the very function of the institutions for maintaining the rule of law suffers from the absence of the recognition of legal validity of their authority. At a time when command capacity and command responsibility are most needed, the present crisis of legitimacy contributes negatively to any resolution of the most fundamental questions facing the nation.

The 17th Amendment issue has been extensively documented in AHRC statements. You may find such statements (<http://www.ahrchk.net/statements/>).

## **5. Disregard of views expressed by the Human Rights Committee**

(The state's failure to implement the views and recommendations of the Human Rights Committee on individual complaints, and the failure to implement the Committee's and the CAT Committee's recommendations after periodic reviews - the resulting situation of the bewildering absence of protection to the citizens and the total absence of effective mechanisms to investigate, monitor or prosecute gross human rights abuses)

## **The Non-implementation of views and recommendations expressed by the HRC in all the communications decided upon to date.**

The Sri Lankan government has consistently failed to respect or to take any measures to implement the views expressed by the Human Rights Committee, although Sri Lanka became a signatory to the Optional Protocol in 1997. Since then there have been many communications filed by Sri Lanka's before the Committee and the Committee has made its final decisions in six cases.

1. In chronological order of the final views expressed by the Committee these six cases are as follows:

July 22, 2002, Communication 916/2000 in the communication submitted by Mr. Jayalath Jayawardena, a member of parliament, the author complained that a statement made by the president of Sri Lanka on the state owned media put his life at risk and further that the failure of the state to investigate and take appropriate action on the threats also placed him at risk. The Human Rights Committee held that the author's rights under article 9, para 1 of the Covenant had been violated and recommended the government to provide an appropriate remedy.

July 16, 2003, Communication No. 950/2000 in the communication submitted by Mr. S. Jegatheeswara Sarma. This case related to the disappearance of the author's son regarding which the Committee held that article 7 and 9 regarding the author's son and article 7 regarding the author and his wife were violated and stated that the state party is obligated for a thorough and effective investigation into the disappearance, providing adequate information to the author and for adequate compensation.

July 21, 2004, Communication No. 1033/2001 in the communication submitted by Mr. Nallaratnam Singarasa, which was the case of the sentencing of the author for 35 years of imprisonment without fair trial solely on the basis of a confession from the author without any collaboration, taken in a language that the author did not understand and without addressing that claim that the confession was taken under torture. The Human Rights Committee held that the facts disclosed violations of article 14 (1), para 1, 2, 3, (c) and 14, para (g) read together with article 2, para 3, and 7 of the Covenant. The Committee recommended release or retrial of the prisoner and compensation and to impugn the Prevention of Terrorism Act to make it compatible with the provisions of the Covenant.

July 27, 2004, Communication 909/2000 in the communication submitted by Mr. Victor Ivan, who is a well known journalist the allegation was that certain indictments filed by the then Attorney General (now the Chief Justice), violated the rights of the author and that some judgments of the Supreme Court amount to violations of the rights of the author in the failure to provide equality before law, equal protection of the law and the right to freedom of expression. The Human Rights Committee held on the basis of the facts before it a violation of article 14 para 3 (c), and article 19 read with article 2 (3) of the ICCPR had taken place. The Committee recommended that an effective remedy

including appropriate compensation should be paid to the author and the state party should prevent future occurrences of this nature.

March 31, 2005, Communication 1189/2003 in the communication submitted by Mr. Tony Fernando, the author alleged that he had been sentenced for one year's rigorous imprisonment without appeal for allegedly talking loudly in court and thereafter he was also severely torture while in prison custody. The Human Rights Committee held that the author's rights under article 9 para 1 had been violated and left the issue of torture to be determined by the courts in Sri Lanka. The Committee recommended that the author be provided with an adequate remedy, including compensation and to make such legislative changes as are necessary to avoid similar violations in the future.

July 26, 2006 Communication 1250/2004 in the communication submitted by Mr. Sundara Arachige Lalith Rajapakse, the author alleged that he was subjected to torture, further subjected to unlawful and arbitrary detention and violation of the liberty and security of persons by constant threats to his life and the lack of adequate remedy within his country. The Human Rights Committee held that the author's rights under article 2, para 3 in connection with article 7, article 9, para 1, 2 and 3 and article 9, para 1 have been violated. The Committee recommended that the state party take effective measures to ensure that: (a) the High Court and Supreme Court proceedings are expeditiously completed; (b) the author is protected from threats and/or intimidation with respect to the proceedings; and (c) the author is granted effective reparation. The state party is under an obligation to ensure that similar violations do not occur in the future.

### **The government holds that it cannot implement HRC recommendations relating to court decisions**

2. The government of Sri Lanka has paid no respect for any of these views of the Committee and has not done anything to implement the recommendations. The authors of these communications have constantly written to and even made press statements requesting the government to implement the Committee's recommendations but the state party has failed to heed these requests. In two of these communications, that is Mr. Nallarattnam Singarasa, Communication No. 1033/2001 and Mr. Sundara Arachige Lalith Rajapakse Communication 1250/2004 the state party wrote to the Human Rights Committee stating that it is unable to implement the recommendations of the committee on these two communications on the basis that the views of the Human Rights Committee affect the decisions made by Sri Lankan courts. The view of the state party was that the views of the Committee regarding violations of the ICCPR by the courts cannot be binding.

## **Supreme Court holds the president's signature to the Optional Protocol unconstitutional**

3.a. The situation of the state party's disregard of the Human Rights Committee's decisions reached an even more critical level due to a case which came up before the Supreme Court of Sri Lanka, Nallaratnam Singarasa vs. The Hon. Attorney General (S.C. Spl(LA) No. 182/99). An application was filed on behalf of Nallaratnam Singarasa by way of review and/or revision of the earlier judgment of the court affirming the prison sentence against him on the basis of error in law. Lawyers on behalf of the prisoner requested the court to use the Human Rights Committee's view as a persuasive authority and to revise the earlier judgment on that ground and several other grounds. A five bench judgment led by the Supreme Court without going into the issues of law raised instead decided that the accession of Sri Lanka to the ICCPR in 1980 has internal implications for Sri Lanka and that the signing of the Optional Protocol in 1997 by the president is ultra vires and unconstitutional. This judgment of the Supreme Court virtually sealed off the possibility of implementation of any of the recommendations of the Human Rights Committee in the future in Sri Lanka.

### **The Attorney General's view**

3.b. During this case the Attorney General, who is the chief legal advisor for Sri Lanka, made submissions on behalf of the state to the effect that the views of the Human Rights Committee and its recommendations regarding this case should be rejected. Thus, the views of the court and the views of the state party are the same on this matter.

### **Optional Protocol and sovereignty**

3.c. Over several decades the Supreme Court of Sri Lanka has been brought under severe pressure by the ruling regime and the court itself has become severely politicised. The present decision which speaks of international obligations under the Optional Protocol as an infringement of the sovereignty of the country reflects a political view of the state to depart from international obligations.

### **Ignoring the recommendations of the HRC made after periodic reviews**

4. Besides the above Sri Lanka as the state party has also disregarded recommendations of the Human Rights Committee in the periodic reviews as well as the recommendations of the CAT Committee and other sub-committee. The Human Rights Committee on December 1, 2003 made the following

recommendations: To bring the Constitution into conformity with the ICCPR and also to recognise the right to life, judicial review, removing the limit of one month for the filing of fundamental rights applications and to remove all laws incompatible with the ICCPR; to bring Chapter three of the Constitution (the fundamental rights provisions) in conformity with articles 4 and 15 of the ICCPR; to address the issue of torture by improving provisions to ensure prompt investigations and effective prosecution of perpetrators and to provide victim protection and eliminate the clear of fear that plagues the investigation and prosecution and to increase the Human Rights Commission of Sri Lanka for investigation and prosecution of torture; regarding disappearances Sri Lanka was asked to implement article 6, 7, 9 and 10 of the ICCPR and to implement the recommendations of the working group on forced and involuntary disappearances; to eliminate corporal punishment from schools; to ensure legislation to bring the Prevention of Torture Act (PTA) compatible with the ICCPR; combat the trafficking of children for exploitative employment and sexual exploitation; to reduce the overcrowding of prison institutions and grant sufficient resources for the monitoring of prison conditions; to strengthen the independence of the judiciary by providing judicial rather than parliamentary supervision and discipline of judicial conduct; to protect media pluralism and to avoid the state monopolization of the media; take steps to prevent harassment of the media personnel and journalist and investigate their complaints properly; have legislative review and reform of all discriminatory laws; bring local legislation against domestic violence and marital rape; publish the Committee's recommendations and submit a report within a year on some of these recommendations. None of these recommendations have been implemented by the state party.

### **Non-implementation of the recommendations of the CAT Committee**

5. Sri Lanka as the state party has also failed to implement any of the recommendations made by the CAT Committee on November 23, 2005 (CAT/C LKA /CO/1/CRP.2). The Committee recommended to strengthen the Human Rights Commission of Sri Lanka, to appoint under the Constitution the National Police Commission and also to establish a public complaints procedure as required by the Constitution, that effective measures to ensure the fundamental safeguards for persons detained by the police are respected including the right to habeas corpus, the right to inform a relative, access to a lawyer of a doctor of their own choice and the provision of information about their rights; bring domestic legislation to implement the principle of non-refoulement of article three of the convention; ensure that acts of torture become subject to jurisdiction in Sri Lanka even regarding non Sri Lankan citizens who have committed torture outside Sri Lanka but are present in the territory of Sri Lanka; allow independent human rights monitors including HRCSL full access to places of detention including police barracks without prior notice and set up a national system of review on the basis of such monitors; cause prompt and impartial and exhaustive investigations

into all allegations of violations of torture, ill treatment and disappearances committed by law enforcement officers, particularly by the police; prosecute offenders without impunity; ensure that procedures are in place to monitor the behaviour of law enforcement officials and promptly and impartially all allegations of torture and ill treatment including sexual violence with a view to prosecuting those responsible; take necessary measures to ensure that justice is not delayed; take effective steps to ensure that all persons reporting acts of torture or ill treatment are protected from intimidation and reprisals in making such reports; provide programmes for witness and victim protection; establish a reparation programme including treatment of trauma and other forms of rehabilitation; take necessary action in a comprehensive manner and to the extent possible in the circumstances to prevent abduction and military recruitment of children by the LTTE. None of these recommendations have been implemented by the state party.

### **Consequences of ignoring recommendations of UN bodies on the morale of the people**

6. The failure of state party to respect its international obligations and also the failure to implement the Human Rights Committees views and recommendation of UN human rights bodies has placed the citizens in an extremely helpless situation. It is commonly admitted even by the state authorities that the rule of law situation is at its lowest ebb at the moment. Extreme forms of torture including death in police, military and prison conditions are a frequent feature in all parts of the country. In the north and east there are massive acts of violence done by the agencies of the state, the LTTE and other militant groups which the UN High Commissioner for Human Rights and the UN Rapporteur against disappearances have described as gross abuses of human rights. What is worse is that there are no effective authorities to ensure that people have access to institutions to make complaints and/or to have them investigated. As for the monitoring of human rights there is a near total absence of it. Due to the failure to appoint the Constitutional Council the commissioners who lead several leading monitoring bodies cannot be appointed in conformity with the Constitution. As such there is almost complete impunity due to the lack of investigations and this situation encourages further violations of human rights.

### **The need for international monitoring of human rights**

7. The UN High Commissioner for Human Rights, the Rapporteur for extrajudicial killings, amnesty international, Human Rights Watch, the International Commission of Jurists and the Asian Human Rights Commission and several human rights watchdogs have called for a UN mission for the monitoring of human rights.

## **6. Some references to important statements from various sources on the human rights situation in Sri Lanka**

*A few important statements from UN agencies and other international agencies, these being:*

- An extract from the report of Prof. Alston, Special Rapporteur on Extrajudicial Killings, made to the Human Rights Council on 19 September 2006 General Assembly
- An extract from the report of Prof. Alston, Special Rapporteur on Extrajudicial Killings, made to the General Assembly

We reproduce below the extract of UN Special Rapporteur Prof. Alston at the UN Human Rights Council relating to Sri Lanka. We also reproduce below a statement by Amnesty International.

Human Rights Council, 19 September 2006

Statement by Professor Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions

(ii) Sri Lanka

The situation in Sri Lanka has gravely deteriorated since my visit at the end of 2005. 700 civilians are widely reported to have been killed in the past four months. Over 200,000 have been displaced and many thousands have fled to India. "Political killings" continue apace while the Government and the Liberation Tigers of Tamil Eelam (LTTE) as well as other military groups deny all responsibility and blame the other side.

The most important characteristic of the tragedy that is again engulfing Sri Lanka is that the most widespread types of killing amount to quintessential human rights violations. Many people are killed for the purpose of keeping them from speaking freely, assembling freely, participating in politics, and so on. The years of peace did not end these violations and a rising death toll has not changed their character. There is sometimes also a sense that human rights accountability must be subordinated to the pursuit of peace. First peace, then human rights. But in Sri Lanka a sustainable peace will forever prove elusive if the underlying problem that multiple communities in Sri Lanka fear abuse from one or more of the parties is not addressed. Human rights accountability especially in relation to extrajudicial executions is truly essential to improving the situation in Sri Lanka. At present, the Government, the LTTE, and others succeed in committing deniable human rights abuses through the use of proxies, the subversion of accountability mechanisms, and disinformation that shifts the blame. The ability to commit "deniable" abuses assumes strategic importance, because it is



understood that the conflict is as much about achieving international and domestic legitimacy as territorial control. Both parties seek the moral high-ground of being a defender of human rights, but they believe that this moral high-ground can be reached without actually respecting human rights in practice.

The only way forward is to establish effective human rights monitoring which would foreclose the possibility of employing this strategy of deniability, and would pressure the Government and the LTTE to seek legitimacy through actual rather than simulated respect for human rights.

National accountability mechanisms are important but insufficient for achieving the necessary accountability. The criminal justice system police investigations, prosecutions, and trials has utterly failed to provide accountability. Indeed, it is an enduring scandal that convictions of government officials for killing Tamils are virtually non-existent. National oversight mechanisms are also incapable of playing this role. The National Human Rights Commission has gone on record as concluding that it would not be an appropriate body to investigate political killings countrywide. Moreover, the current Government has undermined that body's independence, thus further limiting its ability to provide human rights oversight.

President Mahinda Rajapakse's announcement that he would invite an international commission to inquire into recent killings, disappearances and abductions in Sri Lanka promised to be a very important initiative and I welcomed it. But I also noted that the commission needed to be independent, credible, effective, and empowered to make a difference. Recent announcements that the commission would consist merely of "observers" have cast doubt on whether it will prove a credible project. It is now incumbent upon the Government to honour the President's original undertaking and for the international community to ensure that its support and assistance is directed to this end rather than to supporting an initiative that seems more likely to distract attention than contribute to a solution.

The time has come for the establishment of a full-fledged international human rights monitoring mission. This mission must conduct in-depth investigations throughout the country, report publicly on its findings, and report to a neutral body. Such a mission would stand a real chance of changing the manner in which political ends are pursued, reducing human rights abuse, and creating the conditions for a sustainable peace.

### **Extrajudicial, summary or arbitrary executions**

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report on the worldwide situation in regard to extrajudicial, summary or arbitrary executions submitted by Philip Alston, Special Rapporteur, in accordance with paragraph 20 of General Assembly resolution 59/197.

## Summary

This report is submitted pursuant to General Assembly resolution 59/197. In its first part the Special Rapporteur reviews the situation of country visits requested and replies received thereto. He concludes that the prolonged lack of a positive reply by numerous countries, including members of the Human Rights Council, is deeply problematic. The Special Rapporteur then reviews developments in the two countries he visited in the course of 2005, Nigeria and Sri Lanka. He concludes, inter alia, that there is an urgent need for a robust international human rights monitoring mission in Sri Lanka.

The second part of the report deals with substantive issues of relevance to the mandate, elaborating on principles of international law that are applicable to numerous cases raised by the Special Rapporteur in communications with Governments. The Special Rapporteur explores the standards applicable to the use of lethal force by law enforcement officials, explaining the role of the twin principles of proportionality and necessity, and highlighting the interplay between customary law, treaty law and so-called soft law standards in this respect. He also explains the \* A/61/150. A/61/311 2 06-48801 central concept of due diligence obligations, both with respect to the recently adopted International Convention on the Protection of All Persons from Enforced Disappearance and to deaths in custody. Finally, the Special Rapporteur discusses problems raised by certain legal doctrines that enhance the role of victims in death penalty cases, both in the decision on whether capital punishment should be executed and in the actual execution.

The Special Rapporteur's recommendations to the General Assembly concern country visits, the need to investigate the killings in Gaza, Israel and Lebanon since June 2006, and international human rights monitoring in Sri Lanka.

## 2. Sri Lanka

### 1. The human rights situation

10. I visited Sri Lanka in November/December 2005 and met with government officials, members of civil society and representatives of the Liberation Tigers of Tamil Eelam (LTTE).<sup>10</sup> The conflict in Sri Lanka is complex, but its outline may be briefly summarized.<sup>11</sup> LTTE began fighting the Government in the late 1970s with the aim of establishing a State of Tamil Eelam in the north and east of the island. In February 2002, the Government and LTTE had signed the Ceasefire Agreement (CFA) brokered by the Government of Norway. In March 2004 the LTTE Eastern Province commander, Colonel Karuna, split with the LTTE leadership, initially taking with him perhaps one fourth of the LTTE cadres. The "Karuna group" has since killed many LTTE cadres and supporters. Attacks on government forces that occurred during my visit placed CFA under unprecedented stress. Three weeks later the Sri Lanka Monitoring Mission warned that "war may not be far away", and subsequent events have only intensified this

perception.<sup>12</sup> At times like this, it is often argued that respect for human rights must await the emergence of political or military solutions.

## **EXTRACTS FROM THE HIGH COMMISSIONER'S STATEMENTS**

### **From the HC's Statement to the 2nd Session of the Human Rights Council**

Mr. President,

Also in Sri Lanka conflict has flared up again. In the past six months, the country has descended further into violence with the death toll climbing to include an increasing number of civilians. As the Special Rapporteur on extrajudicial, summary and arbitrary killings will report to this session, scores of extrajudicial and political killings, allegedly committed by Government security forces, the Liberation Tigers of Tamil Eelam (LTTE) and other armed elements, continued. At present, several cases of killings and disappearances are reported each day in the Jaffna area. Since April 2006, some 240,000 people have been newly displaced from their homes, in addition to the hundreds of thousands who were forced to flee during earlier stages of the conflict as well as by the tsunami. Restrictions on humanitarian access have been imposed by both sides, worsening the vulnerability of these populations. The LTTE's persisting record of forced military recruitment, including children, is a major concern.

While LTTE abuses continue on a large scale, human rights violations by State security forces, and the failure of the Government to provide the protection of the rule of law to all its citizens also generate serious concerns. The Government's public commitment to investigate these crimes, including the killings of 17 humanitarian workers of Action Contre la Faim, is welcome. In too many cases, however, investigations have failed to produce results and victims have been denied justice and redress.

There is an urgent need for the international community to monitor the unfolding human rights situation as these are not merely ceasefire violations but grave breaches of international human rights and humanitarian law.

### **The HC's statement on disappearances and extrajudicial killings in Sri Lanka**

6 November 2006

United Nations High Commissioner for Human Rights Louise Arbour today welcomed the Sri Lankan President's establishment of a Commission of Inquiry into extrajudicial

killings and disappearances, expressing hope that it will see the perpetrators of serious human rights violations brought to justice.

The High Commissioner underlined the significance of this initiative in addressing impunity for human rights violations related to the on-going conflict in Sri Lanka. She noted that the Government has also invited a group of international observers in the form of an International Independent Group of Eminent Persons to monitor, provide advice as requested, and report on the Commission's work.

The High Commissioner thanked the Government for inviting her to provide advice on the terms of reference for the Commission of Inquiry and the observer group in line with international standards. She expressed satisfaction that many of the comments by her Office had been taken into account in establishing the Commission, including the need for witness protection and measures to increase the transparency of the inquiry.

The High Commissioner expressed concern, however, over several shortcomings in the national legal system that could potentially hamper the effectiveness of the Commission of Inquiry, particularly the absence of any legal tradition of establishing command responsibility for human rights violations. She also noted that many recommendations of past commissions of inquiry, including into disappearances, had not yet been fully implemented.

"It will be critically important for the Commission to establish not only individual responsibility for crimes, but the broader patterns and context in which they occur", the High Commissioner said.

The High Commissioner also noted that any commission of inquiry can only investigate a selection of cases, and that a broader international mechanism is still needed to monitor, ultimately prevent, human rights violations in the longer term.

At the invitation of the Government, the Office of the High Commissioner for Human Rights (OHCHR) has submitted a list of names of suitable candidates who could potentially serve as observers to the inquiry. These persons, if selected, would serve in their personal capacities and would not represent the High Commissioner or OHCHR.

### **Statement from the Special Advisor on Children and Armed Conflict**

<http://www.un.org/children/conflict/pr/2006-11-13statementfromthe127.html>

Allan Rock, the Special Advisor to the United Nations Special Representative for Children and Armed Conflict on Sri Lanka, has concluded his 10 day mission to the country

Colombo, 13 November 2006 - Allan Rock, the Special Advisor to the United Nations Special Representative for Children and Armed Conflict on Sri Lanka, has concluded his

10 day mission to the country. During those ten days, the mission visited Colombo, Ampara, Batticaloa, Kilinochchi and Jaffna districts. The Mission enjoyed the full cooperation of the Sri Lankan government and met with all parties concerned with the ongoing conflict. In his meeting today with President Rajapakse, the Special Advisor expressed his appreciation for the extensive efforts made by the Government of Sri Lanka to facilitate his visit and access to all areas.

The purpose of Mr. Rock's visit was to ascertain first-hand the situation on the ground, mainly in the North and East, with a particular focus on compliance with the Action Plan for Children Affected by Conflict. The Action Plan was endorsed by the Government and the LTTE following their commitment during peace talks in 2002 and 2003 to work with UNICEF and the Government to end the recruitment of children and to release under-age recruits in their ranks.

The mission's initial findings reveal that the LTTE has not complied with its commitments under the Action Plan to stop child recruitment and release all the children within their ranks. Under-age recruitment continues and the LTTE have yet to release several hundred children as verified by UNICEF.

The mission also found that the so-called Karuna faction continues to abduct children in government-controlled areas of the East, particularly Batticaloa district. Since May of this year, 135 cases of under-age recruitment by abduction have been reported to UNICEF, with evidence that this trend is accelerating.

The mission also discovered a disturbing development involving the Karuna abductions. It found strong and credible evidence that certain elements of the government security forces are supporting and sometimes participating in the abductions and forced recruitment of children by the Karuna faction.

The mission met with the parents of many of the abducted children in Batticaloa district. As a result, it learned of eye-witness evidence that links the Karuna faction abductions to certain government elements. Based on the evidence as a whole, the mission concluded that some government security forces are actively participating in these criminal acts.

Apart from the issues of child recruitment and abductions, the mission also observed the deteriorating humanitarian situation in certain areas of the North and East. During his visits to Vaharai and Jaffna, Mr. Rock saw first hand the fear, isolation and critical unmet needs of IDP children there.

The Special Advisor met with the leadership of the Muslim Community in Batticaloa and elsewhere, and learned of their feelings of isolation and vulnerability. The mission concluded that special efforts should be made to acknowledge the rights and needs of the Muslim Community.

With respect to attacks on civilian areas, the mission called on all parties to respect their obligations under International Humanitarian Law.

In the case of LTTE, the mission reminded it of its obligation to ensure that military assets are not placed in areas where civilians, especially children, can be at risk. It also called on the LTTE not to engage in the use of civilians as human shields.

With respect to the Government, the Mission reminded it that it has a responsibility to ensure that no civilians are targeted in military operations.

On these various issues, Mr. Rock sought and received several assurances and commitments by the parties involved.

The LTTE gave him assurances that they would work with UNICEF, commencing immediately, to accelerate the release from their ranks of all children, with the objective of completing that process by January 1, 2007. They also committed to better training for their military commanders in relation to recruitment, and a process of discipline for those who do not comply.

The Tamil Makkal Viduthalai Pulikal (TMVP), on behalf of its military wing Karuna, undertook to publish formal policy statements forbidding under-age recruitment, and to release any children who may now be in its ranks. The TMVP agreed to work with UNICEF in an effort to trace the whereabouts and arrange the release of those abducted children whose families have complained to UNICEF.

Mr. Rock also received assurances from President Rajapakse concerning the allegations that elements of the Sri Lankan security forces have been complicit with the Karuna faction in its child recruitment, and that they participated in or facilitated child abductions. The President made clear to Mr. Rock that he will order an immediate and thorough investigation to determine whether such things have occurred and, should the evidence support that conclusion, he will take action to hold accountable those who are responsible.

The Special Advisor welcomes all such assurances and will seek concrete evidence of compliance by all parties before the submission of his formal written report to the Security Council in January next year.

"It is increasingly clear that children are at risk from all sides," said Mr. Rock. "It is crucial that ways be found to monitor and protect their rights and interests. Wherever I traveled, I saw with my own eyes that systems meant to safeguard children's rights are either deteriorating or absent. It is apparent that there is an urgent need for an independent monitoring capacity to ensure that children affected by the conflict are protected" stated Mr. Rock.

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## **A statement by Amnesty International**

[EMBARGOED FOR: 17 November 2006] -- Public

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### **Amnesty International**

Sri Lanka

Observations on a Proposed Commission of Inquiry and International Independent Group of Eminent Persons

AI Index: ASA 37/030/2006

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW  
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### **Amnesty Internationals observations on a proposed Commission of Inquiry and International Independent Group of Eminent Persons**

On 4 September 2006 the President of Sri Lanka announced that the government would invite an international independent commission to probe abductions, disappearances and extra-judicial killings in all areas of the country. Amnesty International welcomed the Government of Sri Lanka's commitment to address past human rights violations. On 6 September 2006 the President, instead announced that he would invite an International Independent Group of Eminent Persons (IIGEP) to act as observers of the activities of the Commission which will investigate alleged abductions, disappearances and extra judicial killings. The eight Sri Lankan commissioners were formally announced on 6 November with a mandate to inquire into fifteen specific incidents that have occurred since August 2005 and the possibility of broadening their investigations to include cases arising during their inquiries and complaints received by the commission on other serious violations.

Amnesty International has benefited from having been in dialogue with the Government of Sri Lanka on its proposal and has welcomed the opportunity to provide recommendations on establishing a commission of inquiry into serious violations of human rights law and international humanitarian law in Sri Lanka<sup>1</sup>. The following are Amnesty International's observations on the proposals. Amnesty International's comments are made on the basis of dialogue with the Government of Sri Lanka in Colombo, London and Geneva and documents produced by the Government of Sri Lanka preparatory for the Commission of Inquiry (CoI) and International Independent Group of Eminent Persons. AI has also benefited from meetings with civil society actors and Sri Lankan human rights defenders in Colombo and Geneva. Amnesty International has confirmed to the Government of Sri Lanka, in response to their request, that it is not in a position to nominate anyone to stand as candidate for the International Group of Eminent Persons.

In light of decades of impunity for perpetrators of violations of international human rights and humanitarian law in Sri Lanka, characterised by the failure of the authorities to investigate and prosecute such perpetrators effectively, only an international and independent Commission would have the credibility and confidence of all parties to the conflict and sections of society to be able to conduct meaningful investigations, obtain critical testimony or information from witnesses and gain the acceptance of its recommendations by all relevant parties. To this end, members of the body conducting the inquiry should be international experts, chosen for their recognised impartiality, integrity and competence. Crucially, they should be, and be seen to be, independent of any institution, agency or individual that may be the subject of, or otherwise involved in, the inquiry, including the Government of Sri Lanka. Amnesty International does not believe that an independent group of eminent persons observing an essentially national inquiry can serve as a substitute for the independence, real and perceived, of the Commission of Inquiry itself. Amnesty International therefore calls on the President of Sri Lanka to:

- Add independent, impartial and competent international experts to the proposed CoI;
- Ensure that the CoI's work is developed in consultation with a representative profile of civil society, including NGOs;
- Ensure that the CoI will assess the information collected in light of relevant provisions of international human rights law and international humanitarian law, as well as relevant Sri Lankan laws;
- Ensure the safeguarding of the CoI's independence, access to all relevant persons and information, accessibility to the public, protection of witnesses, and full discretion as to its mode of operation and publication of interim and other reports;
- Ensure that the CoI's recommendations are carefully considered with a view to their full implementation.

Unless the CoI is established and allowed to function under these standards, the organization believes that the CoI will not be able to function as an investigative body that would address violations of international law in a meaningful way, as required by international standards.

Further, Amnesty International is concerned that the current terms of reference for the IIGEP would undermine its independence, effectiveness and ability to publish its reports at its own discretion, as detailed below.

Amnesty International has requested to see the terms of reference for the CoI itself but this has not yet been provided by the Government of Sri Lanka. However the organisation understands that the CoI has been established under the Commissions of Inquiry Act No. 17 of 1948. Amnesty International has significant concerns about the ability of the Commission of Inquiry to attract the degree of public confidence and cooperation necessary for it to carry out meaningful investigations and for its recommendations to be accepted by all relevant parties. These concerns in large part arise from the broad powers granted to the President under the Commissions of Inquiry Act



No. 17 of 1948 and the absence of a process to involve all relevant sectors of Sri Lankan society, including members of Sri Lankan civil society, and all relevant parties, including the Liberation Tigers of Tamil Eelam (LTTE), in providing input to the establishment of the Commission, the appointment of its members, and the development of its terms of reference.

The Commissions of Inquiry Act No. 17 of 1948 grants the President the power to set the terms of reference of the CoI and appoint all its members (sec.2); add new members at his/her discretion (sec. 3); revoke the warrant establishing the CoI at any time (sec. 4); and appoint the Commission's secretary (sec. 19) without needing to consult the Commission or its chairperson. The decision as to whether the inquiry — “or any part thereof” is to be public also rests solely with the President (sec. 2(2)(d)). In addition, there are no provisions in the Act requiring that the reports or recommendations of the CoI are made public. Amnesty International is concerned that these and other provisions, which grant the President a wide discretion, may undermine the independence and impartiality of the CoI,<sup>2</sup> as well as the Commission's ability to inspire public confidence and interact freely with the public<sup>3</sup>. Accordingly these factors may undermine the willingness of the public to engage with the CoI and to come forward with evidence.

Amnesty International is deeply concerned that there does not appear to have been an adequate consultation process to solicit and take into account the views of Sri Lankan civil society, during the preparations for the establishment of the CoI and IIGEP. In establishing a commission of inquiry, it is essential that, before being finalised, the draft terms of reference are circulated among civil society for their input, and that civil society's views are also taken account of in selecting the members of the commission. However, AI is concerned that in this instance civil society groups, including those involved in the promotion and protection of human rights, may not have participated in the selection and appointment process of the Commissioners, or the selection of incidents to be investigated by the Commission. If this is the case, the CoI may lack the perception of credibility and independence which are essential for its acceptance by all parties to the conflict and sections of society throughout the country. A commission appointed without such consultation and support runs the risk of being perceived to be partial.

Amnesty International takes the view that the CoI and the IIGEP should be free to issue interim reports throughout the duration of their work. The interim and final reports of each of these bodies should be presented to the government, the LTTE and other relevant parties, and must be made public without undue delay and in their entirety, except where witness protection or the need to avoid prejudicing future legal proceedings requires certain elements to be withheld.<sup>4</sup> Beyond these reasons there should be no restrictions placed on either of these bodies to prevent them from speaking or reporting publicly.

Amnesty International is concerned that the publication of the IIGEP's final report will, according to its present Terms of Reference, be subject to the exclusion by the President of “any material which in His Excellency's opinion may be prejudicial to, or absolutely necessary for the protection of, national security and public order”.<sup>5</sup> While Amnesty International recognizes that in certain instances issues of this kind may arise, the

organization is concerned that this proviso may be used by the Executive as a way of censoring the IIGEP's report or parts of it. Amnesty International believes that concerns of this nature regarding the IIGEP's final report should be treated in the same way as are public statements by the IIGEP "during and after the completion of investigations and inquiries of the Commission of Inquiry". In the present Terms of Reference<sup>6</sup> such statements are first to be provided to the "Chairman of the Commission of Inquiry" and the Attorney General, who may object to a statement's release, but the final decision as to publication rests with the IIGEP (with the objections being published alongside the statement).

Amnesty International emphasises that protection for complainants, witnesses, those conducting the investigation and others involved in any way, will be a critical element for the success of the CoI and the IIGEP. Efforts must be made to ensure at all times the protection of all those involved with these bodies and this should form part of their terms of reference. The practical implementation of such measures of protection will need to be the subject of serious and detailed discussions between the government and these bodies prior to beginning investigations.

Amnesty International understands that the access of the IIGEP to witnesses is subject to the agreement of the Commission. Amnesty International believes that this is an unnecessary constraint on the IIGEP's work and has the potential to limit its ability to perform its functions effectively. Amnesty International emphasises that, if it is to be effective in performing its task of monitoring the work of the Commission, it must have powers which enable it to observe all aspects of the work of the Commission without limitations.

Amnesty International is also concerned that the IIGEP's Terms of Reference state that "[T]he Secretary to the Ministry of Justice will be the Head of the Secretariat of the IIGEP" and similarly that "representatives of His Excellency the President, Minister of Disaster Management and Human Rights, the Attorney General and Secretary to the Ministry of Foreign Affairs, will be attached to the Secretariat of the IIGEP."<sup>7</sup> Amnesty International is deeply concerned that these provisions, which give the government control of the administrative functions of the IIGEP, will undermine the independence of the IIGEP and accordingly of the Commission, and create the impression, if not the reality, that its movements and actions are closely monitored by, if not under the supervision of, government officials. While the government must ensure the provision of all necessary technical and administrative assistance, including staff, that independent investigatory bodies may require, any such assistance must be an option for them to take, not be imposed upon them, and it should be made explicitly clear that the administrative staff are responsible and accountable only to the independent body in respect of all functions they perform with regard to the work of the independent body.

In the present circumstances, with the armed conflict escalating and the failure of the recent Peace Talks in Geneva, Amnesty International wishes to reiterate its strong preference for a commission of inquiry comprising international experts, as suggested by the President in his statement of 4 September 2006. In the alternative, the CoI should be

composed of both Sri Lankan and international members. Amnesty International understands that the government takes the view that it would not be possible to do this because, Sri Lankan law prohibits international participation on a commission, and because the Commission exercises (quasi) judicial power. In this regard Amnesty International notes that it has not identified any provision in the Commission of Inquiry Act No. 17 of 1948 which would preclude the appointment of a commission composed of, or including, international members. Were such members to be appointed to the Commission, it would remain a national body, established under Sri Lankan law. Indeed, precedents exist in Sri Lanka where Commissions of Inquiry have been of a mixed or wholly international nature, such as the inquiry into the killing of Denzel Kodbekaduwa which was initiated under the Commissions of Inquiry Act of 1948 in 1993, and comprised of international judges from Ghana, New Zealand and Nigeria.

Moreover, the Commission of Inquiry Act No. 17 of 1948 does not grant a commission appointed under this Act any judicial or similar powers such as powers to arrest, detain, charge, try, convict or impose punishment. A commission of inquiry established under the 1948 Act and composed of or including international members, as by the President in his statement of 4 September 2006, could in this regard make only recommendations for prosecution, which would be taken up for consideration by prosecutorial authorities through their regular procedures. Recommendations for changes in laws and policies would similarly be taken up by the relevant legislative and executive authorities. In neither case would the powers granted by the Constitution to these authorities be in any way compromised by the recommendations of the Commission of Inquiry.

Amnesty International wishes to emphasise that while the establishment of an international independent Commission of Inquiry has the potential to be an important step in addressing impunity and reducing the violence which has prevailed for many years and intensified sharply in recent months, it will not address the need for effective and ongoing international monitoring and investigation of human rights abuses in Sri Lanka. Amnesty International has therefore, in addition, urged the Government of Sri Lanka to consider putting in place effective measures to address this need in the near future, and will continue to do so.

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1 See “Establishing a commission of inquiry into serious violations of human rights law and international humanitarian law in Sri Lanka: Amnesty International’s recommendations” (ASA 37/031/2006).

2 See *ibid.* point II

3 See *ibid.*, point IV(A).

4 See *ibid.*, point V(A).

5 The Terms of Reference of the International Independent Group of Eminent Persons, version of 31 October 2006, para. 13.

6 *Ibid.*, para. 11.

7 *Ibid.*, para. 13.

## **7. Overreaching observations and recommendations**

### **Observations**

1. The Asian Human Rights Commission observes that the entire system of the rule of law and democracy has suffered a serious collapse during the recent decades and the aggravating impact of this collapse is now making its impact seriously felt in all areas of life. At the moment there appears to no effort underway to stop this process and even a limited reform package which was brought about by the 17th Amendment to the Constitution in 2001 has been abandoned. The likelihood of a greater societal and legal catastrophe hangs over Sri Lanka unless the government and the international community collaborate in a serious attempt to counter this situation.
2. On the issue of the 'ethnic' conflict the situation has degenerated greater since the virtual undermining of the Ceasefire agreement and recent months have seen extreme levels of violence, allegedly perpetrated by the military, LTTE and other armed groups. At the moment no effort appears to be under way to stop this trend and evolve possibilities of political settlements in the matter. This situation is also causing great hardships to the civilian populations living in the north and east. Meanwhile it is also creating and deepening the insecurity throughout the whole country including the capital.
3. All attempts at credible inquiries in terms of the international norms and standards have failed.

### **Recommendations**

- 1.a. The immediate establishment of a credible investigating unit with the competency and resources to conduct investigations within the framework of the Criminal Justice Procedure of the country, into all allegations of human rights abuses is the only real initial step that will be an effective measure to eliminate the abuse of human rights and to bring the perpetrators to justice. Any amount of fact finding inquiries and commissions can never be a substitute for proper criminal justice inquiries under the provisions of the law and in conformity with international norms and standards. The Sri Lankan state has this obligation under the country's own laws as well as under the obligations it has undertaken by being a state party to international treaties on human rights. In all reviews of state obligations to protect and promote human rights both local agencies and international agencies including various UN authorities should give priority to the review of this aspect.
- 1.b. An effective witness protection law and programme is one of the urgent needs in the country. Though there has been discussion and undertakings about such a law

and programme for quite some time now, no tangible action has been taken to give effect to such promises.

- 1.c. Without drastic steps to ensure speedy trial in criminal cases it is not possible to make any progress in dealing with human rights abuse or crime in general. The state has not only a duty to respect and protect human rights but also to take steps to fulfill such rights. The obligation to fulfill implies that there should be allocation of funds for the needed reforms and personnel resources to supervise a change from an archaic system with unconscionable delays into a modern system capable of delivering justice and of winning the confidence of the people.
2. The problems relating to the implementation of the 17th Amendment needs to be dealt with immediately and the Constitutional provisions must be respected. The appointment of the Constitutional Council of an urgent basis is the very first basic step that needs to be taken if the constitutional order is to be respected in the country. The tremendous problem of legitimacy existing in all areas of public institutions can only be overcome after the constitutional council is put back in place. Though this will not solve all the problems, no problem can be resolved without taking this initial first step.
3. As for the situation of intense violence resulting from the virtual collapse of the ceasefire agreement, international monitoring of human rights has become an unavoidable necessity. Instead of resorting to pure public relations exercises through mere fact finding commissions, with or without international observers, the crux of the present time problems must be dealt with by obtaining the assistance of an international monitoring mission. The benefit such a mission has brought about in Nepal should act as an encouragement in taking this decisive step.
4. That the government accepts the command responsibility to restore the rule of law in the country. To that end the government must propose a series of policy decisions and actions that could make a beginning of a return to the rule of law and democratic process within the country. In the series of actions the restoration of the operation of the institutions created under the 17th Amendment should receive priority. The appointment of the Constitutional Council in proper manner as required by the Constitution is perhaps the most elementary step needed.
5. In the armed forces and the police command responsibility should be restored and strictly adhered to. In all instances where human rights abuses are taking place the immediate superiors and other who bear command responsibility must be brought under discipline. Until this happens it will not be possible to stop the gross abuses of human rights that are taking place now both in the areas of conflict as well as in other areas of the country which suffer from serious problems of rule of law.
6. As for the violations of the LTTE and other armed groups the inquiries and institution of prosecutions is the responsibility of the government of the country. Since under the present circumstances the government is beset with serious problems relating to such investigations it should seek the assistance of the international community to establish a human rights monitoring mechanism in the country which will ensure proper investigations into human rights abuses of everyone. For the government to be able to bring this about it will necessarily

have to allow international monitors to scrutinise its own alleged human rights abuses. There seems to be no out of adopting such a procedure if the intention of the government to bring down the present level of violence by all agents as required under the circumstances.

7. From the point of view of the entire country the situation of the policing system needs immediate attention. A well thought out reform programme for the police remains one of the major steps that need to be taken if the country is not to collapse into further anarchy. While pending such reforms steps must be taken to ensure credible criminal inquiries under the criminal procedure law into all allegations into torture, extrajudicial killings and other forms of gross abuses of human rights by the police through a Special Investigation Unit with competent persons. Inspection of police premises in terms of the following recommendations of the Supreme Court is also urgent.



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### **THAILAND: The Human Rights Situation in 2006**

#### ***The return of the army & the maintenance of impunity***

Respect for human rights and the rule of law in Thailand were set back many years with the return to power by the military on September 19.

The coup, led by General Sonthi Boonyaratglin, abruptly ended the aggressive caretaker government of Pol. Lt. Col. Dr. Thaksin Shinawatra, a civilian autocracy which respected neither human rights nor democratic principles. And so Thailand went from bad to worse. Within hours of taking power, the army abrogated the 1997 Constitution, abolished a superior court, banned political assemblies, restricted movement and authorised censorship.

The military regime insisted that it had taken over to avert a national crisis, but in the following two months had failed to produce any evidence to show that widespread violence was imminent, as it had said in order to justify its actions.

Similarly, it claimed that the overwhelming majority of people in Thailand supported the coup. It evidently felt safe in making this assertion, as there was no way to verify it. The coup group pointed to images of people in Bangkok giving flowers and food to soldiers as evidence of support, but banned opponents from organising. A taxi driver who sprayed his vehicle with protest slogans and drove it into a tank at high speed later said from hospital that he was not a strong supporter of the previous government, but he had been upset at all the flowers and smiling troops giving the impression that there were not many people who disagreed with the coup. He subsequently committed suicide after one senior officer belittled his protest. Talk shows, community radio stations, websites and other avenues for free public expression were shut down or closely monitored. The media was ordered to “cooperate” with the regime, and largely complied. One journalist travelling abroad with the entourage of the new interim prime minister, General Surayud Chulanont, likened herself to a North Korean



*Koreans protest coup in Thailand*

assigned to write glorious reports about the Dear Leader Kim Jong-Il.

### **Fictional constitutionalism vs. genuine constitutionalism**

Writing in 1993, Professor Ted McDorman of the University of Victoria in Canada observed that constitutions in Thailand have been seen as nominal rather than normative. That is, they have served to validate the power of the ruling group, rather than lay down ground rules that everyone must obey. “Most political commentators have accepted that the role of a constitution in Thailand has been to legitimate the authority exercised by the then-dominant political forces,” McDorman said. This is one reason why the country has had a new constitution virtually every time that power has changed hands.

But the 1997 Constitution broke from this tradition. It was the first to be written by the people of Thailand for the people of Thailand. The assembly that wrote the draft was itself elected by popular vote, not handpicked by some general. Hundreds, if not thousands of independent civic groups were organised with the purpose of raising particular interests, widening public involvement and monitoring progress after the charter was enacted. In 2001 Dr Thanet Aphornsuvan of Thammasat University wrote that

“The new Constitution reflected the crystallization of 67 years of Thai democracy. In this sense, the promulgation of the latest constitution was not simply another amendment to the previous constitutions, but it was a political reform that involved the majority of the people from the very beginning of its drafting. The whole process of constitution writing was also unprecedented in the history of modern Thai politics. Unlike most of the previous constitutions that came into being because those in power needed legitimacy, the Constitution of 1997 was initiated and called for by the citizens who wanted a true and democratic regime transplanted on to Thai soil.”

Among other things, the 1997 Constitution made significant changes to the management of criminal justice in Thailand. For the first time, the rule of law truly became a part of the supreme law. On this, Dr Kittipong Kittayarak, a former director general of the Department of Probation has written that

“The Constitution has put great emphasis on overhauling the criminal justice system. The timing of the drafting of the Constitution also coincided with public sentiments for reform, triggered by public dissatisfaction of criminal justice as a result of the wide media coverage on the abuse of powers by criminal justice officials, the infringement of human rights, the long and cumbersome criminal process without adequate check[s] and balance[s], etc. The public also learned of conflicts in the judiciary and other judicial organs which at times were spread out and, thereby, deteriorated public faith in the justice system. With such [a] background, the members of the Constitutional Drafting Assembly used the occasion to introduce a major overhaul of Thai criminal justice.”



The constitution initiated extensive changes to all branches of government and their procedures, alongside strong affirmations of constitutional rights. These were to be furthered through new institutions and laws, and were upheld by the courts. When protestors against the Thai-Malaysian gas pipeline project were prosecuted, they were acquitted after asserting their rights to assemble and express their opinions freely under the constitution, as were local administrative officers sued by a company for organising meetings against a proposed phosphate mine. Officials of the Anti-Money Laundering Office were found guilty of breaching the constitutional right to privacy of five social activists whose bank accounts and other personal financial details they had illegally investigated. A lawyer sued the public prosecutor for denying him a job because of a physical disability; the court decided that he had suffered discrimination in breach of the constitution.

There were also many innovations. Radio and television broadcasting were identified as national resources to be used in the public interest (section 40): the ground upon which media rights campaigner Supinya Klangnarong successfully stood in court against the huge resources of the former prime minister's telecommunications empire. In March 2006 the Criminal Court in Bangkok threw out the defamation charges lodged against her by the corporation of the former prime minister for comments she had made pointing to the economic advantages it had obtained since he took office. Government departments also had to inform people of any project that may affect their local environment or quality of life before giving it approval (section 59): the basis for a 2004 judgment against the industry minister and overturning of a mining concession in Khon Kaen that had not first been subject to public debate.



*Supinya Klangnarong*

New innovations encouraged new thinking and behaving. Jinthana Kaewkhao, the organiser of a protest against a power plant concession in Prachuab Kiri Khan, won her case after the court defended not only her rights to free assembly and speech but also her right to participate in the management and preservation of natural resources under section 46 of the new constitution. The court went on to observe that this and other new provisions in the law were specifically intended to develop a democratic administration that obliged greater involvement by ordinary persons in public and political life than had earlier charters.

The 1997 Constitution marked a great advance in the thinking of people in Thailand on constitutional issues and the management of their society. It enriched the behaviour of millions. It also constituted a great advance in the notion of consensus. Whereas “consensus” had earlier been understood in terms of patronage--what the elite decided on behalf of everyone else--it was now understood as mature agreement among the general public. Ordinary people throughout the country soon demonstrated a better grasp of the true meaning of consensus than had the traditional authorities.

The 1997 Constitution was also of importance to many far beyond Thailand. It set an example to a region plagued by authoritarianism and the un-rule of law. As Professor Andrew Harding from the University of London has written, “Thai public law reform should be regarded as being of great significance in the context of the development of the new constitutionalism in Asia and the developing world generally.”

So the new constitution both validated the power of the people of Thailand as the new ruling group, and also began the long process of laying down some ground rules. It wrested a measure of authority away from conventional forces--the army and established elite--and attempted to place it in the hands of the public through autonomous agencies and new laws. Unfortunately, inadequate safeguards meant that it struggled to protect its institutions and stay its course in the face of the unrestrained aspirations of an elected tyrant and his supporters. But to deal with such problems under the terms laid down by the law is the challenge of a constitutional system of government.

By contrast to the 1997 charter, the October 1 interim constitution has returned Thailand to its fictional constitutional order, re-securing power for the military elite while trying to give the opposite impression. The charter granted the remodelled junta authority of appointment and decision making over the heads of any new government. Apart from appointing the prime minister--himself a career military general and close colleague of the coup leaders--and chairperson and deputy chairperson of the temporary parliamentary assembly, the junta is appointing a 2000-member body which will select 200 persons from among its ranks, among whom the generals will again select 100, who will be responsible for setting up a 35-person constitution drafting group, among whom 25 will be drawn from the 100 and ten will be handpicked by, yet again, the junta. That process is expected to take most of 2007.

Meanwhile, the interim legislature has been rightly named “the assembly of generals”. Out of 242 members named in October, 76 are serving or retired generals and senior officers. Most other members are bureaucrats, businesspeople and some academics. By contrast, there is one labour representative, and four from political parties.

Suggestions from law experts to make changes to the interim charter while it was still in draft, which had as its main author the same person as the 1991 interim constitution, were ignored. It is not surprising that academics and other legal professionals have expressed grave concerns. Of section 34, which allows the junta to call the council of government ministers for a meeting in which to air its views any



*Constitution drafting assembly: No Entry  
(Source: Prachatai)*

time it pleases, former senator and human rights lawyer Thongbai Thongpao wrote that it was “not very clever” as it “spoils the pledge of non-interference in the civilian administration”. A cartoon on the independent news website Prachatai put the situation more simply: the constitution drafting assembly is sealed off by a barbed wire fence; two ordinary citizens are left to cling to the fence and shout from the outside.

### **Military rule of law?**

A few years ago, some senior United Nations staff in Cambodia met with a government minister to discuss the state of the country’s courts. They expressed concern about their lack of independence, and asked what intentions the government had to address this problem. “Don’t worry,” the minister told them simply, “I will make them independent.”

Apparently suffering similar confusion, in November 2006 the interim prime minister said that his government “is committed to restoring the rule of law” through reforms to administration of justice, the police and anti-corruption agencies.

One of the key features of the rule of law is that every person is equal before the law. This notion entails that no person is above the law. It implies that all persons, without regard to rank or other conditions, are subject to the ordinary law under the jurisdiction of the ordinary courts.

However, under section 37 of the interim constitution, the September 19 coup leaders and all persons assigned or ordered by them--General Surayud included--are exempt from any form of legal sanction for any actions before, during or after the coup:

“All matters that the Leader and the Council for Democratic Reform, including any related persons who have been assigned by the Leader or the Council for Democratic Reform or who have obtained orders from the persons assigned by the Leader or the Council for Democratic Reform pursuant to the seizure of State administration on 19 September B.E. 2549 (2006) to take actions prior to or after said date for enforcement of legislative, executive, judicial purposes, including meting out punishment and other administrative acts, whether as principal, supporter, instigator or assigned person, which may be in breach of the law, shall be absolutely exempted from any wrongdoing, responsibility and liabilities.”

Equivalent sections can be found in previous constitutions of Thailand, with the important exception of the 1997 Constitution. Any permanent constitution approved by the current junta is also bound to adopt such provisions.

Section 37 of the interim constitution is a direct contradiction to the rule of law. It places the coup group and its people beyond the reach of the ordinary laws and courts. It also contradicts the junta’s commitment to United Nations treaties. UN experts have in recent times made plain that the granting of immunity through a blanket amnesty is contrary to international law. Domestic courts also are increasingly overturning such amnesties later.

The very essence of article 2 of the International Covenant on Civil and Political Rights, to which Thailand is a party, is the even application of law and ending of sweeping impunity for criminal offences. Thailand has already been harshly criticised for shielding soldiers and police who commit human rights violations while operating under emergency regulations. The amnesty therefore flies in the face of the country's obligations and does nothing to abate fears that army officers and police in Thailand are above the law.

Another remark by the interim prime minister in November seemed to have an unintended meaning. He said that on the one hand, "I am not a politician and I am not bound by special interests." On the other, he added that, "I have the authority and the power that comes with being an appointed prime minister to act quickly and decisively." General Surayud has made a virtue out of a vice: the fact that he is unencumbered by any political parties and an elected parliament, he says, is a good thing.

Inseparable from the rule of law is the notion of parliamentary sovereignty. This means that an independent parliament alone has the power to pass acts, free from interference, with effect in law. Those acts may then fall within the exclusive purview of the courts. In this way the judiciary too is strengthened, and its role reaffirmed as the arbiter of the law.

The prime minister's assertion that he is free to do what he needs to do to uphold the rule of law is a non sequitur. Only a head of government bound by the institutions of the rule of law, among them a functioning parliament and courts, can uphold the rule of law. The prime minister's very position, and his assertion of his authority to act upon it, is itself a violation of the rule of law.

In the absence of a sovereign parliament, who is making the law in Thailand? Certainly no one answerable to its people: an unelected assembly of military and police officials, bureaucrats and academics is acting on their behalf. No evidence of the rule of law there, either.

Nor is there any to be found in the generals' understanding of the meaning of judicial "independence". They appear to think that having abolished the constitution and disbanded one of the country's three highest courts, ordering the establishment and composition of a new tribunal in its stead, judges can be made independent by virtue of saying that it is so.

Section 18 of the interim constitution of Thailand, which was signed into law by the head of the military junta, reads: "Judges are independent in the trial and adjudication of cases in the name of the King and in the interest of justice in accordance with the law and this Constitution." Section 35 goes on to order the appointment of a new tribunal in place of the Constitutional Court, comprising of judges from the two remaining senior courts.

These provisions in fact do nothing to ensure the independent functioning of courts in Thailand. The independence of judges cannot simply be declared. It is by the effective functioning of institutions and maintenance of safeguards that judges obtain true

independence. The declaration in this so-called constitution is also itself directly contradicted by the order to replace a superior court with a tribunal, and stipulation of its membership, on the signature of a military officer who obtained power by force.

Above all else, the independence of judges is ensured by security of tenure. This means that judges cannot be removed and appointed on the whims of the executive or any other part of government. It means that courts cannot be opened and closed on the prerogative of any one person or agency outside of the judiciary. It means that judges, once appointed, are not easily or quickly removed.

Innumerable commentaries and precedents established around the world recognise security of tenure as vital to the integrity of the courts and maintenance of the rule of law. In the Federalist Papers, three framers of the United States constitution note that “nothing will contribute so much as this to that independent spirit in the judges”. It follows that the 1985 UN Basic Principles on the Independence of the Judiciary have declared: “Judges, whether appointed or elected, shall have guaranteed tenure.”

The 1997 Constitution laid down clear guidelines with checks and balances designed to protect judges’ independence, through procedures for appointment and maintenance of tenure. It recognised the principle of independence through serious efforts to see it obtained via institutional arrangements. It also gave the higher courts unprecedented authority. In a 2003 paper Dr. James Klein described how,

“Thailand’s fifteen previous constitutions had been subservient to code and administrative law designed by the bureaucracy to regulate individuals in society by restricting their fundamental rights and liberties... Thai politicians, the military and senior civilian bureaucrats had always reserved for themselves the power to interpret the meaning of law and the intent of the constitution.”

By contrast, the 1997 Constitution sought to make itself the basis of law, with government agencies subordinate to it, rather than vice versa. This was nothing short of a revolutionary change, and it was bound to bring conflict and problems. So the Constitutional Court and some independent agencies--notably the Election Commission--became mired in controversy. Why should this be surprising? The development of new institutions, particularly where they challenge established authority, is by its very nature provocative. And before September 19 Thailand’s senior courts were addressing this conflict: a conflict that in essence was over whether society should be founded upon the rule of law or the rule of lords. They had public support and the backing of His Majesty the King. So what changed?

As opposed to the 1997 Constitution, the interim constitution offers no guarantees for judicial independence. Nor does the junta have any genuine interest in such matters. Its appointing of a new constitutional tribunal instead defies the very notion of judicial independence. Its orders to various government agencies to go after members of the former government have revealed that its interests are limited to the exercise of “justice”

as justification for its own illegal acts, rather than to uphold any notions of the rule of law.

Professor Worachet Pakeerut of Thammasat University has rightly said that coups will continue in Thailand for so long as the courts there recognise the amnesties that perpetrators pass for themselves. Worachet has said that there is “a discrepancy in the Thai judicial system that recognised law written by people in power even though the law was against morality and people’s common sense”.

In fact this “discrepancy” is the crux of Thailand’s problems. For as long as its higher judiciary legitimises illegal takeovers of power, there will be illegal takeovers. For as long as the orders of generals are written into law through new constitutions, there will be fictional constitutionalism.

### **Empty promises to the south**

In the days after the September 19 coup in Thailand there was some expectation that the bloodshed in the south may lessen. Like a lot of other things, it did not happen. Bombings and shootings have continued, and the scale of incidents has perhaps escalated.

Among them, in October two human rights defenders were killed in incidents that have again raised grave concerns for the security of others working in the region. Muhammad Dunai Tanyeenoo was shot dead near his house in Tak Bai, Narathiwat province. According to his family, Dunai was killed soon after he went out on his bicycle having received a phone call. A village headman, he had been assisting villagers suffering unwarranted prosecution and harassment by state officers. Hassan Yamalae, another headman, in Raman, Yala province, was shot dead with a friend after lodging complaints with the National Human Rights Commission (NHRC) of Thailand and a local human rights group about the treatment of local villagers by security forces.

The warring in the south was greatly inflamed by the prior administration. The use of emergency regulations; alleged abduction, torture and killing of local residents by security forces; slaughters in April and November 2004 and wanton mismanagement of government agencies and personnel in the region all exacerbated it. The cynical use of political appointees to investigate cases that should have been handled by judicial agencies guaranteed impunity to army officers and police responsible for deaths in custody, mass killings and other gross abuses. The malicious pursuit of innocent persons by the public prosecutor in their stead, which continues to this day, has damaged confidence among local people in the impartiality of the courts.

In 2005 the government established the National Reconciliation Commission ostensibly to come up with solutions to the conflict, and in fact as a means to deflect growing public criticism of its policies. The commission did its work thoroughly and in May 2006 submitted a 132-page report. It clearly explained that the problems in the south were essentially the same as those facing rural communities throughout the country,

heightened due to tensions produced by the overwhelming presence of security forces in response to the separatist agenda of a small number of persons. Among the primary causes of the conflict, the commission identified unconstrained abuses of administrative power and violent measures by state authorities, together with injustices arising from the existing judicial process and administrative system. Its recommendations included that the judicial system in the south should be reconfigured through coherent administration, improved efficiency, greater monitoring and changed attitudes.

The government and security establishments mouthed appreciation about the report, but did nothing to implement it. A deputy prime minister was assigned the task of looking at ways to realise its recommendations, which came to naught. General Sonthi, who at that time was directly responsible for the region, also expressed support for the findings but apparently did not attempt to put them in to practice.

After taking power in September, the new government stressed its interest in addressing the problems in the south with sincerity. However, on October 18 the emergency decree over the southern provinces of Thailand was renewed for a further three months. This decree offers the highest level of systemic immunity for gross human rights abuses committed by state officers in Thailand. In July the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Professor Philip Alston, had already said that, “The emergency decree makes it possible for soldiers and police officers to get away with murder.” He went on to say that, “Impunity for violence committed by the security forces has been an ongoing problem in Thailand, but the emergency decree has gone even further and makes impunity look like the official policy.” He also again requested, for at least the fourth time, to be allowed to visit Thailand. There is no evidence so far as to whether or not that request is likely to be honoured, or when the emergency decree will be lifted from the southern provinces.

Another United Nations human rights agency that has taken a strong interest in events in the south of Thailand is the UN Working Group on enforced and involuntary disappearances. In 2006, the Asian Human Rights Commission (AHRC) together with the Bangkok-based Working Group on Justice for Peace lodged the details of some 18 forced disappearance cases in southern Thailand with the United Nations. These are just a few of an unknown number--believed to be in the hundreds--of such cases that have occurred in the south during recent times, out of many more across the country as a whole.

Among the cases submitted was that of a group of five, including one child, who allegedly disappeared together in October 2005. Wilailak Mama went



*Five disappeared: Wilailak Mama & others*



together with her husband, 4-year-old son, and two friends to collect a new car from Hat Yai and come back home. None ever arrived. A family friend called the next day and said that Crime Suppression Division police officers had arrested Wilailak and the others. An officer at Hat Yai told relatives that the group had disappeared due to a “personal” conflict. Like other similar cases in the south, to date nothing is known about what happened to them and no proper investigation has ever been conducted. Department of Special Investigation (DSI) officers visited relatives to make some inquiries, but said nothing more.

**WHERE ARE THEY?**



**Ya Jaodohlaoh**  
 Disappeared: 26 March 2002  
 Place: Parkview Hotel, Yala  
 Disappeared after meeting police



**Waeharong Rorhing**  
 Disappeared: 26 March 2002  
 Place: Parkview Hotel, Yala  
 Disappeared after meeting police



**Imrohlim Gayo**  
 Disappeared: 8 January 2004  
 Place: Bannansata, Yala  
 Taken from house by men in uniform



**Adduloh Hayimasaleh**  
 Disappeared: 5 June 2005  
 Place: Yala Train Station  
 Allegedly pulled into pick up truck on street



**Wae Addul Waheng Baning**  
 Disappeared: 15 October 2005  
 Place: Between Pattani & Yala  
 Circumstances unknown



**Ku-amad Ahmeeden**  
 Disappeared: 1 November 2005  
 Place: Pattani  
 Allegedly followed by police





**Muhamad Senren**

Disappeared: 1 November 2005

Place: Pattani

Allegedly followed by police



**Adduloh Salam**

Disappeared: 1 November 2005

Place: Pattani

Allegedly followed by police

When police or soldiers abduct and kill someone and then dispose of the body they are carrying out what is both the most heinous and most secretive of crimes. Forced disappearances necessitate methodical and extreme violence. They combine raw brutality with detailed organisation: the use of informants; making of lists; allocating of personnel, vehicles, weapons and premises; falsifying of records; disposing of remains, and making or modifying of laws to protect the perpetrators. They are accompanied by other forms of gross human rights abuse, including torture, incommunicado detention, and arbitrary extrajudicial killing. The expression “forced disappearance” is anyhow just a euphemism for kidnapping and detaining with intent to kill.

All of this can go on only under conditions of very deep denial. It can only go on where institutions to protect the rule of law are perverted, destroyed or ignored. This denial is not limited to the practice of forced disappearances alone: over time it becomes the standard reaction to any suggestion of wrongdoing. Eventually, it impedes the possibility of any solution to any problem. Above all, it denies the possibility of redress for the victims, as state agencies are organised not to afford remedies but rather to conspire against the public and keep secrets.

The scale of denial over what has been happening in the south of Thailand was evident at the end of May when two prominent and involved persons called for special investigations of hundreds of unidentified bodies there. Dr Porntip Rojanansunan, acting director of the Central Institute of Forensic Science, has been leading preliminary investigations into some sites, and has said that she would exhume and examine hundreds of bodies in cooperation with international experts. She has said that most of the bodies may be those of migrant workers from neighbouring countries, not local people. Meanwhile, Caretaker Senator Kraisak Choonhavan said that the government had completely failed to do anything about hundreds of unidentified graves in the south. The reaction of government officials, including ministers and provincial governors, was to dismiss the reports out of hand. The interior minister was reported as saying that he was not taking



*Porntip Rojanansunan*

the allegations seriously. The justice minister said that it was an “old story” and nothing to get excited about.

All of this speaks to the persistence and prevalence of denial among government officials about the alleged widespread abductions and killings by government officers in the south. Attempts are made to deny that bodies exist, then that they exist in large numbers, then that they are the bodies of local people, then that they may have anything to do with the security forces and enduring conflict and allegations of abductions there. The emphasis on numbers of bodies, and whose bodies, misses the point. The fact that all of this is going speaks to a situation in which the rule of law has all but collapsed.

Where institutions for the rule of law are functioning, there would be no uproar about whether or not there are bodies, how many there are, who they were or how they died before there was even a proper investigation. Instead, ordinary criminal procedure would be followed to open graves, identify remains, submit findings to concerned agencies and report to the courts, upon which there would be decisions about whether or not to proceed with inquiries, and if so, how. But where emergency regulations and martial law have superseded ordinary criminal law and where the police and military have been free to arrange and commit atrocities with impunity, it is denial--not law--that rules.

The consequences of this denial are felt daily, in myriad ways, by victims and their relatives. Among them, the families of the disappeared struggle not only with psychological and emotional burdens but also with unsympathetic state agencies and day-to-day practical problems that arise from having a son, father, uncle or brother abducted. As there is no simple and non-threatening established procedure to lodge a complaint over a disappeared person, most victims are in the eyes of the ordinary administration still alive and accessible. Inevitably, this creates practical difficulties for the families. One disappeared man was sent a conscription order by the army; when he failed to appear, an arrest warrant was issued. Similarly, a man who was released on bail pending trial has since disappeared; the bail is now forfeit, and again an arrest warrant is being issued. Another family lost possessions during a raid on their house by state officers and now has nothing left with which to identify the missing person when making complaints. Others may have problems associated with joint bank accounts, property title deeds and other documentation and records where the disappeared person's authorisation or involvement is somehow required to permit an inquiry or transaction.

It is for these reasons that a specialised agency is needed in Thailand, with the sole purpose of recording complaints of forced disappearance which, after preliminary inquiries, can issue a document with the legal effect of recognising that prima facie the concerned person has disappeared. The documents it issues could then be used in courts of law, government offices, banks and other premises to free the disappeared person from any immediate obligations--pending further inquiries--and entitle a close relative to act on his behalf. The same agency could expedite arrangements for disappeared persons to be declared legally dead.

Thailand already has a clear precedent upon which to base this work. After the December 2004 Indian Ocean tsunami, it became apparent that a large number of bodies would never be recovered and that the victims could be presumed dead. Ordinarily, under article 61 of the Civil Code, the relatives of persons missing in a disaster or war must wait two years before they can apply to a court for their loved ones to be declared legally dead, placing an enormous and unreasonable obstacle on people trying to go on with their lives. The cabinet in May 2005 took the sensible and praiseworthy decision to amend the law in order to exempt tsunami victims from this provision. Other countries whose nationals were victims of the wave made similar arrangements.

The victims of killings and disappearances in the south of Thailand, or those brought to the area from elsewhere and killed or buried there, are the victims of a man-made tsunami. It has swept silently over their homes and towns, leaving a different kind of death and destruction in its wake. In fact, this man-made disaster is far more catastrophic than the natural one. It is doing much more than causing death and mayhem. It is also destroying the very institutions that allow for society to function. It is damaging beyond repair all areas of social life and basic human relations. The first step for any government body concerned with ending this tragedy and reintroducing the notion of justice to people in the south is to acknowledge the extent and nature of the real problem. That problem is the forced disappearance of an as yet unknown number of persons. It is in the national interest that they be entitled to the same considerations as the victims of the tsunami.

One of the characteristics of abductions and killings of persons in the south of Thailand, as elsewhere, is the use of “lists”. General Sonthi in April indicated that such lists existed and had been misused to settle personal grudges, but did not give details of what he knew about the lists and their management. In November the interim prime minister acknowledged the use of blacklists in the south by ordering the authorities there to “tear up” the lists.

The use of such lists had been a widely known secret, and in fact is a practice that has been employed by security forces in Thailand for many years.

However, many questions remain concerning the use of such lists in the south, including:

1. Who made the lists? How many lists did they make?
2. Who ordered that they make the lists? Why did they order that they make the lists?
3. How were the lists distributed and used? How were they used to abduct and kill people?
4. How many names were on the lists? Whose names were they?
5. How many persons were abducted and killed because they were on a list? Who were they? Who abducted and killed them?
6. What investigations have there been of state officers who allegedly abducted and killed persons whose names were on the lists? How many investigations have there been? What were the outcomes of these investigations?

7. How will the public know that the lists have been torn up? How will the government know? What methods will be used to ensure that the order to tear up the lists is followed?
8. What measures will be put in place to ensure that new lists are not made? How will the public obtain assurances of this?

While acknowledging the use of such lists, so far the authorities in Thailand have failed to accept the implications of this acknowledgment.

### **No evidence, no problem**

In October the then head of the Department of Rights and Liberties Protection (DRLP) under the Ministry of Justice was quoted as saying that,

“I would like to call on state officials involved in investigating the cases to collect clear evidence before making arrests, because wrongfully charged people, to whom the government has to pay compensation, account for more than 30 per cent of the cases deliberated.”

Where large numbers of serious criminal cases can be clearly identified as resting on false charges, something has gone awfully wrong. It is not just a matter of compensation. Rather, the claims for compensation are symptomatic of deeper ailments in the entire criminal justice system. These demand many more serious questions. They include the following:

#### **1. What is wrong with the supervisory system of the police?**

Criminal investigation is central to policing. Where large numbers of persons are being arrested, charged and tried without evidence, it means that there are serious defects in the police. The organisational structure of the police should guarantee supervision of investigators by superiors, and scrutiny of their work before it is used to deprive someone of his or her liberty. If the problem of false charges in Thailand is to be addressed, it is necessary to deal with this failure of supervision. It is also necessary to address long-recognised structural problems in the police force that have arisen due to its being built on principles of self sufficiency rather than centralised state support and control.

#### **2. What percentage of cases is deliberately fabricated?**

Among the wrongful serious criminal charges, while a certain number may simply be due to careless police work, others will have been deliberately concocted against innocent people, in exchange for cash or other favours. The police in Thailand are almost universally recognised as thoroughly corrupt and frequent users of torture and other means to extract confessions and falsify material evidence. They also have strong links with the crime world. Under these circumstances, it is not sufficient to urge investigators to check the facts before submitting a case. This may simply lead to more sophisticated falsification of evidence, particularly where the charges are serious, as in the cases demanding compensation from the government. The real issues go to the nature of justice

and society in Thailand. Is the level of criminal intimidation in the society so high that the guilty persons cannot be prosecuted and innocent ones used instead? Are the police so heavily influenced by criminals that they will sooner falsify cases than seek to locate and charge the culprits? How can these deep institutional and social problems be addressed?

### **3. What is wrong with the laws and procedures on evidence?**

The 1997 Constitution brought with it many reforms aimed at improving the delivery and management of criminal justice in Thailand. It contained specific provisions on the getting of evidence before arrest and inadmissibility of confessions obtained through torture or other illegal means. Notwithstanding, the judicial system in Thailand has still tended to rely disproportionately on police and witness testimony. This makes it easy for police to lodge wrongful charges against innocent persons. One important way to address this imbalance is to place a greater emphasis on forensic evidence, particularly when obtained by independent professionals. In Thailand, the Central Institute of Forensic Science has been a pioneer in this field; however, as it has challenged the established authority of the police it has been subject to heavy attacks and its work unnecessarily hampered. Much more needs to be done to develop the institute and the laws and procedures to admit and utilise reliable forensic evidence from reputed experts in conjunction with testimony. As Thailand is a modern and advanced society with more resources compared to many other countries in Asia, there is no acceptable reason for its criminal justice system to be left behind. Much more attention must be paid to scientific methods of investigation and the bringing of specialist testimony into the courts in Thailand.

### **4. What is wrong with the public prosecution?**

The responsibility of the public prosecutor is to review cases before taking them to trial. However, it is widely known that in Thailand the prosecutor acts with little independence and relies almost exclusively upon whatever is given by the police or other criminal investigators. The prosecutor is not involved in the investigation work, except in some special cases. One person working for the office has described it as a “meatball factory”: whatever it gets, it grinds up and serves to the courts without question. The unprofessional behaviour and lack of independence of the prosecutor’s office also is a serious barrier to addressing the high number of false cases going to the courts.

One of the recent notable examples of how the public prosecutor in Thailand can be used for any purpose is the malicious prosecution of 58 victims of the crackdown by security forces outside Tak Bai police station, Narathiwat on 25 October 2004 that ended with some 84 deaths--78 in army custody--and many more permanent physical injuries.

Those military and police officials responsible for the mass killing at Tak Bai, just like those at Krue Se in April of the same year, have never been punished. In fact, they have been promoted. By contrast, the victims were hauled before the court on allegations of having incited the military and police violence that led to the deaths and injuries that day.

Justice was played for a fool in the Narathiwat courtroom where the public prosecutor has consistently failed to ensure that witnesses appear, and where the chief investigating

officer--the former Tak Bai police chief--could not identify even one of the defendants (two of whom have died), or tell what evidence had been brought against them. It was as if the prosecutor and police are between them doing their best to botch the case. And why not botch it? As the men were charged in order to distract attention from the real guilty parties of 25 October 2004 and somehow justify the excessive violence of that day, it wouldn't really matter to the state whether they are found guilty or not. The case had already served its real purpose: to ensure that there are no penalties for generals.

It is not surprising, then, that the interim administration had the charges against the 58 dropped this November. Although welcome, the withdrawal of charges neatly avoids the real issues: why were the men were charged in the first place, and how has the case against them been dragged on by police and the public prosecutor for two years without any evidence? This is a question not only for the court in Narathiwat, not only for the south: it is a question for the entire justice system in Thailand.

Prosecution in Thailand doesn't have to be like in Narathiwat. Contrary to complaints by public prosecutors and police that they lack money, time and other precious resources with which to perform their jobs more admirably, the main obstacle to the effective handling of criminal cases--against persons of any stature--is the political and administrative will to do it. That was most clearly illustrated by the recent conviction of former police chief Pol. Lt. Gen. Chalor Kerdthes to 20 years in jail over the infamous 'Saudi gems' theft case. One of the significant characteristics of that case, which is ongoing, has been that a public prosecutor has been assigned to handle the prosecution full time for over 13 years. Just one competent and determined prosecutor full time on the job has yielded results that stand in stark contrast to countless other cases in the courts.

In Thailand, as in other countries in Asia, whether or not someone is investigated and prosecuted is a political decision; whether they are investigated and prosecuted well or badly also is a political decision. It is a political decision not in the narrow sense of the word, but in its widest sense: the police and public prosecutor are subject to the whims, demands and influences of one another, soldiers, administrators, businesspeople and mafia figures, in addition to politicians.

### **No way to complain**

In July the AHRC described how a victim of alleged abduction, torture, armed robbery, illegal detention and extortion by Thai police has over three years been unable to excite any genuine interest or attention in his case by any government agency. As there is no part of the government with the purpose of receiving and investigating complaints of gross abuses by the police in Thailand, none feels the responsibility to do anything about them.

According to Uthai Boonnom, he and his partner were taken--at gunpoint and blindfolded--to a house in the forest of Saraburi where the police assaulted him and took all their possessions before settling down to an evening of drinking and gambling. That

night they forced them to sign documents that later served as confessions that they had been buying and selling drugs. Uthai was offered a way out in exchange for cash, but as he could not produce the money immediately, they were detained.

All that happened in March 2002. But it is only the first part of the story. The second part began when Uthai and his partner started complaining that they had been assaulted and had confessions taken by force. They had some evidence to back their claims: for instance, the medical report of the prison nurse that recorded evidence of the assault on Uthai, later backed by the nurse's testimony in court. A police investigator from the same police station as the alleged perpetrators--in effect, a subordinate of at least one of the accused police--came to visit and document their complaints while in prison. But the court went with the police version, and the two were sentenced to long jail terms, which they are now appealing.

Meanwhile, Uthai began writing. From 2002 to 2005 he wrote complaints to the prime minister, justice minister, privy councillor, National Counter Corruption Commission (NCCC), courts, chief of police, attorney general, ombudsman and DSI, among others. In 2006 his case was also submitted to the NHRC. In fact, he wrote to anyone whom he thought might be able to do something to open an investigation into his alleged illegal arrest, torture and imprisonment.

The results of Uthai's complaints were not commensurate with his efforts. Most of the offices to whom he wrote never bothered to reply. And the replies that he did get were not promising. The prime minister's office replied that it had referred the case to Police Region 1 headquarters. But Police Region 1 never contacted Uthai. The justice ministry replied that the case had been referred to its rights and liberties department, which replied that it had checked with the police and they had said that the arrest was legal. It indirectly blamed Uthai for not making a complaint with the investigating officer immediately following his arrest, or launching criminal proceedings against the alleged perpetrators. The ombudsman replied that he could do nothing as the case is still in court. The DSI replied that the case did not come within its criteria for investigation. Somehow, the alleged illegal arrest, detention, torture, armed robbery, attempted extortion and rape and a host of other offences committed by a group of Saraburi police did not fall within the purview of any of Thailand's many government and policing agencies. In short, everyone passed the buck, or just ignored the case altogether.

This is the reality of making complaints against police in Thailand. It is not in any way an exceptional case. In this reality, it is impossible to make a complaint about Thai police and expect that it will be handled credibly, effectively and seriously.

The AHRC has itself over a number of years observed how the system in Thailand works to apparently, but not actually, respond to complaints. Communications with various government agencies have revealed the same pattern of inaction in all cases where the accused are police. The following are further examples:

1. The alleged attempted rape of Ma Thet Thet by a policeman in Mae Sot, Tak was inquired into by the DRLP. In a letter of 11 April 2006 one of its deputy directors informed the AHRC that the department “had contacted Provincial Police Region 6 in order to verify this case and was informed that... this incident really occurred as claimed.... but by persons who falsely claimed to be police officers by dressing [in] similar outfits”.
2. The alleged brutal torture of Urai Srineh by police in Chonburi was inquired into by the Ministry of Interior. Through a letter of 3 November 2005 it informed the AHRC that it had instructed provincial authorities to investigate and that they had found that the victim had been tortured but “Mr. Srineh said that he was *not* tortured brutally by the Police and confirmed that the group of men were *not* the Police”.
3. The alleged illegal raid and confiscation of documents from a migrant workers union in Mae Sot by immigration and police officials was inquired into by the DRLP, which informed the AHRC through a 25 October 2005 letter that “Immigration Division 3 has investigated the matter and revealed that... all concerned officials followed the prescribed procedures without the use of violence or damage of any personal properties”.
4. The alleged extrajudicial killing of Sunthorn Wongdao by police in Nonthaburi was inquired into by the Ministry of Interior, which informed the AHRC through a letter of 25 August 2005 that provincial authorities were instructed to investigate and had found that “Bang Yai District Police had performed the autopsy and concluded that it was a suicide”. The police said that the victim killed himself by shooting five bullets into his chest and head. The DSI said that it could not take up the case.
5. The alleged brutal torture cases of Anek Yingnuek and three others and also Ekkawat Srimanta by police in Ayutthaya were inquired into by both the DRLP and Ministry of Interior, which informed the AHRC in turn that the cases had been passed to the NCCC. Attempts by the AHRC to point out that as the allegations related to torture the NCCC was not an appropriate investigating agency fell on deaf ears. There is also no evidence that the NCCC ever investigated any of the complaints. The AHRC also found out that statements that the concerned police had been removed from duty were either false or that the police had resumed their duties after a short period of suspension. The Ombudsman declined to take up the case because it was in court, even though the complaint to the Ombudsman and matter before the court were different. The victims testified in court that they had been tortured but their testimony was overlooked by the court on procedural grounds. A family member of one of the victims has since herself been sued for defamation by one of the accused police.

The AHRC is not aware of a single genuine complaint of police abuse by an ordinary person in Thailand that has led to a satisfactory investigation and prosecution of the alleged perpetrators. Even high-profile cases struggle to get into the courts and obtain a fair hearing.



The reason for this failure, which has been pointed to by many concerned agencies and experts, is the absence of an independent unit to receive and investigate complaints.

In Thailand it has been known for some 30 years that there is a drastic need for reforms of the police. As far back as 1980 the parliamentary Administrative Committee recognised that “the police department is hated and despised by all people outside of it” for reason of its corrupt practices and rampant abuses. Nothing has been done since then to change this miserable situation. Repeated attempts at change have been blocked by the power of the police themselves. That power has been steadily entrenched and has reached a new level under the current administration, with police or former police occupying senior posts from prime minister down, in practically every part of government.

Ultimately, the possibility of justice and human rights in any society depends upon there being the means through which genuine complaints of illegality and wrongdoing by state officers can be received, investigated and, where necessary, prosecuted. In some well-established jurisdictions, existing agencies are sufficiently robust and trusted by the population as to be able to do this work themselves. In other places, it is necessary to establish completely new and independent bodies to do this work: the Independent Commission against Corruption in Hong Kong is a good regional example. The 1997 Constitution of Thailand opened the door for the creation of many such bodies, but to date many have not performed as had been expected by the public. The DSI is a case in point: whereas many human rights defenders and organisations had hoped that it may be the starting point for objective investigations of police, with a police officer in charge it only served as another layer of protection for alleged perpetrators in uniform.

The concluding remarks of the UN Human Rights Committee in 2005, when it assessed Thailand’s compliance with a core human rights treaty, the International Covenant on Civil and Political Rights, deserve recollection:

“The Committee is concerned at the persistent allegations of serious human rights violations, including widespread instances of extrajudicial killings and ill-treatment by the police and members of armed forces [in Thailand]... any investigations have generally failed to lead to prosecutions and sentences commensurate with the gravity of the crimes committed, creating a culture of impunity. The Committee further notes with concern that this situation reflects a lack of effective remedies available to victims of human rights violations, which is incompatible with article 2, paragraph 3, of the Covenant (arts. 2, 6, 7). The State party should conduct full and impartial investigations into these and such other events and should, depending on the findings of the investigations, institute proceedings against the perpetrators. The State party should also ensure that victims and their families, including the relatives of missing and disappeared persons, receive adequate redress... The State party should actively pursue the idea of establishing an independent civilian body to investigate complaints filed against law enforcement officials.”

An independent civilian body to investigate complaints filed against law enforcement officials: were such an agency to exist, the victims in any one of the cases mentioned

above would be able to make their grievances heard with some reasonable expectation of a response. It would no longer be necessary to designate each of the cases as “alleged”, because the complaints could be appropriately scrutinised and addressed. Unfortunately, Thailand has shown no inclination to implement any of the suggestions made by the UN committee, let alone this one.

### **Still no law to prohibit torture**

Ekkawat Srimanta was arrested on 2 November 2004 by officers in Ayutthaya province, just north of Bangkok, on allegations of robbery. Officers at Phra Nakhon Si Ayutthaya Provincial Police Station took him into detention where they allegedly covered his head with a hood and beat him all over his body to force him to confess to robbery. Then they transferred him to the Uthai District Police Station, where officers allegedly electrocuted him on his penis and testicles. Unusually, he was released shortly after, and rushed to hospital by friends.

Media reports and images showed Ekkawat with burns all over his testicles, penis, groin, and on his toes. He had injuries from beatings all over his body, including the marks of combat boots on his back, swollen thighs, swollen cheeks, face and throat, and blood in his eyes. He was visited at the hospital by a string of senior police and government officials. Two police officers were assigned to protect him for thirty days.

The twenty-three officers recorded on the case record were transferred to Bangkok while investigations were opened. The regional commander stated on November 9 that criminal proceedings would follow, and the case was transferred to the DSI on November 29. But no officer is known to have faced criminal charges, despite these commitments and the overwhelming circumstantial evidence. All the accused police have retained their posts.

Many human rights and legal groups were involved in the case. Ekkawat spoke at a seminar on torture organised by the NHRC. He was represented by the Lawyers Council of Thailand.

Despite the case receiving enormous publicity and being classified as “special”, Ekkawat is not known to have received any long-term special protection measures. Finally, he withdrew his lawsuit against the police prior to the case opening in the Ayutthaya Provincial Court on 11 November 2005, without informing his lawyer. Almost a year passed between the time of the incident and the time of trial. After media and public attention moved elsewhere, the defendants had apparently coerced and threatened the victim to withdraw his case. Unprotected, Ekkawat was an easy target.

Thailand has failed Ekkawat, and an unknown number of others like him. It has not introduced any domestic law to prosecute alleged perpetrators of torture or cruel and inhuman treatment, despite the fact that these acts are prohibited under section 31 of the country’s 1997 Constitution. Nor have its authorities ever been able to cite a single case

of a law-enforcement officer facing any form of criminal action in a court of law over allegations of torture.

Thailand has still not ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This is despite a growing chorus of calls from inside and outside the country pressing for ratification as a matter of urgency, and greater recognition of the damage to Thailand's international reputation being caused by its non-ratification.

No cogent reason has been given for the failure to ratify the treaty. Notwithstanding repeated assurances from some quarters that ratification is imminent, that there would be new studies done to finalise arrangements, it is clear that some powerful agencies or persons are working against it. This comes as no surprise. Any agreement to comply with an international law against torture and cruel or inhuman treatment will be a challenge to law-enforcement agencies that have been accustomed to using violence as a means of extracting confessions and punishing "bad people". That is why state security officers do not have the authority to make decisions about signing up to international laws. That authority lies with the government. The responsibility for ratification rests with the country's top leadership, as does the blame for Thailand's failure to ratify after years of procrastination.

### **Drug war killings remembered**

On September 18, a day before the military coup that overthrew the caretaker government, one of the Thailand's human rights commissioners called for the authorities to pay serious attention to the findings of his investigations into killings during the first phase of this "war". Vasant Panich said that the victims in cases that he had investigated for the NHRC were mostly innocent persons whose deaths in 2003 had never been properly investigated. Some of the murders had patently been set up by the police.

For his outspokenness, Vasant has himself been made the target of threats, and of at least one attempted abduction in June, when after a series of strange calls to both of his mobile phones, his house phone and his wife's phone his vehicle was followed. As Vasant had worked on the case of abducted human rights lawyer Somchai Neelaphaijit in detail he was sensitive to the use of phone calls and vehicles to track a target. However, despite his official position, there was no acknowledgment by the government of the threat against him or attempts to give protection.

The effort to get the cases reopened was thwarted by the timing of the coup; however, the human rights commission in November resumed its efforts. Together with the Lawyers Council of Thailand it lodged a petition with the justice ministry concerning some 40 cases that have been thoroughly examined by the two groups and found to have been killings of innocent persons by police or their agents, out of at least 2500 in total.

There are many serious persistent questions over the drug war killings and how state institutions in Thailand are used to kill.

Undoubtedly the former prime minister and his cabinet took the decisions that led to the murder of thousands of people on the streets, in their houses and in restaurants over a few months in 2003. The prime minister explicitly ordered the hunting down of alleged drug dealers at all costs, imposing extensive rewards and sanctions in response to performance. The public language used by the government repeatedly made clear that alleged drug dealers should be killed. Local authorities obliged with their own added encouragement, incentives and initiatives.

But how could the prime minister give orders that contravened all standards of both domestic and international law and expect that they be carried out? Who organised and did the killing? Not the prime minister himself; rather, local police and administrative officials, and hired guns acting on their behalf. These people drew up lists, called victims to bogus meetings, coerced them to confess, arranged for the killers, and failed to investigate afterwards. All this required the involvement of tens of thousands of people using the material, skills and money of the state not to protect fellow citizens but to murder them.

In societies established in accordance with the rule of law, state institutions will not readily respond to the demands of legislative or executive authorities that they exceed or violate their authority. This is not for reasons of morality or intellect, but because state officials are aware that later they may be implicated in wrongdoing and the excuse that they were simply following orders will not save them from punishment. By contrast, in societies where institutions are part of a modernised version of the feudal order, as in Thailand, executive or legislative officials can give illegal and illegitimate orders and expect them to be followed. This is because their subordinates are reassured that they will not be investigated or suffer any consequences for their actions. On the contrary, the only punishment they are likely to face is if they fail to do what they have been told.

More than three years have passed since the first phase of the “war on drugs”, and more than 16 months. In that time, an unknown number of other persons have lost their lives at the hands of state officials in Thailand due to the failure of the authorities there to take seriously their commitments to international law, as well as the law of their own state. Half-hearted investigations and apologies do not satisfy their obligations. Nor does the paying of compensation and dropping of charges against wrongly-accused persons. The UN Human Rights Committee in 2005 made clear to the government of Thailand what is required: full and impartial investigations, instituting of proceedings against perpetrators, adequate redress to victims and families, and institutions to receive and follow complaints. No progress has yet been made on any of these requirements.

**Can't get no witness protection**

Witness protection is all about the fight against impunity that is at the heart of human rights struggles worldwide. Without witness protection, victims of human rights abuses who complain and seek justice must face serious threats leading to physical harm and possibly death of themselves or their loved ones. This violence is brought onto them by powerful people, whose power invariably comes from the uniforms they wear.

A legal system that promotes justice but does not set in place the means to protect witnesses is a fraud. When victims of human rights abuses understand this, they do not come forward to assert their rights against the perpetrators. No attempt is even begun to make complaints and assert rights. The victims remain silent, inert and fearful.

Just as the outcome of a case depends upon the quality of evidence presented to the court, the quality of evidence depends upon the investigation, from its earliest stages. If a complainant is unafraid and comes forward shortly after a crime, describes in detail what happened, points to other persons and materials that substantiate this account, is supported by other witnesses and does not change the account, the case will probably be a success. By contrast, if a complainant is fearful and has low expectations of the courts, coming forward only much later--if at all--reluctantly giving details of what happened and who else may be able to substantiate the story, and under pressure changes the account, the case is unlikely to succeed. In human rights cases especially, the determining factor between one outcome and the other is protection.

The authority of a court and respect for fair trial are put to the greatest test when state officers are the accused. A law enforcement officer has many more means than an ordinary person to ensure that complaints against him are never heard by a judge. Where they are heard, he has still many other means to reduce a trial to farce. In most cases against law enforcement officers in Asia, witnesses are afraid to appear in court. Where they do appear, they deny earlier testimonies or lie blatantly in a desperate attempt to escape retribution. At such times, the perpetrator is laughing loudly at the court and its judge.

Protecting witnesses is a duty of the state. This is a fundamental and globally-established principle. Where the state declines to protect witnesses, it denies justice to society. The state must find the people, money and means to do this. A state that talks about witness protection but does not allocate funds and resources for that purpose fails in its duty. But the real problem in setting up a witness protection programme is not money; it is about the place of witness protection in state policy. Where the importance of protecting witnesses to obtain justice is understood and articulated, an authority to give effect to this policy can be quickly established and developed. There are many available resources for such work these days.

Thailand is among those countries in Asia that has gone through a long history of heavy military and police control. This history has created a deep and enduring fear among victims of human rights abuses there. That fear is the heritage of all countries with long traditions of social repression.

So it is that despite the establishment of the Witness Protection Office under the Ministry of Justice, in practice the police in Thailand control most aspects of witness protection. As the police in Thailand are the main violators of human rights, the notion that they can be responsible for protecting victims is both unreasonable and contradictory.

A special report released in June 2006 by the Asian Legal Resource Centre noted that despite its existing severe limitations, Thailand's witness protection scheme is an extremely important initiative, and among the few of its kind in Asia. It deserves much stronger encouragement. If it gets the interest and support it deserves, it could become an outstanding example for the region. If it does not, it will be swallowed up by the perpetrators, not defenders, of human rights.

Unfortunately, little has been done to make the Witness Protection Office into an effective agency. At present it does not have even half of the meager staff it was promised. It obviously needs more personnel and resources before there can be any talk of it doing effective work. This is a matter of policy decisions on the part of a minister and the cabinet, not a question of availability of money with which to do the job. The principle of witness protection, although written into the national constitution, is still foreign to the political leadership of Thailand. This must change.

International bodies, bilateral agencies and overseas missions should all be offering support for the office. Governments with established witness protection programmes could be providing technical and material assistance. They have much to offer. Such exchanges would be very much in their own interests, as foreign nationals in criminal cases in Thailand also suffer from miscarriages of justice caused by the lack of witness protection and attendant problems. And for international agencies, Thailand has the right qualities for a successful witness protection model which could be advertised and replicated elsewhere.

International and local human rights organisations, university departments, scientific and professional groups, members of parliament, the NHRC and above all, the witnesses and victims themselves, should all contribute to the much-needed discussion on witness protection in Thailand, and offer whatever means they have to make it a reality.

### **Where is Somchai?**

The story of the case of Somchai Neelaphaijit is in many respects the story of Thailand. From the time of the abduction of the human rights lawyer by the police on 12 March 2004 the case has attracted immense national and international interest. It has also evolved into a story of successive insincere mouthing of commitments by state officials to their obligations.



*Somchai Neelaphaijit*

The wife of Somchai, Angkhana Neelaphaijit, has worked to obtain some answers and a modicum of justice. In the course of her personal struggle, during which time she has received death threats, she has become an outstanding human rights defender in her own right, who has now established an organisation to fight for the rights of other families of disappearance victims in Thailand. On the second anniversary of her husband's abduction, both her struggle and his were acknowledged when he was awarded the 2nd Asian Human Rights Defender Award of the AHRC. Angkhana herself has also received an award from the NHRC of Thailand and is a 2006 joint recipient of the Gwangju Prize for Human Rights, from Korea.



*Angkhana Neelaphaijit*

In January 2006, after the Criminal Court in Bangkok sentenced one of the five accused police to three years in prison and stated that state officers had been responsible for Somchai's disappearance, the then prime minister insisted that the DSI would lay fresh charges within a month. It never happened. Nor have any other promises by one government official after another been fulfilled. These include numerous written commitments by senior government officials since 2004 that various high-level investigation teams were hard at work on the case.



*The police defendants in court*

Then at the end of October, the head of the new military junta said that he had information that the mastermind of the disappearance of Somchai was a close aide of the former prime minister. The revelation came as little surprise to persons who have followed the case. It was alleged from the start that there was evidence linking someone in the prime minister's office to the abduction. It was also widely agreed that the five police who stood trial in connection with his disappearance--one of whom was convicted--were acting on orders from higher up. However, the DSI has again said that it lacks evidence to lay further charges.

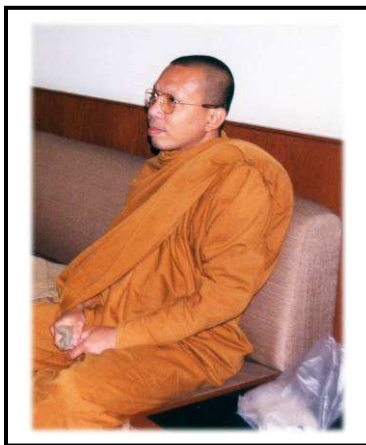
The DSI's constant excuses for its inability to solve the case have no credibility. Under the Special Case Investigation Act BE 2547 (2004) it has extensive authority to investigate any case it has been assigned. Under section 22 it can oblige other government agencies to cooperate. Under section 23 its officers have full investigative powers in accordance with the Criminal Procedure Code. Under section 24 further specific powers are described. These are considerable. They include the power to search a place or person without a warrant, summon any agency or person to come for

investigation or give information, and seize evidence. Under section 25 the DSI can obtain a court order to open mail, tap telephones, and intercept faxes, email messages or other communications in connection with an offence being investigated. Under other sections it can issue fake documents, exempt its staff from ordinary regulations on use of firearms, and appoint special consultants and public prosecutors to cases where necessary. Together with the resources that the DSI is known to have at its disposal this array of powers makes nonsense of claims that it is having trouble uncovering witnesses or evidence. It has used these powers in other instances with good result, particularly relating to financial crimes: so why have human rights cases, and especially that of Somchai Neelaphaijit, not been given equal respect?

The DSI has failed miserably in this and all other human rights cases, including those of murdered environmentalists Charoen Wat-aksorn and Phra Supoj Suwajo. Many attributed this to the placing of a senior police officer at the head of the department, which is under the justice ministry. Many more believe that Pol. Gen. Sombat Amornvivat and his senior colleagues personally thwarted the investigation of Somchai's disappearance. It was in view of this that in 2006 the AHRC launched a petition calling for the removal of the director and reform of the department. Finally, at the start of November 2006 Sombat was removed by the new military administration. However, to date the DSI, including his subordinates still at work there, continues to pose a hindrance to solving this case, and indeed all other human rights cases in Thailand.



*Charoen Wat-aksorn*



*Phra Supoj Suwajo*

Apart from the resurgence of questions about who ordered Somchai's abduction, many more questions must also be asked about the failure of the DSI to solve the case. These include the following: what attempts have been made to follow the chain of command from the five accused officers upwards? Which senior officers have been questioned directly over the lawyer's disappearance? Why were the former prime minister and members of his cabinet not themselves summoned for questioning after admitting that they had heard things about the case? Was there any attempt by investigators to learn what they had heard? If so, what further steps did they take?

Beyond the questions for the DSI chief, there are many more lasting institutional questions for Thailand. These pertain to the keeping of secrets and telling of lies that is at the heart of government there. They are questions that relate as much to the army as to the police and other parts of the state apparatus. In this, the disappearance of Somchai Neelaphaijit is about much more than the presumed death of a single courageous human



rights defender. It is about the deep defects that run throughout state institutions in Thailand that permit disappearances to occur.

It is also about the sense of obligation and public ritual in Thailand's administrative institutions. The trail of ministers, government officials and officers that have given reassurances about the case leads towards the root of the problem. What happens in a society where any commitment can be made without a corresponding sense of obligation? Everywhere in the world politicians and bureaucrats are known for making hollow promises. But there is a difference between an election pledge to tackle crime and a guarantee from a person with a specific mandate that an incident will be properly investigated. When a criminal investigator, departmental head or government minister does not feel obliged to fulfil a responsibility that comes with the job, he, his subordinates and their institutions are degraded. Even the most basic official exchanges among functionaries, or between functionaries and the public, are undermined. As a substitute for good service and effective administration, the state is reinforced by propaganda. The rule of law is denied and authoritarian governance predominates.