2009 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia

The Asian NGOs Network on
National Human Rights Institutions (ANNI)

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Foreword

The Asian NGOs Network on National Human Rights Institutions (ANNI) was established in December 2006, during the *1st Regional Consultation and Cooperation between National Human Rights Institutions (NHRIs) and NGOs in Asia*, which was organized by the Asian Forum for Human Rights and Development (FORUM-ASIA), in Bangkok, Thailand. The idea was to establish a network of Asian NGOs and human rights defenders engaged with NHRIs with the primary goal of helping establish and develop accountable, independent, effective, and transparent NHRIs in Asia. National human rights institutions are viewed as primary protection mechanisms for human rights defenders working on the ground. In the report of the former UN Special Representative of the Secretary General on the situation of human rights defenders (E/CN.4/2006/95, par. 76), Ms. Hina Jilani observed that NHRIs, such as commissions and ombudsmen, can play a critical role in the protection of human rights defenders.

Since its establishment, the ANNI has immersed itself in pursuing its goal. Aside from this book, it has produced two other publications: *The Performance of National Human Rights Institutions in Asia 2006: Cooperation with NGOs and Relationship with Governments* (published in 2006) and *The 2008 ANNI Report: An Assessment of the Performance and Establishment of National Human Rights Institutions in Asia* (published in 2008). It is also the first network of NGOs

that consistently engages with the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) by submitting parallel reports to the ICC Sub-Committee on Accreditation. In 2008, the ANNI submitted four (4) NGO Parallel Reports to the ICC Sub-Committee on Accreditation for the accreditation review of the Human Rights Commission of Malaysia (SUHAKAM), the National Human Rights Commission of Mongolia, National Human Rights Commission of Nepal and the National Human Rights Commission of Thailand. It can be said that these reports prompted more discussion and engagement between the NHRIs and civil society organizations in these countries. More significantly, the report on the SUHAKAM contributed towards the decision of the ICC Sub-Committee on Accreditation to recommend that the SUHAKAM implement measures to improve its performance within a period of one year, otherwise it will be downgraded to "B" status under the ICC.

In 2009, the ANNI submitted two (2) NGO Parallel Reports to the ICC Sub-Committee on Accreditation for the Special Review of SUHAKAM and for the Re-Accreditation Review of the Human Rights Commission of Sri Lanka. These two reports contributed towards the decision of the ICC Sub-Committee on Accreditation to defer the decision on SUHAKAM and to maintain the "B" status of the Human Rights Commission of Sri Lanka. In the case of SUHAKAM, this has effectively prompted the Malaysian government to table an amendment bill in the Parliament in its efforts to make SUHAKAM comply with the Paris Principles.

In the past two years, we have seen the growing role of NHRIs at the regional and international levels. NHRIs now hold independent participation status at the UN Human Rights Council. There are also now vigorous efforts to secure the independent status of NHRIs at the UN Commission on the Status of Women (CSW) that would be analogous to the rights they hold at the Human Rights Council. This growing role of NHRIs reinforces the importance and significance of the work of the ANNI in monitoring NHRIs and holding them accountable under the Paris Principles. If NHRIs are to have a space in these bodies to speak, then it should be assured that they are indeed an independent voice from the government and fully comply with the Paris Principles. Only then NHRIs will

contribute positively and constructively for the advancement of human rights in these inter-governmental bodies.

From the 2008 ANNI Report, members of the ANNI saw three major trends emerging from the national reports. *First*, it was observed that there is a general decline of the independence of NHRIs in Asia. There are three reasons for this lack of autonomy. It may be that the enabling law of the national institution has created a structure that it is either wholly or partially dependent on one of the branches of government. The appointment process of commissioners also allows governments to exercise some influence on the choice of commissioners and that many of these NHRIs do not have fiscal autonomy, relying more on budgets from their governments to run their operations. *Second*, many NHRIs in the region focus more on the promotion, instead of the protection aspect of their mandate. *Third*, there is a general lack of cooperation between NHRIs and NGOs in the region.

In November 2008, the ANNI held its 1st Training Workshop in Bangkok, Thailand, where these three main trends were taken into consideration as the members discussed the focus of the 2009 ANNI Report. With these three main trends in mind, the members of the ANNI developed new objectives and indicators for the 2009 ANNI Report.

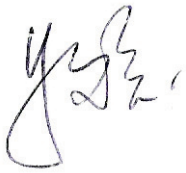
The 2009 ANNI Report now closely examines three main areas. On the issue pertaining to the independence of NHRIs, the members focused on the selection process of new members of NHRIs in their particular countries. With respect to the effectiveness of NHRIs, the national reports looked specifically on the complaints handling systems of NHRIs. Finally, the national reports took a closer look as well at the consultation and cooperation between NGOs and NHRIs.

The 2009 ANNI Report covers the period from 01 January 2008 to 30 December 2008**,** with additions of critical developments occurring during the first quarter of 2009. Writers of the national reports took care to ensure that there is no duplication in terms of the content of the national report in the 2008 ANNI Report.

FORUM-ASIA, as convenor of the ANNI, extends its deepest appreciation to all ANNI members, writers, and editors who have

worked hard to produce the national reports. We also would like to thank the NHRIs in Asia, and all the other friends and partners of the ANNI, who made this publication possible through their input and guidance. We especially would like to express our deepest gratitude to Professor Nohyun Kwak, Mr. Ciarán Ó Maoláin, and Professor Brian Burdekin, for sharing with the ANNI their expertise as the members formulated guidelines and indicators for the drafting of the reports. Also, without the financial support of Ford Foundation, Sweden International Development Agency and Hivos, ANNI's work and this publication would not be made possible.

Again, with this report, we hope to express our deep and sincere commitment to work with NHRIs in building a community devoted to the promotion and protection of human rights in Asia.



Yap Swee Seng

Executive Director

FORUM-ASIA

A Regional Overview: How do Asian NHRIs choose their members and how do they receive our complaints?

In the 2008 ANNI Report, the relationship between national human rights institutions (NHRIs) and non-governmental organizations (NGOs), has been generally described as "rocky". A variety of reasons was given for this, but there are two main factors that emerged. First, NGOs generally engage with NHRIs if they perceive the latter as independent. Second, NGOs also generally engage with NHRIs if the latter respond to complaints of human rights violations forwarded to them effectively and efficiently. It was for this reason that for the 2009 ANNI Report, the members of the ANNI made the decision to look closely into how NHRIs in Asia selects and appoints their members and how these NHRIs receive and investigate complaints filed by victims of human rights violations.

The 2009 ANNI Report reveals that in most countries in Asia, human rights defenders are often not consulted in the selection and appointment process of members of NHRIs. In some cases, the power to select and appoint is given solely to the executive branch of the government. In other cases, it is the legislative body that is given the discretion to select and appoint the members. In most cases, there is no prior consultation nor an open announcement seeking nominations for the posts. Appointments are viewed as rewards to political allies of the appointing powers and more often, expertise and commitment to human rights are not given primary consideration.

With respect to how NHRIs respond to complaints filed before them, many of the reports this year found that sometimes, it is the enabling law of the NHRI itself that serves as a stumbling block to responding effectively and effectively to complaints. In other cases, it was revealed that it is the NHRI itself that lacks the political will to pursue these complaints, despite the strong mandate to do so.

Silencing Civil Society in the Selection and Appointment Processes of NHRIs

It is said that what makes an institution is its people. It is also said that what drives these people to be effective and committed in their work are their leaders. For a national human rights institution, its independence and effectiveness to promote and protect human rights in its country relies to a great extent on the integrity, commitment, and capacity of its leaders. Thus, an essential ingredient for an independent, accountable, transparent, and effective national human rights institution is the selection and appointment process of the members of the Commission.

Under the Paris Principles, "[t]he composition of the national institutions and the appointment of its members, whether by means of an election or otherwise shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civil society) involved in the promotion and protection of human rights."

Currently, in Asia, there are several methods by which members of NHRIs are selected and appointed. One method, which is the least recommended, is where the selection and appointment are done exclusively by the executive branch of the government. In the Philippines, the President has absolute discretion over the selection and appointment of members of the Commission on Human Rights of the Philippines (CHRP). There are no known rules of procedure for nomination, application, selection, and appointment of new Commissioners. There is also no space for civil society participation in the selection process. This is an undesirable model as it runs directly against the Paris

Principles. Appointments that are done without any transparency or consultation with civil society may result to a set of members lacking the expertise, commitment and independence necessary to effectively promote and protect human rights. There is also a bigger chance for appointments to be treated by the appointing authority as 'political rewards' or concessions to close allies.

More often than not, members of NHRIs appointed in this manner do not have the trust and confidence of civil society groups. This would then mean limited engagement from civil society groups who are working with victims of human rights violations in the country. In the Philippine example, there were initial concerns about the appointment of the current Chairperson who is known more to be an expert on elections law than human rights. However, there is now some positive reception of the proactive nature the current Chairperson takes on human rights issues in the country. However, this still does not justify the current process for selection and appointment of members under the present law.

In Malaysia, the Prime Minister, in theory, only recommends nominees and the King (Yang di Pertuan Agong) chooses from these recommendations. In practice, however, the recommendations forwarded by the Prime Minister are often the ones appointed by the King. As noted in the report on the Human Rights Commission of Malaysia (SUHAKAM), "there is no prescribed manner in which the public or civil society can participate in the selection process." Early this year, the Lower House of Parliament, passed an amendment on Act 597, the enabling law of the SUHAKAM, which provides that "[t]he members of the Commission shall be appointed by the King on the recommendation of the Prime Minister." The Prime Minister, in turn, before tendering his advice, shall consult a 'selection committee' composed by the Chief Secretary to the Government (as Chairman of the Committee), the Chairman of the SUHAKAM, and three other members from amongst eminent persons, to be appointed by the Prime Minister. The report emphasizes that no substantial changes were made in the process by these proposed amendments. The process "remains severely lacking in transparency" and still gives the Prime Minister sole discretion over the entire process.

Another method by which members of NHRIs are selected and appointed in Asia is through appointments by the legislative branch of the government. In Mongolia, the parliament, the State Great Kural (SGK), appoints the members of the National Human Rights Commission of Mongolia (NHRCM) from nominees forwarded by the SGK's Speaker. These nominees come from proposals from the President, the Parliamentary Standing Committee on Legal Affairs and the Supreme Court. Civil society participation is nowhere to be found in this process of selecting and appointing members of the NHRCM. During the selection of the current set of members, non-governmental organizations raised the concern that they were unable to participate in the discussions at the SGK, nor were there any broad consultations with civil society groups prior to the selection of nominees. The current members of the NHRCM are from government institutions and often, because of this type of background, as noted in the report, "conflicts of interest emerge." For instance, after the violent riots that erupted in July 2008, the government of Mongolia detained at least 200 individuals alleged to be involved in these riots. The Chairperson of the NHRCM visited detention centers to check on the situation of these detainees. However, despite evidence of torture and malnutrition being suffered by the detainees, the Chairperson of the NHRCM announced that there were no human rights violations occurring within the detention centers. Many human rights groups viewed this statement as a manifestation of how the NHRCM can be co-opted by the government's efforts to project an image of peace and democracy to the international community. Many human rights groups believe that having strong government backgrounds makes members of the NHRCM tend to view the issues from the government's perspective, instead of looking at the situation critically and more objectively.

In other countries in Asia, members of the NHRI are selected and appointed by an autonomous body, which is more often than not, the same type of mechanism used to select members of the judiciary. This method has recently been implemented for the selection and appointment of members of the National Human Rights Commission of Thailand (NHRCT). The process in the past, as laid out under the 1997 Constitution, provided for a Selection

Committee composed of 27 persons, which included at least 10 representatives from human rights NGOs. The 2007 Constitution has amended this process and now, the Selection Committee shall be composed of only 7 persons. These are the very same persons who select and appoint members of the judiciary in Thailand. The Selection Committee is now composed of: (1) the President of the Supreme Court of Justice, (2) President of the Constitutional Court, (3) President of the Supreme Administrative Court, (4) President of the House of Representatives, (5) Leader of the Opposition in the House of Representatives, (6) a person elected by the general assembly of the Supreme Court of Justice, and (7) a person elected by the general assembly of judges of the Supreme Administrative Court. The new process effectively eliminated participation of civil society in the selection and appointment of members of the NHRCT. The ramifications of this elimination of civil society participation immediately became clear after the names of the new Commissioners of the NHRCT were released. It should be noted that most of the new members are from government, one of them being a former officer of the police force. The only representative from a "non-governmental organisation" is one man who is from a group campaigning against drunk-driving.

The setback suffered in Thailand by the revision of the appointment and selection process of the members of the NHRCT was also felt in other countries within the region where human rights groups are striving to establish their own national human rights institutions. The past selection and appointment process of the NHRCT was the model followed by human rights groups in Cambodia when they drafted their version of the law establishing a Cambodian NHRI. After hearing about the changes in Thailand, one human rights defender from Cambodia remarked that it might be more of a challenge now for them to convince their own government that the Thailand process was a best practice when Thailand itself had abolished the same.

It is therefore clear that many countries in Asia where NHRIs exist do not include or consider civil society voices in the selection and appointment process of members of NHRIs. There is a very limited space for human rights defenders to bring forward their nominees, nor is there any opportunity for them to examine or

scrutinize the expertise, commitment, and independence of those who have been nominated as members. Many of the appointments are treated as 'political favors' or concessions to close allies of the appointing power. This therefore severely erodes the trust civil society has for members of the NHRI. This then leads to less engagement by civil society groups with the NHRIs.

A Feeble Response to Complaints

The Paris Principles highlights the investigating role of NHRIs with regards to human rights violations by stating that a "national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade union or any other representative organizations." The Paris Principles adds that the functions of NHRIs can include hearing any complaints or transmitting them to other expert authority or they can make recommendations to relevant authorities such as proposing amendments to existing laws, regulations or administrative practices.

All existing NHRIs in Asia have some kind of mechanism by which they can receive and act on complaints filed before them pertaining to human rights violations. However, as will be seen in the reports, most the NHRIs are not quite effective and efficient in handling these complaints they receive. There are a number of reasons for this inefficiency and ineffectiveness.

In Mongolia, many human rights groups feel that the enabling law of the NHRCM poses as a huge challenge for it to be able to pursue investigations on cases of human rights violations. According to Article 11.2 of the NHRCM Act, the NHRCM is prohibited from receiving complaints related to criminal and civil cases already under investigation. This is related to the sub judice rule that regulates the discussion of issues which are under consideration by the courts. In many countries, matters are considered to be sub judice once legal proceedings become active. The sub judice rule

particularly applies in criminal cases where publicly discussing cases may constitute interference with due process as there may be a chance for these public statements to influence the minds of police authorities conducting the investigation or the court hearing the case. This rule, however, creates a problem for the NHRCM when it receives complaints pertaining to the excessive use of force by police authorities in cases that are under investigation or on trial. Because of this provision, the NHRCM feels that it is prevented from issuing comments on ongoing investigations or trials, even though these cases would have significant impact on the application of human rights norms and principles in the country. At present, the NHRCM simply refers complaints related to criminal and civil cases to relevant authorities or legal advisors. According to the Mongolian report, the abovementioned provision of the NHRCM Act prevents it "from being proactive in relation to certain human rights violations suffered by citizens". It is important to note that the NHRCM has submitted amendment proposals to its Act that would allow them to investigate human rights violations during police or judicial investigation.

While the NHRIs from the Philippines and Malaysia have clear mandates that give them full powers to receive complaints and pursue investigations on alleged violations of human rights, there are a number of factors that hinder these NHRIs from pursuing these duties.

In the Philippines, the CHRP has a primary function to investigate all human rights issues, including violations of civil or political rights. According to the Philippines report, the CHRP has the authority to provide legal measures to protect human rights, provide legal aid services and preventative measures to the underprivileged who are victims of human rights violation or need protection, and, the CHRP has the authority to grant immunity to any individual when their testimony is crucial to establish the truth. Many human rights groups however have observed that this power by the CHRP is somehow constrained because it does not receive adequate funds from the government to have enough personnel or financial resources to fully push these investigations.

Similar to the CHRP, the SUHAKAM enjoys a clear mandate to conduct investigations on its own or upon complaints made on behalf or by the victims of human rights violations. This power is given specifically to SUHAKAM's Complaints and Inquiry Working Group (CIWG) under Part III of the Human Rights Commissions of Malaysia Act 1999 (Act 597). However, despite SUHAKAM's investigative powers, in 2008, SUHAKAM only conducted one public inquiry when a police officer allegedly used excessive force in Bandar Mahkota Cheras, Kuala Lumpur. The report from Malaysia claims that SUHAKAM failed to conduct other public inquiries in other serious cases against human rights despite having concrete evidence. Many human rights groups view this as a lack of political will on the part of the SUHAKAM to pursue these cases.

The lack of political will is also pointed to as a main factor as to why human rights groups view the National Human Rights Commission of Nepal (NHRCN) as slow and inefficient in receiving and handling complaints. Of the total registered 1,949 complaints during the fiscal year 2007/2008, only 376 cases were decided on and 7 still pending. Recommendations were made only to 73 cases. There are 728 cases that are still under investigation. Because of this slow response to complaints, many of victims of human rights violations file their complaints to other groups, such as the Bar Association, human rights NGOs, the police, with community leaders, or with Chief District officers. There is also a huge number of human rights complaints filed directly with the courts. According to the study conducted by the Advocacy Forum and the International Centre for Transitional Justice, only 10% of victims of human rights violations file complaints with the NHRCN. There is not much confidence placed in the willingness of the NHRCN to safeguard the rights of victims of human rights violations.

There are instances however when the NHRCN does take on certain investigations based on the complaints they have received. However, these investigations would be severely hampered by the lack of cooperation the NHRCN receives from authorities, especially from the military. Sometimes the NHRCN is blocked and prevented from visiting army barracks or unofficial detention centers used by the government.

The lack of accessibility by victims to these complaints mechanisms by NHRIs is also another factor why Asian NHRIs are deemed to have a feeble response to complaints from victims. Most NHRIs have only one main office established in the capital city, thereby making it difficult for many victims to submit complaints. Some NHRIs do have regional branches like those from Sri Lanka, Philippines, and Nepal. Unfortunately, most of the reports do not analyze the effectiveness of these regional branch offices.

The report from Malaysia noted that the SUHAKAM has offices in the following cities: Kuala Lumpur, Sabah, and Sarawak. However, despite these three offices scattered around the country, people from the rural or suburban areas still find it difficult to submit their complaints as they would still need to travel. Furthermore, SUHAKAM's Complaints and Inquiry Working Group (CIWG) does not have mobile ground staff in rural and suburban areas to reach out to local communities; hence, victims are constrained to expend resources to travel to the city to file their complaints.

Many NHRIs in Asia now accept complaints through other means, such as by fax or through the internet. It should be noted, however, that there are still numerous areas in the region where people have no access to these types of technology. It is also quite significant that more often than not, most of the human rights violations occur in these isolated areas. In the Maldives, not all the islands have access to the internet. Moreover, the report on the National Human Rights Commission of the Maldives (NHRCM) reveals that people find it difficult to file their complaints by phone since when they do call the NHRCM, it is often difficult for them to be connected to the appropriate members of the staff who should be receiving their complaints.

The Importance of Solidarity and Partnership

The Paris Principles recognizes the fundamental role played by NGOs in expanding the work of NHRIs. Therefore, under the Paris Principles, NHRIs must pursue the development of relations with NGOs that are devoted to promoting and protecting human rights.

It is indeed unfortunate that in Asia today, the voices of NGOs are silenced or unheard in the process of selecting and appointing members of NHRIs. It is mainly because of this that in Asia, the trust and confidence NGOs have in NHRIs have been severely eroded this past year. It is also believed that the type of leadership an NHRI has would shape the institution and determine whether it would be proactive and committed to responding to complaints of human rights violations.

NGOs and NHRIs, as human rights defenders, are at the frontlines of defending human rights on the ground. Both should therefore be allies since they are working towards the same goal, and the same end.

The voices of NGOs should therefore be heard and be a significant factor in selecting members of NHRIs, as well as in formulating mechanisms for receiving and responding to cases of human rights violations. If NGOs' voices are heard, there would be a sense of solidarity and partnership with NHRIs. NGOs would then readily engage with NHRIs and share with NHRIs what expertise and networks they employ in defending victims on the ground. Undoubtedly, this partnership would result to stronger NHRIs in Asia, and a more effective movement working for the promotion and protection of human rights in the region.

Bangladesh: General Overview of the Country's Human Rights Situation in 2008

Prepared by Ain o Salish Kendra (ASK)[1]

The political landscape in 2008 shifted dramatically at the very end of the year. After nearly two years of a State of Emergency under a military-backed caretaker government, during most of which several fundamental rights were suspended and political activity banned, the Emergency was finally lifted on 17 December. Much anticipated and twice-postponed parliamentary elections took place on 29 December in a peaceful atmosphere, with a large voter turnout. These two significant events were certain to have direct and indirect effects on the human rights environment.

Development of the NHRC in 2008

The National Human Rights Commission Ordinance 2007 was promulgated on 23 December 2007. Almost one year later, the Commission was established in September 2008. In December 2008, one Chairman and three other Commissioners were appointed and an office was allotted to the Commission. Justice Amirul Kabir Chowdhury, a former judge of the Supreme Court, has been appointed Chairman. Professor Niru Kumar Chakma from the Dhaka University Philosophy Department,

1 Contact person: Mr. Sayeed Ahmad, Senior Coordinator, Media and International Advocacy

and Munira Khan, former chairperson of the Fair Election Monitoring Alliance (FEMA), have been appointed as members of the Commission.

After the December election, a new Government came to power and set up a committee to review all the ordinances promulgated by the caretaker government. According to the constitution, any ordinance needs to be approved in the first parliamentary session. The review committee prioritized several ordinances to be placed before the first session of the parliament which did not include the National Human Rights Commission Ordinance 2007. Thus the 2007 Ordinance no longer exists. The Law Ministry drafted the new National Human Rights Commission Bill 2008, which was placed before parliament before being sent to the parliamentary standing committee for further review.

Activities of the NHRC in 2008

The Commission received several complaints in 2008, but did not carry out any investigations. It visited just four victims that had been chosen from newspaper scanning. The Commissioners have said informally that they were unable to conduct investigations because they have not developed any rules of procedure and they lack adequate human resources.

Though the Commission has prepared and submitted its budget and to the Government, the Government has yet to approve it. The Commission also does not have its own support staff. The Government allocated TK 1.7 million (approximately $25,000) at the time of the establishment of the NHRC for the salaries of the chairperson and the commissioners and to pay the utility bills. The Government also seconded one Secretary, one Personal Assistant and one office orderly. Furthermore, the NHRC appointed two IT personnel and one accountant with the financial support of the UNDP Project 'Promoting Access to Justice and Human Rights in Bangladesh'. Under this project, an Identification and Formulation Mission is being led by Mr. Peter Hosking, former Commissioner of New Zealand's National Human Rights Commission and Director

of the New Zealand Human Rights Foundation. The mission comprises two national experts, Dr. Asif Nazrul and Barrister Sara Hossain. On 24 January 2009 the mission held a sharing meeting with human rights NGOs in the country in order to find out various NGOs' views on the scope, framework and modalities of engagement with the Commission.

The Commission has yet to develop its own working mechanisms, including appointments. The Commission also faced challenges regarding its office space and furniture. The Commission started its office in a government house at Ramna, Dhaka. In December, it was made to shift without any alternative because the house had been allocated to a newly appointed minister. Later the Commission had been shifted to a rented flat.

In February 2009, during the Universal Periodic Review of Bangladesh, the government delegation included Commissioner Munira Khan – one of the members of the National Human Rights Commission – even though the NHRC is supposed to have independent representation at the UN Human Rights Council.

The first parliamentary session took place from February to March and, since the NHRC Ordinance 2007 was not approved in the first session, many legal experts judged that the National Human Rights Commission established under the ordinance has no legal existence. This has put the Commission to a standstill, with Commissioners feeling deeply insecure in their positions.

Government representatives have on several occasions declared that the National Human Rights Commission Bill 2009 will be placed in the agenda of the current, ongoing parliamentary session. This was also confirmed in the official response of the government during the Universal Periodic Review recommendations. Moreover, the Commission's Chairman and Commissioners made a courtesy visit to the Minister of Law and Parliamentary Affairs on 17 June 2009, during which he confirmed that the bill will be brought before parliament very soon and will be given retrospective effect.

Conclusion and Recommendations

We urge the Government to ensure that the proposed bill conforms to the Paris Principles, in order to safeguard the independence and effectiveness of the National Human Rights Commission.

Report of Cambodian Working Group on NHRI (2009)

Prepared by Pa Nguon Teang, Secretary General of the Cambodian Working Group on the Establishment of an NHRI

I. Introduction

It is said that Cambodia already has several mechanisms in place to promote and protect human rights. There are the Human Rights Commissions under the Senate, the National Assembly, and the Executive branch. There are also dozens of non-governmental organizations (NGOs) on the ground working on human rights issues. However, Cambodia does not yet have a national human rights institution (NHRI). Human rights violations are a regular occurrence in the country, with land grabs, forced evictions, freedom of expression and freedom of assembly being the key issues on which human rights NGOs and activists voice their concerns.

Cambodian civil society groups working in this field recognise that establishing a national human rights institution is crucial to improving human rights in the country. NGOs have therefore formed a group called the Cambodian Working Group (CWG), which has been working for the establishment of an NHRI since the year 2000. Unfortunately however, the CWG has yet to achieve its goal. The Cambodian government is still at the stage of revising the Draft Law on the establishment and functioning of a National

Human Rights Commission in Cambodia (hereafter referred to as 'the Draft Law'), which must first be sent to the Council of Ministers before being taken to the National Assembly for debate and adoption.

As a result of its activities, the CWG has seen more cooperation and greater commitment from the Cambodian government. In September 2006, the governmental Cambodian Human Rights Committee (CHRC) cooperated with the CWG in organizing a regional conference in Siem Reap Angkor, Cambodia, which was attended by representatives from working groups and NHRIs in other countries belonging to the Association of Southeast Asian Nations (ASEAN). At the event, the current Cambodian Prime Minister declared in his opening speech that the government would strongly support not only the formation of a national institution consistent with the Paris Principles, but also an ASEAN regional human rights mechanism. This commitment was reiterated by the government representative H.E. Mr. Mak Sambath during his opening speech at a similar regional conference held in Siem Reap last December.

Following this conference, in August 2007 the CWG submitted its version of the Draft Law on the establishment of an NHRI in Cambodia to the government's CHRC for comments. This version of the Draft Law is a product of several consultations the CWG convened to get input from a wide variety of members of Cambodian civil society. In April 2009, the CWG and the CHRC entered into an agreement to collaborate and establish a technical team that will be tasked to work on the revision of the Draft Law. The Cambodian office of the Office of the High Commissioner on Human Rights (OHCHR) has committed to support the work of this new technical team. This new approach is expected to speed up the process of establishing an NHRI in Cambodia.

It appears, therefore, that the establishment of the Cambodian NHRI is imminent. The question remains, however, as to when this NHRI will actually be established and if this NHRI will be independent and effective, in accordance with Paris Principles.

II. Independence

A. Relationship with the Executive, Judiciary, and Parliament

The Draft Law on the establishment of a Cambodian NHRI has been awaiting the government's comments since 2007. The status of the future NHRI therefore remains unclear since the law has not been approved by Cambodia's elected representatives. Article 3 of the Draft Law proposes that the NHRI should be a constitutional body that is independent from the institutions of government, consistent with the Paris Principles. According to the Draft Law, public authorities are required to cooperate with the NHRI in its activities. Specifically, government ministries must provide information required by the NHRI for its investigations (Article 17, pa.2); make interventions when requested by the NHRI to protect complainants and witnesses (Article 17, pa.4); and suspend officials under investigation by the NHRI for committing human rights violations (Article 17, pa.5). The NHRI itself is required to coordinate with state institutions, non-governmental organizations and international organizations working in the field of human rights (Article 16).

The Draft Law also grants the NHRI the power to summon witnesses for inquiry under oath; to issue an order or warrant to compel those who refuse to provide answers at the request of the NHRI; to issue search warrants and conduct searches for evidence; to order state institutions to hand over any documents related to cases under NHRI investigation; and to question witnesses or accused, publicly or on camera (Article 17, pa.1).

B. Selection Process of Members

To guarantee the independence of the NHRI, the Draft Law provides for a selection committee composed of members from different institutions (Article 5). This committee should include:

- One representative from each political party represented in the National Assembly;
- Six representatives from NGOs that have carried out activities promoting and protecting human rights for at least five years and have an adequate operational budget;
- Two representatives from the media;
- Two representatives from trade unions;
- One lawyer from the Bar Association of the Kingdom of Cambodia.

To avoid conflicts of interest, this Article also bans selection committee members from being elected as members of the NHRI. At the moment, the actual procedures by which the committee is formed and candidates apply for the position are still very vague. However the Draft Law does hint that candidates will be required to submit their applications to the National Assembly, since Article 5 of the Draft Law states: 'Among the candidates submitted to the National Assembly, the Selection Committee shall select candidates to reflect representations of the Cambodian society.'

According to the Draft Law, the NHRI shall have nine members (Article 3), who shall be appointed by the King after being selected by the National Assembly from among 18 candidates submitted by the selection committee (Article 4). The selection criteria for candidates are set out in Article 6 of the Draft Law; NHRI members must:

- Be Khmer nationality from birth;
- Be at least 25 years old;
- Hold at least a bachelor degree or equivalent;
- Have at least 5 years working experience in the field of human rights;
- Have not held any active position in any political party for at least the last two years.

C. Resourcing of the NHRI

In order to guarantee the independence and effectiveness of the NHRI, the current draft proposes to allocate sufficient funds to the NHRI as part of a national budget. The NHRI is also able to seek and receive funding from charitable sources and foreign donors (Article 21). However, it may not receive financial assistance from commercial enterprises or other profit-making businesses operating in Cambodia.

The Draft Law does not include any procedure for administering the finances of the NHRI, and it is therefore impossible to comment on the NHRI's financial management at present. However, regarding the transparency of financial management, the Draft Law requires the NHRI to keep accounting documents for at least 10 years for auditing purposes; and auditing must be carried out by the National Auditing Authority or an independent private company (Article 22).

III. Effectiveness

A. Protection

In term of protection, the Draft Law provides the NHRI with the power to visit prisons without asking permission from the government beforehand (Article 16, pa14). It may also issue search warrants, summon witnesses, including government officials, and order government officials to protect complainants and witnesses (Article 17), as well as receive complaints from individuals and conduct investigations into their claims (article 18).

B. Promotion

The NHRI's duties to promote human rights are clearly and specifically defined by the Draft Law; the NHRI must promote human rights awareness among the general public and civil

servants at all levels (Article 16, pa.1). However, the draft is also limiting. It only tasks the NHRI with submitting comments to the government on the ratification of international human rights instruments, reports to human rights treaty bodies, and damage and compensation resulting from violations by state institutions (Article 16, pa.7-9).

IV. Potential cooperation and engagement between the NHRI and NGOs

Since the start of the initiative to form a Cambodian NHRI back in 2000, the CWG has conducted provincial workshops with villagers in order to introduce the initiative and gather their comments on the draft. CWG has also organised national and international consultations on the Draft Law, such as workshops and conferences attended by members of legislative bodies, government, and NGO representatives.

V. Recommendations

1. The government should remain firm on its commitment to establish an NHRI consistent with Paris Principles;
2. The government should support and expedite the process of reviewing the Draft Law, ensuring transparency by facilitating public participation in its review.

An Eye on Hong Kong: Examining New Developments

Prepared by the Hong Kong Human Rights Monitor (HKHRM)[1]

Highlights of the Year 2008

The government rejected the need for an NHRI in Hong Kong[2]

In June 2008, the Subcommittee on Human Rights Protection Mechanisms of the Legislative Council (LegCo) Panel on Home Affairs recommended that the government follow the Paris Principles in reviewing the competence, composition, mandate and method of operation of existing national human rights institutions (NHRIs). It also emphasized the need to establish a human rights commission which is in compliance with the Paris Principles and which can protect human rights as a whole.

Citing the non-mandatory nature of the Paris Principles and the lack of representative studies on the effectiveness of the existing NHRI, the Hong Kong Special Administrative Region Government (the government) rejected the Subcommittee's recommendations. It claimed that the existing bodies are quite extensive and largely

1 Contact Persons: Chong Yiu Kwong (Chairperson) Law Yuk Kai (Director), Kwok Hiu Chung (Senior Project and Education Officer), Debbie Tsui (Project and Education Officer).

2 LegCo Panel on Home Affairs: The Report of the Subcommittee on Human Rights Protection Mechanisms of the LegCo Panel on Home Affairs, June 2008. Available at: http://www.legco.gov.hk/yr07-08/english/panels/ha/ha_hrpm/reports/ha_hrpmcb2-2218-e.pdf

follow standards set by the Paris Principles in terms of independence and operational and financial autonomy. This demonstrates that the government has no intention of setting up an NHRI in Hong Kong.

The problematic Race Discrimination Bill was passed into Ordinance

In response to the call for racial discrimination legislation by Hong Kong NGOs and United Nations (UN) treaty bodies,[3] among others, the government introduced a Race Discrimination Bill in December 2006. However, the bill is marked with serious flaws. The United Nations Committee on the Elimination of Racial Discrimination (CERD) had written to the Permanent Mission of the People's Republic of China in Geneva, first under its follow-up procedure in August 2007 and then under its early action/urgent action procedure in March 2008, to express concerns on these flaws and to call for information and improvements.

The Race Discrimination Bill was finally passed and signed into the Race Discrimination Ordinance (RDO) in July 2008 with most of its problems largely intact. Namely: (1) It has a weak definition of 'indirect discrimination'; (2) it does not bind the government's powers and functions, even though it is the immigration authorities and police that are responsible for many of the discriminatory practices long complained of by ethnic minorities;[4] (3) it fails to address the language issues in education

3 These bodies include the UN Human Rights Committee (HRC), the UN Committee on Economic Social and Cultural Rights (CESCR) and the UN Committee on the Elimination of Racial Discrimination (CERD), all of which had issued concluding observations calling for the enactment of such a law.

4 Two recent incidents demonstrate the problem of discrimination in Hong Kong society. A Nepalese with Hong Kong Permanent Residence, Mr. Limbu, was shot dead by police on 17 March 2009. The police officer was found to have warned Mr. Limbu in Chinese only. After the incident, false leaked information—allegedly from police sources—suggested that Mr. Limbu had a criminal record, was born in Hong Kong (justifying the claim that he spoke Chinese) and had acted violently. Almost one quarter of the Nepalese community in Hong Kong marched to demand an apology and a fair, independent investigation. See also '2,000 march over fatal police shooting', 30 March 2009, *South China Morning Post*. The second incident relates to racial stereotyping by the columnist Chip Tsao in an article published in April 2009, in which he refers to the Philippines as a 'Nation of Servants'.

and vocational training; (4) it does not cover discrimination on the basis of nationality, citizenship and residence, thereby effectively excluding mainlanders, immigrants and migrant workers in many circumstances; and (5) it offers no protection for foreign domestic workers against discriminatory government policies over immigration control, right of abode and the right to vote.

To partly remedy the problematic provisions, the Bills Committee, Equal Opportunities Commission (EOC) and various NGOs proposed the adoption of an Equality Plan to mainstream racial equality in all government activities. However, the government refused to adopt it, demonstrating its unwillingness to fully comply with its convention obligation to eliminate racial discrimination.

The RDO is being implemented in two phases. The sections relevant to empowering the EOC and other authorities to exercise their functions on rules and code-making came into effect on 3 October 2008, while the full commencement date has yet to be announced.

Under section 63 of the RDO, the EOC may issue codes of practice for the purposes of eliminating discrimination and promoting racial equality and harmony. The EOC published the draft Code of Practice on Employment in November 2008. However, it was criticized for its negative tone over the role of the EOC, which could discourage victims from lodging complaints; for providing lots of illustrations to explain the exemptions; for using a language and writing style which is difficult to understand; and for only publishing Chinese and English versions. After public consultation, the EOC revised the draft code to address these criticisms. The revised draft code was published in the Government Gazette on 8 May 2009 and is being scrutinized by the Legislative Council.

Though the EOC is responsible for issuing codes of practice to educate the public, it has refused to accept civil society demands to start drafting codes on other important areas—especially education—as soon as possible. Currently, ethnic minority students may enroll in mainstream local schools,

designated schools with larger concentrations of ethnic minorities and more government support, and other alternative schools. But without government guidelines on dealing with ethnic minority students and a lack of understanding of the requirements under the RDO, most principals, teachers and government officials cannot determine appropriate policies for ethnic minority students, making it difficult for ethnic minority students to enjoy racial equality in education. By neglecting this area, the EOC has therefore further alienated itself from the NGO community.

The government has promised to issue administrative guidelines for the public sector on some government policies and operations relevant to ethnic minorities' livelihood and welfare, such as social welfare, labour and medical issues. Draft guidelines were scheduled to be discussed in LegCo in early 2009, but this has not yet taken place.

In the Director of Audit's April 2009 report, the EOC was criticized for excessive spending and lax supervision, as is discussed in greater detail below. It is not yet clear whether the government will seize on these criticisms as an opportunity to restrict the EOC's autonomy and independence.

The government has no intention of setting set up an NHRI, as revealed by its reports for the Universal Periodic Review.

The Universal Periodic Review (UPR) of China, Hong Kong and Macao was conducted during February and June 2009. In its report to the UN for the UPR,[5] the government is boasted of its current human rights mechanisms while ignoring all current human rights issues and institutional weaknesses in these existing mechanisms, including those already pointed out by UN treaty bodies. Its commitment to human rights described in the report is at best dubious.[6]

5 Report of the Hong Kong Special Administrative Region for the United Nations Human Rights Council Universal Periodic Review, February 2009. Available at http://www.hkhrm.org.hk/upr/UPR-from_HK_Govt_Part_Eng.pdf

6 For instance, in its report the government states that it attaches great importance to the promotion of human rights through public education and publicity. However, the reality is just the opposite. The government has disbanded the human rights education

The government report again rejects the need for an NHRI in Hong Kong, claiming—without any supporting arguments—that the existing human rights framework is operating well and that a new body would supersede or duplicate existing institutions. The government's reply shows that it has no intention of setting up an NHRI, ignoring repeated recommendations to do so by the UN and Hong Kong civil society.

Remarks

These developments indicate that the government gives a low priority to the promotion and protection of human rights. This does not bode well for the prospect of establishing a human rights commission in the foreseeable future.

Although we do not have a human rights commission in Hong Kong, we will take the Equal Opportunities Commission as an example in the following analysis, since it can be regarded as a kind of NHRI. Moreover, examining the EOC can help us understand the limitations of other human rights institutions in Hong Kong because they suffer from similar problems. Unfortunately, the International Coordinating Committee (ICC) only accredited the EOC with 'C' status, indicating the failure of the EOC to comply with the Paris Principles.

Independence

Relationship with the Executive. Judiciary and Parliament: The EOC is a statutory body set up in 1996 under the Sex Discrimination Ordinance (SDO) in order to implement anti-discrimination legislation. It is house-kept by the Constitutional and Mainland Affairs Bureau (CMAB) and monitored by the Legislative Council and the Audit Commission. In spite of the fact that it is expressly stated in the law that '[t]he Commission shall not be regarded as a servant or agent of the Government or as enjoying any status,

working group under the Committee on the Promotion of Civic Education, and has terminated preparation work on a public perception survey on human rights.

immunity or privilege of the Government',[7] the EOC Chair and members are all appointed by the Chief Executive.

Selection process not transparent:

The composition and selection process of EOC members does not comply with the standards of independence and pluralism stipulated by the Paris Principles. The Commission has long been criticized for lacking transparency and excluding civil society participation.[8] For instance, the EOC Chairperson and members are appointed by the Chief Executive, while the Chief Executive also determines the requirements, remuneration and terms and conditions of the appointment. The whole process is not made public; the only restriction is that every appointment shall be published in the Gazette.[9] Although NGOs have previously nominated independent-minded candidates who are experienced in anti-discrimination work, the government has not adopted any of these suggestions and reasons have never been given. Instead, members lacking experience in anti-discrimination work or with low attendance rates in EOC meetings were appointed or re-appointed.

Resourcing and performance:

The resources of the EOC are publicly funded. The funding of EOC was proposed by the Executive and then appropriated by the Legislative Council. The Secretary for Financial Services and the Treasury may give directions to the Commission in relation to the amount of money which may be spent by the Commission in any financial year, and the Commission must comply with those directions.[10] Subject to these constraints and to examination

7 Section 63(7) of the Sex Discrimination Ordinance. Available at http://www.legislation.gov.hk/eng/home.htm

8 Appointments were often criticized because some of those appointed did not have proven track records on human rights and equal opportunities..NGOs fought for participation in the selection process by nominating candidates for the EOC in 2004 and 2007, but received no response from government.

9 Section 63(3)(9) of the Sex Discrimination Ordinance

10 Para 15, Schedule 6 under the SDO.

by the Director of Audit, the EOC has the power to direct its own resources.

With the overall budget basically under the control of the Executive, there are important constraints on the EOC's strategy, including constraints on its freedom to litigate—which is necessary to build up precedents for new equal opportunities legislation in Hong Kong. While chairperson, Anna Wu had argued for a dedicated litigation fund, to which the government objected. EOC funding for litigation must therefore be derived from savings in the whole budget. As a result, economic pressures have prevented the EOC from using litigation as a means to combat discrimination and promote racial equality. These constraints, however, should not be exaggerated. The EOC has had a surplus over the years and, with the right commitment and planning, the surplus should have allowed the EOC to be more active in litigation and in preparing codes of practice desperately needed by the marginalized groups and Hong Kong society in general.

After the economic crisis in 1997, the government reduced the salary of civil servants and public authorities like the EOC. By contrast, the judiciary has been able to maintain its salary largely due to its financial independence. In 2005, the government claimed that the expenditure of overseas visits by the EOC—including those to brief UN treaty bodies during their consideration of Hong Kong reports—should be approved by the relevant government bureau. The EOC opposed this move to undermine its independence. The financial independence of EOC is also undermined by its treatment as an ordinary body receiving government funding, which means that it must refund a proportion of its surplus. Around March 2006, the EOC returned HK$13,000,000 (approximately US$1.6 million) of its surplus to the government.

The Director of Audit's April 2009 report[11] criticized the EOC for excessive spending and lax supervision. While the EOC spends a lot on litigation with former employees and life insurance for the Chairperson, it imposes strict constraints on the approval of legal assistance to applicants, refuses to issue the Code of Practice

11 Audit Commission Hong Kong. Session: EOC. *The Director of Audit Report no. 52*. March 2009. Available at: http://www.aud.gov.hk/pdf_e/e52ch03.pdf

on Education under the SDO and RDO, and is reluctant to give advice to schools on whether their policies and practices are in compliance with anti-discrimination principles. Aside from government spending constraints, this demonstrates that the EOC misallocates its resources, failing to prioritize anti-discrimination in its deployment of these resources.

Poor transparency and public accountability: The operation of the EOC is seriously lacking in transparency. In 2004, the EOC completed an internal review on its role and organizational and management structure, and another review on its human resources management policies and practices. In 2005, the Secretary for Home Affairs appointed an Independent Panel of Inquiry to investigate incidents that had affected the credibility of the EOC, whose report has been published. Yet despite repeated requests from civil society, the two internal EOC reports have never been made public. Furthermore, its meetings have never been open to the public.[12]

Furthermore, its draft Memorandum of Administrative Arrangements (MAA) with the Constitutional and Mainland Affairs Bureau (CMAB) has not been made public. The Government has no intention to seek the views of the public on such administrative arrangements. All of these show a serious lack of transparency.

Effectiveness

Limited jurisdiction:

The EOC has a narrow mandate. It can only enforce the Sex Discrimination Ordinance (Cap 480) (SDO), the Disability Discrimination Ordinance (Cap 487) (DDO), the Family Status Discrimination Ordinance (Cap 527) (FSDO) and, probably before the end of 2009, the Racial Discrimination Ordinance (Cap 602) (RDO).

12 Audit Commission Hong Kong. *Director of the Audit's Report No.52*. March 2009. Available at: http://www.aud.gov.hk/pdf_e/e52ch03.pdf Pp 5-7.

Inconsistency among the discrimination laws:

As the RDO provides less protection from discrimination than the SDO, DDO and FSDO,[13] this inconsistency causes confusion for the EOC in its enforcement of anti-discrimination laws. For instance, while section 21 of the SDO provides, 'it is unlawful for the Government to discriminate against a woman in the performance of its functions or the exercise of its powers', the government has deliberately and successfully excluded a similar provision in respect of racial discrimination from the RDO.

Complaints-handling:

The EOC receives complaints by email, phone, fax, post, or in person. Its office is located in Tai-koo on Hong Kong Island, which is difficult to access for many ethnic minorities, who normally live in Kowloon or the New Territories.

The EOC does not have adjudicative power in handling complaints, so it may mediate; if mediation fails, the matter may be resolved by going to court.[14]

The EOC has a non-committal approach toward handling complaints, emphasizing to complainants that the EOC is not a court and must remain neutral. This confuses complainants,

13 The particularly problematic provisions of the RDB (1) have even more limited scope for application to the government; (2) give a narrower definition of discrimination; (3) explicitly exclude discrimination based on nationality and immigration status and (4) include language exemptions for education and vocational trainings.

14 The discrimination laws are complicated and involve substantial legal costs. Around 2003, the EOC proposed to set up a tribunal in order to deal with disputes in a quick, cheap and efficient manner. The administration declined to set up an equal opportunities tribunal, but the EOC continues to promote its establishment. According to Article 80 of the Basic Law, '[t]he courts of the HKSAR at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.' Hence, only the judiciary has the power to adjudicate under the framework of separation of powers. The EOC cannot set up its own tribunal and may only persuade the Executive, the Legislature and the judiciary to adopt such a proposal. If they agree to establish a new tribunal, the Executive would draft the law which would then be passed by the Legislature. The tribunal must be under the judiciary. Source: Raymond Tang, during a meeting between the EOC and the NGO alliance Civil Human Rights Front, 12 July 2007.

who may not know whether they can protect their rights with reference to the anti-discriminatory laws, and makes it hard for them to believe that the EOC can help them. The lack of emotional support inherent in this approach also makes the EOC extremely user-unfriendly.

The EOC stresses conciliation throughout the process of complaints-handling, and is unwilling to approve legal assistance for complainants. If the application is rejected, there is no independent board to which complainants may appeal.

In 2008, there were 817 complaints in relation to the SDO, DDO and FDO. Among 1143 cases acted upon through investigation or conciliation (including complaints carried forward from previous years), 301 cases are under investigation or conciliation, while 491 cases have been discontinued. The rate of discontinued investigation is 42.96 per cent. Among the 281 cases which the EOC attempted to conciliate, 193 cases (68.68 per cent) were conciliated successfully while 88 cases (31.3 per cent) were unsuccessful. There were 40 applications for legal assistance, of which 13 (32.5 per cent) were granted while 16 (40 per cent) were not granted. 11 applications (27.65 per cent) are still under consideration.[15] The EOC includes the above information on its website and in its annual report, both of which are open to the public. It also publishes research and investigation reports regarding discrimination issues.

Consultation and cooperation with civil society: There is no formal relationship between the EOC and civil society groups. As mentioned above, the selection process and operation of the EOC excludes the participation of civil society.

15 Statistics on Enquiries and Complaints for the period of 1 January 2008 to 31 December 2008, EOC. Available at:
http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/papers/statisticcontent.aspx?itemid=8165

Other Human Rights Protection Mechanisms In Hong Kong

The Office of the Ombudsman

Limited jurisdiction:

The Ombudsman in Hong Kong is primarily mandated to handle cases of poor or improper administration in the bureaus, departments, and non-departmental public bodies specified in Schedule 1 of the Ombudsman Ordinance (Cap 397).[16] Conventionally, pure government policies per se are outside the Ombudsman's jurisdiction. However, in certain instances, the Ombudsmen make comments and offer suggestions if the policies under investigation are considered to be outdated or inequitable.[17] There is also no law to ensure that Ombudsmen take into account international human rights treaties when considering cases within their mandate. Thus, it is left to the discretion of individual Ombudsmen whether or not to take cognizance of international human rights law.

The protection of the Ombudsmen's independence was called into question after Mr. Andrew So was not re-appointed in 1998. Mr. So, who had actively pursued a human rights perspective and had publicly expressed his wish to remain in office, did not have his term renewed as Ombudsman despite considerable public support. It was widely reported that the Government was unhappy with Mr. So's vigorous investigation into maladministration in the opening of the international airport and his attempts to expand the Ombudsman into a broad-based human rights body.[18]

The Ombudsman recently conducted a review on its jurisdiction since 2005. Its review consists of both two parts: an operational review; and a generalized review of ombudsmen in overseas jurisdictions and their implications on Hong Kong's ombudsman system.

16 Ombudsman Ordinance, Section 7(1)(a).

17 Alice Tai Yuen Ying, 'Letter to Hong Kong Human Rights Monitor' (OMB/CR/31_V, 9 January 2007), at 1.

18 Gren Manuel, 'A New Watchdog in the Jungle,' *South China Morning Post* (27 December 1998).

The first part was submitted to the government in November 2006 with recommendations for the inclusion of eight public authorities[19] and the relaxation of certain restrictions on the Ombudsman's investigative powers. In its response, the government rejected the idea of subjecting some of the public authorities, including the Electoral Affairs Commission and the District Councils, to the Ombudsman's jurisdiction, citing dubious reasons such as their lack of executive powers in these bodies and the safeguarding of the credibility of elections. The government will only work on legislative amendments to bring four of the public bodies[20] under the Ombudsman's jurisdiction.

The second part of the review was submitted to the administration in November 2007. It discusses overseas ombudsman systems and examines the possible developments of the Ombudsman in Hong Kong. Important possible developments raised in the report include the Ombudsman taking the role of a human rights commission to protect and promote human rights, since it deals with complaints across the entire spectrum of public services, often raising human rights issues. However, in the government's April 2009 Report on Review of the Jurisdiction of the Office of The Ombudsman, the government again claims that the existing mechanism has worked well and does not see an obvious need for establishing another human rights institution to duplicate or to supersede existing mechanisms.[21] Other possible developments are access to government information, protection of whistleblowers and specialized Ombudsmen. In particular, the review highlighted setting up a medical ombudsman office. The government has shown little interest in these proposals, apart from agreeing to look into the possible establishment of a 'financial ombudsman' in response to the pressure of those who had lost their money in 'toxic bond' investments.

19 Auxiliary Medical Service, Civil Aid Service, Board of Management of Chinese Permanent Cemeteries, Chinese Temples Committee, Consumer Council, Estate Agents Authority, the Electoral Affairs Commission and the District Councils.

20 Auxiliary Medical Service, Civil Aid Service, Consumer Council and Estate Agents Authority.

21 Chief Secretary for Administration's Office. *Submission to LegCo Panel on Administration of Justice and Legal Services on 'Review of the Jurisdiction of the Office of The Ombudsman'*, April 2009. Available at http://www.legco.gov.hk/yr08-09/english/panels/ajls/papers/aj0427cb2-1384-7-e.pdf

On the issue of an inter-institutional redress mechanism for institutions funded by the University Grants Committee, there were proposals to extend the remit of the Ombudsman to cover complaints by university staff against their university. Citing that the Ombudsman does not cover employment issues and the corresponding expertise and resource implications, the administration rejected these proposals.[22]

It should be noted that there is no public consultation over the government's consideration of the second part of the Ombudsman's review after its submission in November 2007, despite the public being one of the key stakeholders. The government had claimed in June 2006 that it would consult the relevant parties where necessary if the proposals involved policy or legislative changes, and would hold public consultations depending on the contents of the report.[23]

The Office of the Privacy Commissioner for Personal Data (PCPD)

Limited jurisdiction:

The mandate of the PCPD is severely limited by the Personal Data (Privacy) Ordinance (Cap 486).[24] It does not provide for any conciliation measures, legal advice or legal assistance, and does not have powers to bring legal proceedings.

In January 2006, the Commissioner Raymond Tang left the office and joined the EOC as Chairperson. The Commissioner's departure from a human rights body within the term of office affected its stability and independence.

The leakage of complainants' personal information via the internet from the Independent Police Complaints Council (IPCC)

22 Paper to LegCo by the Education Bureau: 'Redress mechanism for the University Grants Committee-funded sector'. June 2009. Available at: http://www.legco.gov.hk/yr08-09/english/panels/ed/papers/ed0706cb2-2073-2-e.pdf

23 http://www.legco.gov.hk/yr08-09/english/panels/ajls/papers/aj0427cb2-1384-9-e.pdf

24 The PDPO has a limited remit and cannot effectively protect the right to privacy enshrined under the Basic Law and ICCPR.

showed that the PCPD has not been effective in improving the data protection function of the government, public bodies, or civil services in cyber space.[25]

Budgetary constraints since 2003: PCPD government funding has been reduced from HK$35,096,287 in 2003, HK$33.3 million in 2004, and HK$31.4 million in 2005 and in 2006. This amounts to a 10 per cent decrease in government funding. Three PCPD requests for a budget increase in the past few years have been rejected.[26] The PCPD was finally provided with HK$39.1 million in 2008-2009, representing an increase of 7.7 per cent over the revised estimates for 2007-2008. However, the Privacy Commissioners pointed out that the increase would only allow the PCPD to recruit an assistant information technology officer, instead of recruiting an IT expert to cope with the increasing invasion of personal data privacy posed by technology advancements.[27] The small budget makes it difficult for the Commission to pursue certain strategies and areas of concern to cope with overwhelming technological advances.

The PCPD submitted its review report, with recommendations on 50 amendments to the Ordinance, to the CMAB in December 2007.[28] However, the public cannot access the report and has not yet been consulted in any way. The government has agreed to report to the LegCo Panel on Home Affairs later in 2009, after studying the issues and discussing ways forward.[29]

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25 The PCPD has suggested that this paragraph (12c) should be amended to read: '[t]he recent incident on leakage of the complainants' personal information via the internet by the IPCC showed that the Privacy Commissioner for Personal Data took prompt and proactive measures to investigate with a view to ensuring strict compliance of privacy law by the Government and public bodies.' Letter, 20 August 2007.

26 Speech by Privacy Commissioner at the special meeting of Legislative Council Panel on Home Affairs on 4 July 2008. Available at: http://www.pcpd.org.hk/english/infocentre/press_20080704a.html.

27 Panel on Constitutional Affairs. *Background Brief prepared by the Legislative Council Secretariat: Financial provision for the Office of the Privacy Commissioner for Personal Data*. 15 December 2008. Available at: http://www.legco.gov.hk/yr08-09/english/panels/ca/papers/ca1215cb2-437-7-e.pdf

28 LegCo Minutes, 21 May 2008.

29 Replies to supplementary written questions raised by Finance Committee in examining the Estimates of Expenditure 2008-2009. Reply Serial No.: S-CMAB08. Question Serial No. S021

Both the Ombudsman and the PCPD first submit their review reports on their jurisdiction to the government, keeping them confidential from the LegCo and the public. This indicates that these watchdogs see themselves as answerable to the government, not the public. This is totally inconsistent with their status as independent watchdogs. They leave the government in a position to decide what information should be accessible to the public. This is particularly problematic as the government is likely to be one of the main targets of their monitoring. By maintaining this practice and this attitude, the watchdogs weaken their independence and public accountability.

The Police Complaints Mechanism

The Complaints Against Police Office (CAPO) is a branch of the police and is not independent of the Police Force.[30] Practically all complaints against the police are referred to it for investigation.

The Independent Police Complaints Council (IPCC) has only advisory and oversight functions to monitor and review the complaints handled and investigated by CAPO.[31] It became a statutory body on 1 June 2009. The restrictions on its power and effectiveness are rigidly entrenched in the Independent Police Complaints Council Ordinance.

The former Chairperson of IPCC, Ronny Wong Fook-hum, QC, SC, in his testimony before the Bills Committee of the Legislative Council, described the system as having 'all the odds stacked against the complainant'. He warned that the legislation providing a statutory basis to the IPCC would actually make IPCC 'an instrument being used to protect the police'.[32]

30 In the concluding observations of the Human Rights Committee on the First HK report in 1999, '[t]he Committee takes the view that the Independent Police Complaints Council has not the power to ensure proper and effective investigation of complaints against the police. The Committee remains concerned that investigations of police misconduct are still in the hands of the police themselves, which undermines the credibility of these investigations. The HKSAR should reconsider its approach on this issue and should provide for independent investigation of complaints against the police.' See Paragraph 11.

31 Para 12. Concluding Observations of the Committee against Torture on the HKSAR on November 2008

32 The recorded proceedings can be found at http://drs.legco.gov.hk/public/search/

The Commissioner for Covert Surveillance

The office of the Commissioner on Interception of Communications and Surveillance ('Commissioner') was established under the Interception of Communications and Surveillance Ordinance, which came into force on 9 August 2006. Mr. Justice Woo was appointed by the Chief Executive as the first Commissioner for a period of three years.

The Commissioner has insufficient power to punish unlawful covert surveillance. He can only 'submit reports to the Chief Executive and make recommendations to the Secretary for Security and heads of departments in case of non-compliance.'[33]

Justice Woo has already released two annual reports for 2006 and 2007. In his first report, Justice Woo expressed concerns about the differences in the interpretation of provisions in the legislation and incidents of wrongful interception and protection of the privacy of the public. He recommended reviewing and amending the relevant Ordinance which allows for different interpretations. In his second report,[34] Justice Woo raised serious concerns about possible loopholes in dealing with confidential privileged conversations between lawyers and clients and the failure of the Independent Commission Against Corruption (ICAC) to destroy reports on operations inquired into by Justice Woo. The Government has stated that the Ordinance would be reviewed after the next report.

Recommendations

We urge the Government to enhance the transparency and the operation of the EOC by filling the membership of the EOC with high-quality independent persons who will be able to steer the EOC to be in compliance with the Paris Principles.

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search.html with date 24 April 2008 0:58:00 to 01:02:00. It has also been reported by the South China Morning Post "Bill will clip police watchdog's wings: chief,' on 25 April 2008

33 Id, Section 40(b)(iv).

34 Justice Woo Kuo-hing. *Annual Report 2007 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance*. June 2008. Available at: http://www.legco.gov.hk/yr08-09/english/panels/se/papers/se0216-rpt0806-e.pdf

India: Losing its long established standards?

Prepared by People's Watch-India[1]

I. Introduction

The study of the performance of the NHRC in India gains great importance due to the fact that it is one of the most 'prestigious' of the NHRIs in the world's largest democracy – India. The Indian democracy boasts the existence of the following national-level NHRIs:

i. the National Human Rights Commission (NHRC) of India created under the Protection of Human Rights Act 1993;

ii. the National Commission for Women (NCW) created under the National Commission for Women Act 1990;

iii. the National Commission for Minorities (NCM) created under the National Commission for Minorities Act 1992;

iv. the National Commission for Scheduled Castes (NCSC) established under Art 341 and 342 of the

1 Contact person: Mr. Henri Tiphagne, Executive Director, People's Watch-India and Member of the National Core Group of NGOs of the NHRC in India. This report was done with the assistance of Ms. Esther Miller, Mr. Rod Sanjabi (interns and volunteers of People's Watch) and Mr. Subash Mohapatra of FFDA.

Indian Constitution and formally bifurcated from the National Commission for Scheduled Castes and Scheduled Tribes in the year 2004;

v. the National Commission for Scheduled Tribes established under Art 341 and 342 of the Indian Constitution and formally bifurcated from the National Commission for Scheduled Castes and Scheduled Tribes in the year 2004;

vi. the National Commission for Protection of Child Rights (NCPCR) created under the Commission for Protection of Child Rights Act 2005;

vii. the National Commission for Safai Karamcharis (NCSK) created under the national Commission for Safai Karamcharis 1993;

viii. the Central Information Commission (CIC) created under the Right to Information Act of 2005; and

ix. the Chief Commissioner for Persons with Disabilities (CCPWD) created under the Persons with Disabilities Act 1995.

At the state level, there are 18 State Human Rights Commissions, 34 State Womens Commissions, 15 State Minorities Commissions, 24 State Information Commissions, 12 state headquarter offices of the National Commission for Scheduled Castes, 35 State commissioners for Persons With Disabilities, 6 state headquarter offices of the National Commission for Scheduled Tribes and one state commission for protection of Child Rights. Thus, there are almost 145 statutory human rights institutions at the state level in India.

Since all these institutions at both the national and state levels contribute to the promotion and protection of human rights in India, national, regional and global human rights community should start addressing and monitoring these institutions' performance, capacity-building, and representations at the UN and other international fora, instead of focusing solely on the

NHRC. It is also time for the NHRC and the Office of the High Commissioner for Human Rights in Geneva to ensure that its cooperation and collaboration with all these statutory institutions is institutionalized in the years to come. All Treaty Monitoring bodies and Special Procedure Holders who deal with India should also address these institutions for assistance in their work.

II. Independence of the NHRC :

The Paris Principles lay out two primary qualities to be satisfied in the composition of human rights institutions -- independence and pluralism. The NHRC of India fails on both counts. The Protection of Human Rights Act of 1993 stipulates that of the five members of the Commission, three (including the Chairperson) must be current or former members of the judiciary; meanwhile, the only requirement for the other two seats on the Commission is that they be filled by "persons having knowledge of, or practical experience in, matters relating to human rights"1. (PHRA, §3(d)). These two seats are currently filled by Shri Satyabrata Pal and Shri P.C. Sharma, retired members of the Indian Foreign Service (IFS) and the Indian Police Service (IPS) respectively. For the whole duration of the NHRC's existence, these positions have been filled by members who, like Pal and Sharma, have records of government or government related employment.

Former employees of the 'National Government' are unlikely to be 'independent' from government interests. In the case of Mr. P C Sharma, a former Director of the CBI and lifelong employee of the IPS, independence cannot be expected, regardless of the individual's best intentions; since the respondents in most cases brought before the NHRC are also members of the IPS or their own subordinates. Apparent biasness is thus unavoidable.

The NHRC's record does little to dispel this notion.[2] Though the Paris Principles are clear that NHRIs must function independently of government, the composition of India's NHRC does not even pay lip service to this requirement. When Mr. P.C.Sharma was first appointed to the NHRC in 2004, his appointment was challenged

in the Supreme Court. The Supreme Court, however, upheld his appointment in 2005. Nonetheless, the record shows that there was widespread dissatisfaction with the placement of an IPS employee on the NHRC—even the sitting chair of the Commission was opposed to Sharma's appointment. Sharma's appointment had also paved the way for many other SHRC in appointing retired IPS officers as Members of the SHRCs in the country – something that some of the former Special Rapporteurs who happened to be IPS officers resented when their names were proposed for such positions.

Since the Indian judiciary is overwhelmingly male, the three seats on the NHRC allocated to judges are likely to be filled by males in the foreseeable future (as is currently the case). The two other members are also male. The Paris Principles state that a "pluralist representation of the social forces (of civilian society)" is a necessity for an institution such as the NHRC, and lays out guidelines through which such a pluralist representation can be achieved. The absence of any female members in the NHRC, in addition to the monopoly on membership held by retired government officials, highlight that the NHRC does not take this call for pluralist representation seriously.

In 23 March 2009, Ms. Navaneethan Pillai, the UN High Commissioner for Human Rights, remarked on the absence of women from the NHRC.[3] Two days later, Mr. P.C. Sharma was reappointed for a second term after his first appointment itself had been challenged in the Supreme Court. Despite Ms. Pillai's criticism—among that of many others—and despite the considerable controversy surrounding Sharma's initial appointment in 2004, the NHRC's appointment committee did[4] not recommend a female replacement for Mr. P.C. Sharma. The practical effect of this action is that there will not be a single female member on the NHRC for at least the next five years. In this instance the NHRC missed an excellent opportunity to strengthen its authority by following the recommendations outlined in the Paris Principles--similarly, the NHRC had missed a chance to include a member from the SCs, STs, and OBCs of India.

Does the NHRC truly believe that the "pluralist representation of social forces (of civilian society)" is satisfied by having one member from the IPS and the other from the IFS? The NHRC's neglect of the pluralism requirement of the Paris Principles is a breach of not only the Principles themselves, but of existing statute in India. The Protection of Human Rights Act requires that the NHRC "study treaties and other international instrument on human rights and make recommendations for their effective implementation".[5] There is no doubt that the Paris Principles envision more pluralism than is currently present on the NHRC. But there is no record of the NHRC making any recommendation with regard to the issue of its membership. This characteristic failure of the NHRC is a breach of its statutory obligations under the PHRA. Indeed, the Paris Principles call for the incorporation of agents of civil society in the NHRC. No such appointments have been made since the NHRC's inception in 1993 while the Indian human rights movement has long existed in this country due to the sacrifices of many human rights defenders from civil society, many of whom are also women of caliber.

Clearly, the NHRC must be a more transparent body in order to speak with authority on the state of human rights in India in general and in specific cases. The appointment process is completely opaque; the public has no way of knowing how or why Mr. P.C. Sharma was appointed and re-appointed, and whom his competitors were for the role. If the NHRC wishes to be taken seriously, this appointment process must be brought into daylight.

NHRC without a Chairperson for the next two years ?

The NHRC is presently without a Chairperson and functions only with an Acting Chairperson. The NHRC was rendered headless after its chairman, Justice S. Rajendra Babu retired on May 31. Three days later, a former Supreme Court judge, Justice G.P. Mathur, was appointed as its acting chief. The reason for this stop-gap arrangement is that the Protection of Human Rights Act 1993 specifies that the NHRC chairperson "shall be a person who has been a Chief Justice of the Supreme Court." Further, the

retired chief justice of India (CJI) should not be more than 70 years of age. The Act specifies that "a person appointed as a member shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of 70 years, whichever is earlier". Of all the former chief justices of India who are alive, only two are below the age of 70. In the given circumstances, the earliest the government can hope to get a regular NHRC chief would be in May next year, when the incumbent CJI K.G. Balakrishnan retires from the Supreme Court. It would also depend on whether Justice Balakrishnan would be interested in accepting the post, should such an offer is made to him.[6]

NHRC's Destruction of Records

The NHRC destroys all records after six months of adjudication in case there is no positive recommendation made in the case(s).[7] No other official body in India follows this custom. This policy reveals a profound lack of transparency with regard to the Commission's work, paralleling the lack of transparency in the appointment process. If all documentation coming out of the NHRC is destroyed, then it is clear that its actions are non-reviewable, even by the Supreme Court of India, beyond a six-month period. Such a profound lack of accountability, both in the appointment process and with regard to its decisions, has grave implications for the distribution of power in India: it effectively places the Commission above the national judiciary.

The case of Arjun Paswan, a man tortured and robbed by Railway Police in Bihar, is an example that confirms this fact.[8] Mr. Paswan's case was dismissed by the NHRC, only to be remanded by the Delhi High Court for further proceedings before the NHRC. The Commission never followed this order. Surely, this lack of accountability was never the intent of the PHRA, but the existing reality necessitates greater transparency in the appointment and record-keeping processes. Anything less will in fact be a continued breach of both the Paris Principles and the PHRA itself.

NHRC's National Core Group

The National Human Rights Commission of India had reconstituted its National Core Group of NGOs on 10th October 2006. The members included Dr. Anand Grover, the present UN Special Rapporteur on Health, Ms. Maja Daruwala, the Director of the Commonwealth Human Rights Initiatives and Dr. Babu Mathew, Director of Action Aid India. This Core Group has so far met only on five occasions – 6 December 2006, 28 & 29 April 2007, 12 September 2007, and 18 July 2008. The last two meetings of the National Core Group of NGOs of NHRC were held just prior to the 12 and 13th APF. During the last meeting, a plea was made specifically requesting for at least two meetings a year. Unfortunately, the National Core Group of NGOs has not met since July 2008. The NHRC's unwillingness to convene the National Core Group of NGOs and the Commission's non-engagement with NGOs speaks extremely poorly about the putting into practice of the Paris Principle of 'cooperation' and the NHRC.

In India, the civil society that has spearheaded efforts for the protection and promotion of Human Rights and for the establishment of statutory Human Rights Institutions. There is a vibrant Dalit civil society, an even more vibrant national women civil society, a vibrant civil society working with fishermen, with the physically challenged, with persons suffering from HIV/AIDS, with persons engaged in the promotion of communal harmony, with the civil society organizations engaged in making the right to education - the right to health a reality – the right to security etc a reality for the larger sections of the poor n our country. Human Rights and its promotion are activities that many National / State level and local civil society organizations are engaged in. Human Rights Defenders have paid the cost for the sacrifices they have made in this large country. However, it is a pity that since its inception till today, not a single member of this vibrant human rights community has been invited to serve as a member of the NHRC.

The Regional Conference on Human Rights" of the South Asian Association for Regional Cooperation (SAARC) countries in New Delhi and ots respect for the Paris Principles

Another case in point is an invitation by the NHRC to the National Core Group of NGOs to attend the "Regional Conference on Human Rights" of the South Asian Association for Regional Cooperation (SAARC) countries in New Delhi from 24-27 January 2009.[9] The invitees were to include the Chairperson/ Chief Commissioner from the NHRIs of Afghanistan, Bangladesh, Nepal, Sri Lanka and Maldives and representatives from relevant bodies/individuals from Bhutan and Pakistan. Later, in response to a mail[10] from one of the members of the National Core Group of NGOs requesting for a space for NGOs in the conference, the NHRC said that it had decided to extend the invitation to NGOs only for the inaugural of this program. Thereafter, the program was postponed and was reconvened from 16 April to 18 April 2009 in Delhi – but this time with no invitation extended to the National Core Group of NGOs of the NHRC.

The first Conference of National Human Rights Institutions of South Asian Countries on "Human Rights Awareness and National Capacity Building", organized by the National Human Rights Commission of India, was attended by the Afghanistan Independent Human Rights Commission, the National Human Rights Commission of Bangladesh, the Human Rights Commission of the Maldives, the National Human Rights Commission, Nepal, the Sri Lanka Human Rights Commission and the National Human Rights Commission of India. The participating NHRIs agreed to:

- work towards national capacity building through sharing of experience, information and best practices on human rights;

- take steps to promote human rights awareness, and towards this end, hold conferences at least once in two years, apart from exchanges of visits, training programs and bilateral or regional cooperation between the NHRIs;

- work together to identify and cooperate on capacity building for dealing with human rights issues like human rights awareness, human trafficking and migrant labour;
- work collectively at UN fora, including the Human Rights Council, for an independent status for NHRIs, distinct from NGOs;
- appeal to the respective Governments to support and provide necessary wherewithal to NHRIs to ensure that they become fully compliant with Paris Principles, which includes administrative and financial autonomy.

All these resolutions were made without a single NGO being present there from South Asia.

Special Rapporteurs of the NHRC : a 'reserved berth' for former IAS / IPS / former Senior functionaries of the NHRC ?

NHRC has established the practice of appointing Special Rapporteurs since 1997 – 1998. The annual report 1997-98 states "These Special Rapporteurs, chosen from persons of the highest repute, of impeachable integrity and with a pronounced commitment to human rights, have been of immense help to the Commission. They constituted a group, outside formal administrative structures of the Commission, to act as the eyes and ears of the Commission, to follow up the endeavours of the Commission at the highest levels with its full authority, and to undertake such special studies and other assignments as may be requested from them from time to time[11]." In a meeting of the Special Rapporteurs and Special Representatives of the NHRC in the year 2000, the role and the functions of the Special Rapporteurs (SRs) were further clarified to include 'that they were to act as informal mechanisms, outside the regular set up of the Commission, and function as a credible machinery to apprise the Commission of ground realities, and to facilitate the efforts of the Commission to carry out the functions assigned to it [12]'.

In the year 1999 – 2000, there were 4 SRs , in 2001 – 2002, there were 3 SRs and 4 Special Representatives; in 2002 – 2003 there were 6 SRs ; in 2003 – 2004 the SRs continued to be almost the same as earlier; in the year 2004 – 2005, there were 5 SRs. Many of the existing SRs resigned in the year 2006. However, it is surprising to note that although it is more than almost two years that Mr. P.G.J. Namboothiri, Mr. K.R. Venugopal and Mr. A.B. Tripathy have resigned as the Special Rapporteurs, their names still continue to figure in the website of the NHRC as late as July 2009. In addition, what is surprising is that during the year under consideration 2008 – 2009, there has been a spate of Special Rapporteurs who have been appointed. At least 9 different Special Rapporteurs were appointed in 2008.[13]

A matter of concern once again is the appointment of only retired Indian Administrative Service (IAS) and the Indian Police Service (IPS) Officers as SRs of the NHRC in a country where vibrant human rights civil society has existed many years prior to the constitution of the NHRC itself. This is a clear indication that civil society representatives are seen to be 'untouchables' to the NHRC and that there is an urgent need, after almost 16 years of its existence, to start a vibrant national movement for the inclusion of the human rights civil society in its functioning – a factor duly acknowledged in public by several past functionaries and architects of the NHRC in India, including many of the past Chairpersons.

When persons of repute from the Indian civil society like Mr. Miloon Kothari, Dr. Anand Grover have been appointed as SRs of the United Nations, a question arises as to whether it is incompetence of the members of civil society organisations or the lack of trust on the part of the NHRC on civil society representatives in appointing them as SRs. The NHRC's own belief in the principles of 'independence' and 'cooperation' , both enshrined in the Paris Principles will be better expressed only when NHRC starts placing the much desired trust in civil society more.

The Right to Information Act of 2005 speaks about the duty for "Public Authorities' to provide 'voluntary disclosure' of information under Sec 4 (b) of the Act. Nowhere in the website of the NHRC has there been provided any information whatsoever

neither on this sudden need for SRs in the NHRC nor on the special tasks that they are to engage themselves in. This in no way is to underwrite the need for SRs in the country.

The NHRC needs Honorary SRs for all the districts of this country, to act as the 'eyes and ears' of the NHRC. But they have to be young, spirited, and persons who strongly believe in human rights and are willing to act swiftly. We cannot only look for retired IAS and IPS authorities to be appointed as SRs, although it also cannot be denied that there are persons from these agencies who turned out to be effective SRs.

'Deemed Members' of the NHRC

The Protection of Human Rights Act, 1993 and as amended in 2006, provides for the NHRC to include the Chairpersons of the National Commission for Minorities (NCM), the National Commission for Scheduled Castes (NCSC) , the National Commission for Scheduled Tribes (NCST) and the National Commission for Women (NCW) to be 'deemed members' of the Commission for the discharge of functions specified in clauses (b) to (j) of Section 12.[14] These are very important functions of the NHRC and it has been envisaged as a provision to provide for 'cooperation' between existing statutory Human Rights Institutions in the country – one of the important principles contained in the Paris Principles.

In the earlier years of the functioning of the NHRC, the said meetings of the 'full Commission' – meaning the NHRC along with the then Chairpersons of the NCM, the NCSC/ST and the NCW were held regularly for quite some years. However, this practice was stopped when the NCSC and the NCST became bifurcated as two independent National Commissions. Even then, the Chairperson of the other two Commissions, namely the NCM and the NCW were never invited for meetings of the Full Commission of the NHRC. Even after the amendment of the Protection of Human Rights Act, 1993 in 2006, it is sad to note that the NHRC has never so far convened a meeting which included the 'deemed members', such as the Chairpersons of the NCM, NCSC, NCST and the NCW.

Such reluctance on the part of the NHRC of India to conduct periodic meetings of this sort once again puts forward the question whether the NHRC of India indeed is committed to put into practice the 'principle of cooperation' under the Paris Principles. It should be emphasized that the specialized institutions in India have developed expertise in their fields, which would undoubtedly enrich the work of the NHRC of India. A collaboration of the specialized institutions and the NHRC of India would serve Indian civil society well, as envisaged in provisions 12 (b) to 12 (j) of the PHRA 1993.

The country today sees a host of NHRIs with 'complaint handling powers' covering a wide variety of thematic issues pertaining to the human rights of Women, of Minorities, of the Scheduled Castes, of the Scheduled Tribes, of Children, of Persons With Disabilities, on the Right to Information and of Safai Karmacharis. Many of these thematic NHRIs are also represented as independent statutory institutions in the States, totaling to over 130 such statutory institutions in the Country.

But it is unfortunate that the NHRC constituted under the PHRA 1993, and which today has over 18 State Human Rights Institutions functioning under the same Act and whose Chairpersons, General Secretaries and Members are invited for periodic meetings convened by the NHRC, have never had the opportunity of attending a single meeting of the Asia Pacific Forum (APF) in the last 13 years, nor have they been exposed to any of the capacity building programs offered by the APF or by the Office of the UN High Commissioner for Human Rights.

It is urged that the State Human Rights Commissions and the other specialized institutions in India should also be given the benefit of these training programmes by the abovementioned bodies. India is said to be the world's largest democracy and the building of the capacity of the State Human Rights Commissions and the specialized institutions would benefit the entire country.

Need for Independent Staff within the NHRC

Every annual report of the NHRC in India from the year 1993 to 1994 has a Chapter titled "Administration and logistical support". In order to guarantee independence of the NHRI, the ICC Sub – Committee on Accreditation notes that senior level posts in any NHRI should not be granted by secondment and that the number of seconded staff should not exceed 25%, and never be more than 50% of the total workforce of the NHRI.[15] There is therefore, the urgent need for the NHRC to start recruiting staff of its own and if need be, also recruit functionaries from NGOs who have experience and have been working in the field of human rights.

III. Effectiveness :

The Need for Urgent Reforms in the Complaints – Handling Systems of the NHRC

The NHRC has been slapped with a fine of Rs 100,000 (approximately US$2,000) by the Delhi High Court for 'blatant violation of the human rights of a constable who was employed with it for 10 years before being 'thrown out'". In a recent order, Justice Kailash Gambhir rebuked the NHRC for not hearing the plea of constable Rajender Prasad who wanted his 10-year job regularised and said: "There has been blatant violation of the human rights of the petitioner. "Since the Commission failed to protect the human rights of the petitioner who will be thrown on the road to struggle again to search for a job, the same being in serious violation of his human rights, cost of Rs 100,000 is imposed for their inhuman act," the court said.[16]

This case illustrates the extent of neglect the NHRC of India is showing with respect to its duty to adjudicate human rights claims. Most recently, this neglect--and the underlying lack of sympathy it shows for victims of human rights violations--has taken a number of particularly insidious forms. The NHRC has revealed, at best, a casual contempt for its own vital role in policing human rights violations by the Indian Police Service and others.

In one case, for instance, regarding a gang-rape and assault of civilians by an insurgent group in Tripura, the NHRC did not deny that the crimes had taken place, but rather claimed that Rs. 15000 (approximately US$300) in government compensation for an individual's death and a total of Rs. 6000 (approximately US$125) compensation for rape victims was sufficient to show "that the Government was alive to the suffering of the victims and it had taken appropriate steps to apply balm to their wounds."[17] This means that, according to the NHRC, Rs. 15000 is acceptable compensation for wrongful death. Human rights groups question this kind of attitude of whether this indeed displays some sympathy for the victims of human rights violations.

Oftentimes, in cases of custodial death and custodial rape, the police are registered as complainants because they are obliged by law to report the cases within 24 hours. Though there are no guidelines prohibiting the registration of multiple complainants in cases before the NHRC, and indeed there are numerous examples of multiple-complainant cases, in practice, in cases in which the police are registered as complainants, families of the specific victims are precluded from bringing their claims since another party has brought them. There is no legal basis for this peculiar practice, and it does have grave implications. While it denies victims and their families a chance for a fair hearing of their claims, it also allows the police, as registered complainants, to control the prosecution of claims against their very own members. This regularly leads to an illegitimate dismissal of cases, even though custodial death is clearly a serious offense for which evidence is often easy to provide: beyond the very fact of the victims' deaths, post-mortem reports such as that of Tadipatri Eswaraiah often reveal the kind of evidence necessary for a conviction, if only the claim were pursued by a diligent aggrieved party.[18] Eswaraiah's death was eventually determined to have been brought about by misconduct, but only after extensive proceedings and an initial falsification of evidence. This episode highlights the problematic nature of the NHRC's practice of registering the police as complainants for their own alleged offenses.

One particularly egregious case that exemplifies the NHRC's lack of seriousness came about when the victim of a brutal beating and robbery by Railway Police brought his case before the NHRC.[19] The regional Superintendent of Railway Security had acknowledged that the crimes had taken place, and had indeed indicted five employees of the Railway Police in connection with the case. Rather than giving the victim his day before an impartial adjudicative body, the NHRC dismissed his claim on the grounds that the complainant's comments had been filed too late; this, however, was patently false. The complainant's comments had been filed eight days before the deadline. Not only does this dismissal on procedural grounds show a lack of sympathy for the victim, but since the grounds themselves were false, an observer can only assume that the NHRC had some malicious reason for denying the victim his rights.

In the case of the death of one Ms. Karupee (see case chart below from People's Watch-India) in police custody in the year 2002, there was a complaint sent by an NGO -People's Watch- to the NHRC to which the NHRC did not respond . However, People's Watch has come to know that the NHRC has taken on file in NHRC Case NO 937 / 22 / 2002-2003-CD a 'complaint' based on the intimation of a custodial death from the District Superintendent of Police of Ramnad District, Tamil Nadu with the date of the incident as 12 January 2002. According to the database maintained in the NHRC's web site it is stated that additional information was requested on 2 April 2009. However, it is the fact that in this case, there was no request for information made and no progress was seen even by the NGO that filed the case.

On 06 September 2008, the court directed the Additional Director Generals of Police (CB-CID) to nominate a team and to file the final report within a period of six months. Further, it was directed that the State Government has to pay Rs. 3 lakhs - including Rs. 1 lakhs already awarded by the order of the State Government dated 01 March 2006 to the family of the victim (ROC. C2/13493/2006) by the proceedings of the District Collector, Ramanathapuram.

Case Details of File Number: 937/22/2002-2003-CD

Diary No.	10968
Name of the Complainant	THE SUPDT. OF POLICE, RAMNAD
Address	TAMIL NADU , TAMIL NADU
Name of the Victim	MRS. KARUPPI W/O SONALI KATTUPARAMAKUDDI
Address	PARAMAKUDI TOWN, TAMILNADU , TAMIL NADU
Date of Incident	12/1/2002
Direction issued by the Commission	A fifty year old woman named Karuppi was suspected of involvement in a case of theft registered at P.S. Paramakudi, District Ramnad, Tamil Nadu. She was repeatedly called to the Police Station between 26 November 2002 and 30 November 2002 for interrogation. On 1 December 2002, in the early hours, she was found hanging from the wireless tower within the premises of the Police Station. The post-mortem revealed contusions on the right hand and shoulder. The authorities who inquired into the circumstances of death concluded that the contusions may have been caused due to police excess. He also observed that no woman police official had been joined in interrogation of the deceased. He recommended criminal prosecution of Inspector Hameed and SI N. Kathiresan. Secretary, Public (Law & Order) Department informed the Commission through a letter dated 12 January 2006 that criminal action had been ordered against the delinquent police officers and an amount of Rs. one lakh had been sanctioned for payment to the next of kin of the deceased. In the proceedings dated 21 December 2006, the State Government was directed to inform the Commission about the status of criminal prosecution of the errant police officers and also to submit the proof of payment to the family of the deceased. The required information and proof of payment have not been received so far. The NHRC issued a reminder to Chief Secretary, Government of Tamil Nadu directing him, to inquire whether criminal prosecution has been launched against Inspector Hameed and SI Kathiresan and, if so, what is the status of the criminal case. The NHRC also requested for him to submit the proof of payment of Rs. one lakh to the next of kin of deceased Karuppi.
Action Taken	Additional Information Called for (Dated 4/22/2009)
Status on 7/9/2009	Commission is considering the reports received from concerned authority.

The case above illustrates the slow and long-winded processes being taken by the NHRC in responding to cases of human rights violations. It also shows the level of sympathy being shown by the NHRC to victims and their families.

NHRC's Fact-Finding Report on Salwa Judum

The official Fact-Finding Report from the NHRC on the issue of the Salwa Judum and Naxalite violence has been the focus of much warranted criticism. Since 2005, the violent civil war in Dantewada district of Chhattisgarh, between the Naxalites, a Maoist 'Peoples War Group', and Salwa Judum, a vigilante force sponsored by state and local officials, has been all over the media [20]. The Salwa Judum, a militia movement armed by the Chhattisgarh Government, has contributed to massive human rights violations in the Southern districts of Chhattisgarh, created an atmosphere of violence and distrust, and led to the displacement of thousands of tribal people. The plight of these tribal people, who are caught in the middle a war zone, has mostly been ignored. In April 2008, it seemed that the government was finally going to do something about the situation when the NHRC had been mandated by the Supreme Court to form a Fact Finding Team to conduct an "inquiry into the allegations of large scale human rights violations by Salwa Judum activists, Naxalites, and security forces in the State of Chhattisgarh[21]." The only golden moment for the people of Chhattisgarh was the Supreme Court decision itself, which ordered the sending of a team to investigate the situation. However, the choice of an incompetent NHRC team led to the failure of the mission.

The NHRC was directed by the Supreme Court in April 2008, to appoint an appropriate fact finding team with such members as it deemed fit to inquire into the "allegations of large-scale human rights violations" by the Salwa Judum, Naxalites, state police, SPOs, and security forces in the State of Chhattisgarh.[22] For some unknown reason, the Commission directed its own Internal Police Unit to create a Fact-Finding Team. The Director General of the NHRC created a team of 16 police officers, three of which were IPS officers, headed by Deputy Inspector General of Police Sudhir Chowdhary.[23] This raised some concerns from

human rights groups because it is common knowledge in the country that some police officers, whether retired or in service, have generally supported the creation of the Salwa Judum.[24] The Fact Finding team also lacked any representative of the local tribal communities, or any independent experts on health, education, sexual violence, or even any of the NGOs associated with the NHRC.[25] The Commission ignored a direct request from the NHRC National Core Group of NGOs to include a civil society representative in the investigation process.[26] The NHRC's decision to appoint a team composed entirely of police officers shows the NHRC's total lack of understanding of the task it was mandated to do, as well as its need to have more sensitivity to the issues of victims of human rights violations.

The NHRC investigation was impaired further, by their reliance on the involvement of Special Police Officers (SPOs) and Salwa Judum leaders whose very activities were the ones under scrutiny. It was reported that in a number of instances, the villagers hid and fled upon seeing the convoy of the NHRC approaching. The convoy included vehicles from the special forces, the very same groups whose alleged human rights violations against the villagers were being investigated and examined. It should also be noted that there were leaders from the Salwa Judum who were with the security forces that accompanied the NHRC fact-finding team.[27]

According to the NHRC, the police and security forces and Salwa Judum members were there 'to provide security.'[28] In reality, however, their presence made it impossible for an independent and impartial inquiry.[29] For example, testimonies given by people who have been displaced from their villages about burning of villages and killings of the people were not included in the fact-finding report because the NHRC team was unable to gather any witness testimonies to corroborate their stories.[30] In one case, in the village of Chintalnar, the villagers were actually threatened for talking to the NHRC.[31]

One of the most serious flaws in the NHRC's investigation methods was its refusal to accept the testimonies given by refugees, treating them as the accused, and in some cases discrediting petitioners, stating that their allegations were based on hearsay.[32]

On the other hand, "the statements made by the Salwa Judum camp residents and SPOs have been accepted, especially when they allege that a person was killed not by Salwa Judum, but by Naxalites."[33] In the report the NHRC found that 'reportedly, many of those who did not join Salwa Judum were branded as supporters of Naxalites."[34] The perception that those not in a Salwa Judum camp must be Naxalites, has affected the report from the start.

In a letter sent to Justice Rajendra Babu by Nandini Sundar, it was stated: "We fear for the safety of the others, and do not wish the NHRC investigation to turn into a source of further harassment of villagers who have already lost everything, including their loved ones." [35]

The NHRC once again showed an inability to see the reality of the situation when they came to the conclusion that none of the villagers had been discriminated against for not joining Salwa Judum camps. It seems that the NHRC cannot see a basic case of cause and effect. In the NHRC's report it notes that "rations are only available in the camps."[36] However, it somehow doesn't see how villagers' not having access to rations is a form of discrimination. The NHRC team chose to visit two of the least affected villages to prove that discrimination was not happening, instead of focusing on those that were affected by the Salwa Judum.[37] If the NHRC was truly there to get to the bottom of the claim of human rights abuses, one would think they would go to the places most affected by the violence to compile the majority of their evidence.

The NHRC Fact- Finding team, being made up entirely of police officers, went against its own guidelines on encounter killings, in favor of the biased version submitted by the police. The NHRCs guidelines clearly states, 'all cases where the police officer involved in the encounter killing is from the same Police Station as the encounter being investigated/registered, such cases should be handed over to an independent investigating agency like the state CB-CID."[38] The NHRC team found that there were suspicious circumstances under which the encounters were reported, but even that doubt did not affect the outcome of their findings.

Another very worrying conclusion in Official Report of the

NHRC is the team's justification of the states recruiting procedure and the vigilantism of SPOs.[39] In paragraph 7.04 of its report, it says that "[t]he allegation of the petitioners that Naxalite violence has increased after Salwa Judum and further aggravated the problem which shows that this experiment has failed is a very narrow view of this complicated problem. Surely the petitioners would not support the subjugation and killings of tribals by Naxalites for years before Salwa Judum. The tribals cannot be denied the right to defend themselves against the atrocities perpetrated by the Naxalites, especially when the law-enforcers are themselves ineffective or not present."[40] The only conclusion that can be drawn from this statement is that the NHRC is in support of the continued violence. It gives justification to revenge killings by a private vigilante force, citizens killing other citizens. "Selective killings by Naxalites of Salwa Judum [meaning "peace mission"] leaders and activists and attacks by Naxalites on Salwa Judum leaders were responsible, to a large extent, for changing the complexion of the movement from a non-violent one to an armed resistance"[41] The NHRC team put all the blame for the violence on the naxalites. "The Campaign for Peace and Justice in Chhattisgarh (CPJC) has observed that the NHRC team's findings do not reflect the ground realities and the need to enforce the rule of law and human rights."[42] This is no excuse, if the state government cannot do anything to protect its own citizens then it needs to be replaced. The finding goes against all of the NHRCs statutes to safeguard human rights.

The composition of the team consisting solely of police, since the main conflict was between the police and the Naxalites with the villagers caught in the middle was one of the many mistakes made by the NHRC. Another one was the process of public enquiry which did not allow petitioners to speak freely in front of independent investigators, making witnesses feel intimidated and afraid. The whole mission was compromised by the composition and methods of the NHRC's investigating team. Until today, the people of Chhattisgarh continue to face the ongoing human rights violations against them.[43]

Human rights groups are urging the Government of Chhattisgarh to accept responsibility for supporting policies that have led to the escalating violence against the villagers. However,

when an independent enquiry was made into the Chhattisgarth government's policies, they resisted by claiming that "[t]here is no failure on the part of the State of Chhattisgarh and therefore independent investigation is uncalled for and unwarranted."[44] Currently, there is no evidence that the government is attempting to do anything to improve the situation.[45] Instead, the officials have used the NHRC report as a justification to ignore the rising violence.[46]

The State Human Rights Commissions (SHRCs)

There are at present 18 SHRCs functioning in the country. It is pertinent therefore to have an idea of how these SHRCs function. We give below a short report on a few of the SHRCs in India that were not covered in the last year's report.

Orissa State Human Rights Commission (OSHRC)

The OSHRC was established on 11 July 2003. As stated by sources, 6,569 complaints were received from the victims and their concerns between July 2003 and May 2008. The Commission took cognizance of 505 cases on suo-motu. Out of the total 7,074 cases, 3,621 have been finalised, thereby leaving 3,453 cases undecided at present. Out of these pending cases, 2,160 are pending due to non-receipt of investigation reports.

It was revealed that from these cases, 1,649 cases were against the police, about pollution and on religious matters. 140 cases were regarding jails, 58 cases were regarding child torture, 49 cases were regarding health problems, 46 cases regarding labour harassment, 51 cases were regarding Scheduled Tribes (ST) and Scheduled Castes (SC), 250 cases were regarding torture on women, 815 cases were regarding employment and 732 cases were regarding persons with disabilities.

The Forum for Fact-finding Documentation and Advocacy (FFDA) has filed over 50 complaints between 2005 and 2008. Most of the cases were dismissed on locus-standi. The FFDA argued that

complaints are not public interest litigation and the OSHRC is a not a high court. It is a quasi-judicial body that cannot dismiss the complaints by treating the complaints as public interest litigation. The lack of understanding by the OSHRC of its role as a human rights institution, as illustrated by this example, makes the victims of human rights violations more vulnerable.

There are many vacancies in the OSHRC and more often than not, the appointments to posts within the OSHRC are given as political concessions. Expertise on human rights is never a consideration for filling these vacancies. This therefore contributes to the rising incompetence by the staff at the OSHRC. In the highly publicized sex scandal case of former Speaker of the Orissa Legislative Assembly, OSHRC played a major role in enabling the perpetrator be free of any kind of liabilities. Human rights groups had raised grave concerns over the way the OSHRC handled this case, raising questions about its impartiality and independence.

Chhattisgarh State Human Rights Commission (CSHRC)

On 1 November 2000, the tribal and Dalit- dominated eastern part of Madhya Pradesh, consisting of 16 districts, were brought into a new administrative set up and recognized as a new state, Chhattisgarh. The hopes and aspirations of the people of the said region are that they would get an exploitation- free zone with their own people, where they can have peace, progress and social justice.

The CSHRC was established in early 2001, soon after the formation of the new state. It was initially headed by former High Court Judge, Justice Mr. K.M. Agrawal. Justice Agrawal was not satisfied with his appointment and left the CSHRC immediately after his appointment. To fill the vacancy, a newly appointed member, Mr Jacob, a retired police Inspector General of former Madhya Pradesh Rank, became the acting chairperson.

In December 2003, the Bharatiya Janata Party came to power and Dr. Raman Singh became the new Chief Minister. In early 2004, he

appointed his own uncle Mr. Lal Jayaditya Singh, a retired district court judge, as a member and acting chairperson of the CSHRC. He still currently occupies this position.

The FFDA files cases before the CSHRC on the issues of torture by state agents, and atrocities related to castes committed by state agents. It also sends in cases regarding the denial of public services, starvation, and other human rights violations. However, most cases are not registered by the CSHRC because the commission staff asks for money from complainants when they register the case. In 2007, Dr. Subash Mohapatra went to the CSHRC to file a complaint on a human rights violation and was asked to give some money to the employees receiving the complaint so that said complaint would be registered. Dr. Subash Mohapatra refused to pay and thus, was physically assaulted by the employees of the CSHRC and was arrested on charges of disturbing public authorities in the discharge of their duties. He was eventually acquitted by the district court in 2009. Under the Act on the Right to Information, Dr. Subash Mohapatra was able to get information that over 2500 cases on pension grievances have been disposed of by CSHRC during the recent years.

In another case, Dr. Subash Mohapatra requested the CSHRC to conduct a post-mortem of a body of an alleged custodial torture victim. Despite the sufficient evidence presented and the report made available to commission, the CSHRC disposed of the petition and freed the state agents involved in the mater. Mr. L.J. Singh, the Chairperson, later said to Dr. Mohapatra, "Subash, why do you come with petition every day? Why don't you sit with us and resolve this? We are all family. It is a family matter. I hope you will understand me."

In another case, when a bank recovered loan from a Dalit girl for her father's debt from her scholarship amount, the CGHRC disposed of the petition saying that "the state enterprises are not state agents". It should be noted that the bank was a state-owned cooperative bank and human rights organisations, such as People's Watch, are currently challenging this ruling.

Punjab State Human Rights Commission (PSHRC)

The PSHRC receives around 15,000 complaints on human rights violations every year and hears around 80 complaints daily. It in only running, however, with two members, instead of the five members, as mandated by its enabling law. It is now composed of a Chairman (Retired Chief Justice R S Mongia) and a non-judicial member (K K Bhatnagar).

The Commission decides on matters like custodial deaths, custodial torture, custodial rape and illegal detention. In case the Commission decides to make any recommendation to the State Government on any matter, it has to constitute a larger bench (of at least three members). One post became vacant in August 2007 while two more posts were vacant since 4 May 2008, leaving only two members in the Commission. Recently, from 31 July 2008 to 15 August 2008, the working in the panel came to a halt as under the rules, a single member cannot take cognizance of new matters. All new cases had to be adjourned.[47]

Endnotes

1 Sec 3 (d) 0f the Protection of Human Rights Act 1993

2 NHRC Case No Case 131/19/2005-2006 and Case No. 10/23/2004-2005

3 In a public address that had been organized by the NHRC in New Delhi during her visit to India returning form Nepal

4 As per Sec 4 (1) of the Protection of Human Rights Act which states that the committee comprises:
(a)The Prime Minister — Chairperson
(b) Speaker of the House of the People — Member
(c) Minister in-charge of the Ministry of Home Affairs in the Government of India — Member
(d) Leader of the Opposition in the House of the People — Member
(e) Leader of the Opposition in the Council of States — Member
(f) Deputy Chairman of the Council of States — Member

5 Sec 12(f) of the PHRA, 1993.

6 Nagendar Sharma, Hindustan Times New Delhi, June 30, 2009

7 Order of the Delhi High Court in WP

8 NHRC Case No. 2422/4/2004-2005

9 Lr in D.O. No. 121917)/2008-Coord dated 27th October, 2008 from the Jt Sec HRC to NHRC Natl Core Group Members.

10 Dt 2nd No 2008 addressed to the Jt Sec NHRC

11 Pg 76 of the Annual Report of the NHRC 1997 – 98.

12 Pg 174 Annual Report of the NHRC 2000 – 2001

13 Website of the NHRC as in July 2009

14 Sec 12 (b) to (j) of the PHRA 1993.

15 ICC Sub Committee on accreditation - General observations.

16 IANS June 24th 2009

17 NHRC Case No. 10/23/2004-2005

18 NHRC Case No. 819/1/2004-2005

19 NHRC Case No. 2422/4/2004-2005

20 PUCL http://www.pucl.org/Topics/Human-rights/2005/salwa-judum-report.htm Findings about the Salwa Judum in Dantewara district". 2005-02-12. http://www.pucl.org/Topics/Human-rights/2005/salwa-judum-report.htm

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22 K Balagopal The NHRC on Salwa Judum : a most friendly inquiry

23 K Balagopal The NHRC on Salwa Judum : a most friendly inquiry

24 K Balagopal The NHRC on Salwa Judum : a most friendly inquiry

25 CPJC www.ohcr.org/english/law/disappearance.htm)

26 Letter to Hon'ble Justice S. Rajendra Babu, 23 4/2008

27 Letter to Babu from Nandini Sundar

28 CPJC www.ohcr.org/english/law/disappearance.htm

29 Frontline Volume 25 - Issue 23 :: Nov. 08-21, 2008 (http://www.hindu.com/fline/fl2523/stories/20081121252308800.htm)

30 CPJC www.ohcr.org/english/law/disappearance.htm)

31 www.ohcr.org/english/law/disappearance.htm)

32 www.ohcr.org/english/law/disappearance.htm

33 CPJC www.ohcr.org/english/law/disappearance.htm)

34 Frontline Volume 25 - Issue 23 :: Nov. 08-21, 2008 (http://www.hindu.com/fline/fl2523/stories/20081121252308800.htm)

35 Letter Justice Rajendra Babu from Nandini

36 NHRC Report section 1.50

37 CPJC www.ohcr.org/english/law/disappearance.htm)

38 NHRC Statue and CPJC www.ohcr.org/english/law/disappearance.htm)

39 Frontline Volume 25 - Issue 23 :: Nov. 08-21, 2008 (http://www.hindu.com/fline/fl2523/stories/20081121252308800.htm)

40 Frontline Volume 25 - Issue 23 :: Nov. 08-21, 2008 (http://www.hindu.com/fline/fl2523/stories/20081121252308800.htm)

41 Report paragraph 7.02 Frontline Volume 25 - Issue 23 :: Nov. 08-21, 2008 (http://www.hindu.com/fline/fl2523/stories/ 200811 21252308800.htm)

42 Frontline Volume 25 - Issue 23 :: Nov. 08-21, 2008 (http://www.hindu.com/fline/fl2523/stories/20081121252308800.htm)

43 CPJC www.ohcr.org/english/law/disappearance.htm)

44 CPJC www.ohcr.org/english/law/disappearance.htm)

45 CPJC www.ohcr.org/english/law/disappearance.htm)

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A Look at the Human Rights Protection Bill of Japan

Prepared by Ms. Azusa Yamashita[1] and Ms. Mikiko Otani[2]

General Overview of the Country's Human Rights Situation

A. General description of the human rights situation in Japan

The major human rights issues in Japan during 2008 included the revision of the Nationality Law in response to a Supreme Court decision and the review of the human rights situations in Japan by the United Nations Human Rights Council and the Human Rights Committee.

1. National Legislation, Court Decisions and Policy Decisions

(1) Supreme Court Decision and Revision of the Nationality Law

On 4 June 2008, the Supreme Court of Japan issued the decision that Article 3 (1) of the Nationality Law—which denies Japanese nationality to a child born out of wedlock to a Japanese father and a

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2 Vice Chair, Committee on the Realization of an NHRI, Japan Federation of Bar Associations (JFBA). *Note: This report is written based on the author's personal views and does not represent the official position of the JFBA.*

foreign mother—violates the equality principle of the Constitution of Japan by discriminating against children based on their status of birth. This unprecedented decision was considered to be a positive recognition of international human rights treaties as judicial norms in the Japanese courts, going against the general reluctance of the Japanese courts to apply them. Though the decision was based on the unconstitutionality of the Nationality Law, its reasoning referred to the international human rights treaties that Japan has ratified, such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

The government responded quickly and the Cabinet submitted the draft revision of the Nationality Law to the Diet (national legislature) in November 2008, which adopted it the following month. The revised Nationality Law allows children born out of wedlock to obtain Japanese nationality even if the parent with Japanese nationality acknowledges parenthood after birth and irrespective of the marital status of the parents.

It should be noted that a coalition of parliament members rejected the decision of the Supreme Court and organized a fierce opposition movement before the final adoption of this draft amendment bill. They argued that the proposed revision would allow children born to foreign mothers to be granted Japanese nationality even if paternity is claimed by Japanese men who are not the biological fathers. The revised Nationality Law therefore criminalizes making false paternity claims in such a way; however, the opposing parliamentarians were not satisfied with this penalty. They pressurized for a supplementary resolution to consider using DNA testing to confirm nationality and to make the procedure stricter by conducting a hearing for the father.

While the Supreme Court decision and swift government response were largely welcomed by the general public as positive progress for human rights in Japan, the strong opposition it generated indicates that a popular anti-human rights movement based on nationalism, xenophobia and conservatism is very much alive. In fact, many of the parliamentarians who opposed amending the Nationality Law are also those who organized a symposium to openly oppose the draft Human Rights Bill to establish a Human

Rights Commission, which is discussed in greater detail below. They urged the general public to send protest letters to the offices of parliament members. In response to their call, some people sent some dozens of faxes to one parliament member, disrupting the function of that member's office. The opposition group claimed that the large number of opposition letters was proof that the general public shared their concerns.

(2) Other progress

The Diet unanimously adopted a resolution recognizing the Ainu as indigenous people of Japan in June 2008. In response, the Chief Cabinet Secretary issued comments on the resolution and set up an expert panel to discuss specific measures for the Ainu people. Another major legislative action taken in the area of human rights was the adoption of the Act on Promotion of Resolution of Issues Related to Hansen's Disease in June 2008. This Act provides for the improvement of national medical centers for sufferers of Hansen's Disease, and the opening up of these long-segregated institutions into communities.

2.International human rights treaties and mechanisms

(1) Review of the human rights situation in Japan by UN Human Rights Mechanisms

Japan, as one of the Member States of the United Nations Human Rights Council, received the Universal Periodic Review (UPR) in 2008. During the interactive dialogue held by the Human Rights Council Working Group on the UPR in May, countries such as Algeria, Canada, Mexico, Qatar and the Islamic Republic of Iran urged Japan to establish a national human rights institution (NHRI) in accordance with the Paris Principles.[3] In response, the Japanese government agreed to follow up the recommendation in June 2008.[4]

3 Report of the Working Group on the Universal Periodic Review, Japan, A/HRC/8/44, para. 60, subparagraphs 2 and 3.

4 A/HRC/8/44/Add.1, para. 1

The Human Rights Committee considered Japan's fifth periodic report and adopted its concluding observations in October 2008. The establishment of an NHRI has been one of the main concerns of the Human Rights Committee since its last consideration of Japan's periodic report in 1998. This time, the Human Rights Committee recommended that 'the State party should establish an independent national human rights institution outside the Government, in accordance with the Paris Principles (General Assembly resolution 48/134), with a broad mandate covering all international human rights standards accepted by the State party and with competence to consider and act on complaints of human rights violations by public authorities, and allocate adequate financial and human resources to the institution'.[5]

(2) Convention on the Rights of Persons with Disabilities

Japan signed the Convention on the Rights of Persons with Disabilities in September 2007 and prepared for it to be formally ratified in early 2009. However, some groups representing persons with disabilities criticized the government for seeking to ratify the Convention only with the partial amendment of the Basic Act for the Persons with Disabilities. These groups asked the government to conduct a comprehensive review of the Basic Act as well as take other legislative measures, including setting up national monitoring mechanisms to meet its obligations under the Convention. As a result, the submission of the draft bill was postponed.

B.Developments on the efforts establishing an NHRI

(1) Political Parties[6]

Despite civil society demands and repeated recommendations from various UN mechanisms that Japan should create a national

5 CCPR/C/JPN/CO/5, para.9

6 *This part of the report is based on an article by Professor Koshi Yamazaki that appeared in *Human Rights* (No. 242, May 2008), a monthly publication by the Buraku Liberation and Human Rights Research Institute.

*This report was written by Azusa Yamashita, Citizens' Council for Human Rights Japan.

human rights institution in compliance with the Paris Principles, there is still no independent NHRI in Japan; nor did the government or any political parties initiate any process or law to establish one during 2008.

In December 2007, the ruling Liberal Democratic Party's (LDP) Research Council on Human Rights and Other Issues[7] (hereinafter referred to as the 'Research Council') met to discuss the Human Rights Protection Bill (hereinafter referred to as the 'Protection Bill'). In October 2007, then Justice Minister Hatoyama had stated: 'we would like to resubmit the Human Rights Protection Bill after considering the means to clear various questions',[8] adding that it was shameful that there was no Human Rights Protection Act in Japan. When asked for his administration's position on the necessity of legal measures promoting human rights protection—besides existing human rights protection mechanisms such as the Human Rights Volunteer Law[9]—the then Prime Minister Yasuo Fukuda said that the government continues to consider such measures. This included considering opinions10 on the final report on the human rights remedy system issued by the Council on the Promotion and Protection of Human Rights[11] and supplementary resolutions to the Law for the Promotion of Measures for Human Rights Protection.[12]

7 Liberal Democratic Party's Research Council on Human Rights and Other Issues was established in May 2002 with the aim to pass the Human Rights Protection Bill.

8 Minutes of the Judicial Committee of the House of Representatives on 24 October 2007. Available at http://www.shugiin.go.jp/

9 There are approximately 14,000 private citizens appointed as human rights volunteers by the Justice Minister in all municipalities such as cities, towns and villages throughout the country based on the Law (Law No. 139, 31 May 1950. Law No. 54, amended in 1978. Law No. 151, amended on 8 December 1999. Law No. 160 December 1999).

10 Minutes of the plenary session at the House of Councilors on 23 January 2008. Available at http://www.sangiin.go.jp/

11 The report was issued in 2001. The Council for the Promotion of Human Rights Protection was established in 1997 based on the Law for the Promotion of Measures for Human Rights Protection (Law No. 120, 26 December 1996. Law No. 102, amended on 16 July 1999).

12 ibid. Supplementary resolutions to the Law were adopted both in the House of Representative and House of Councilors respectively on 13 December and 17 December 1996. It states that the government should make efforts to promote and strengthen human rights protection policy by human rights education and promotion in school and social education. It also refers to the management and selection of the Council for

The Research Council held over ten meetings under Prime Minister Fukuda's administration during the first half of 2008. Faced with strong opposition to both the establishment of an NHRI and the Protection Bill, and and with differing opinions within the party, the Research Council invited several scholars to these meetings. These included Yozo Yokota, a law professor and member of the UN Sub-Commission on the Promotion and Protection of Human Rights, and Koshi Yamazaki, a law professor and executive director of the Citizens' Council for Human Rights.[13] Both professors have criticised the Protection Bill for being insufficiently independent from government, but have echoed civil society's calls for the establishment of an NHRI in accordance with the Paris Principles.

In January 2008, the Ministry of Justice submitted an amendment proposal on the Protection Bill during a Research Council meeting. The Ministry explained that the purpose of the proposal was to 'protect those who are unfairly filed as a violator of human rights.' The proposal limits the scope of complaints that could be handled by the Human Rights Commission to exclude: 1) complaints in which no damage has occurred;[14] 2) complaints based on academic opinions, historical events or religious teachings;[15] 3) complaints based on the opinion that a certain law is unconstitutional;[16] 4) complaints of defamation where the facts are publicized for the public good;[17] and 5) complaints motivated by an ulterior motive, such as to defame someone. The amendment proposal did not

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the Promotion of Human Rights Protection and to consideration of the ratification of human rights related treaties.

13 Other scholars invited included Akira Momochi, a law professor at Nihon University, Hiroshi Shiono, a law professor (Professor Emeritus) at the University of Tokyo, and Saburo Takita, a chairperson of the National Association of Human Rights Volunteers.

14 'For example, a complaint that some politician's critical remarks about certain foreign government or leading figures on the basis of political beliefs violate human rights.' This example appears in material disseminated by the Ministry of Justice.

15 'For example, a complaint that remarks about the acts by the Japanese Military during the World War II is defamation.' ibid.

16 'For example, a complaint that identifying Taiwanese as 'Chinese' in a space to fill in nationality in a alien registration card violates human rights or a complaint that not granting those who graduate from Korean schools the qualification for entrance exams of public high schools violates human rights.' ibid.

17 'For example, a complaint that a certain media report which is true and for the good of public interest violates human rights.' ibid

include a definition of a 'human rights violation' and has failed to convince party members opposed to the establishment of an NHRI and the Protection Bill.

On 29 May 2008, the Research Council's chairperson submitted a proposal[18] intended as a form of compromise, following criticisms by party members that an NHRI could exercise its power arbitrarily and that the definition of a 'human rights violation' in the Protection Bill is too vague. His proposal retains the establishment of an NHRI, but intentionally omits any definition of a human rights violation. Instead of defining it, he described examples of human rights violations. However, both party members and NGOs criticized his proposal. The LDP members opposed to both an NHRI and the Protection Bill argued that the Human Rights Commission could still use its power arbitrarily under the 'Solution by Dialogue Bill'. NGOs complained that the proposal lacked a provision on the structure of the NHRI.

In March 2008, a dozen LDP members[19] organized a symposium to publicly oppose the Protection Bill. The head organizer wrote on his blog: 'The chairperson [of the Research Council] has released his version [of the Protection Bill], but there is no room for discussion. Whatever changes are made [to the Bill], it's still unnecessary and rather dangerous to the people.'[20] According to the report, over five hundred people attended the symposium.[21]

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18 'I've proposed an outlined proposal 'Solution by Dialogue Bill',', blog by Research Council chairperson and House of Representatives member Seichi Ota (29 May 2008). Available at http://www.election.ne.jp/10829/59289.html

19 Some conservative LDP members established the Genuine Conservative Policy Research Group' in December 2007, with approximately 80 members. The group's aim is to do politics based on 'traditional values', and organized the symposium discussed here. See http://www.furuya-keiji.jp/images/%C0%AF%BA%F6%B8%A6%B5%E6%B2%F1%C0%DF%CE%A9%BC%F1%B0%D5%BD%F1.pdf

20 'On Human Rights Protection Bill', blog by House of Representatives member Syoichi Nakagawa (3 June 2008). Available at http://www.nakagawa-shoichi.jp/talk/detail/20080603_315.html

21 'Strong Opposition to the Human Rights Protection Bill – Politicians and People who Protect Interests of the Japanese People Stood Up', a report by a private citizen journalist on 13 March 2008. The website last viewed on 20 April 2009 at http://news.livedoor.com/article/detail/3551111/

The chairperson of the Research Council and the Ministry of Justice had tried to generate support for an NHRI by consulting human rights experts, as well as showing cases of human rights violations which existing systems had failed to solve. Nonetheless, meetings often faced fierce opposition and produced no constructive outcomes. The Research Council had its last meeting on 20 June 2008.

Thus, the ruling party has failed to progress with the Protection Bill; the government has failed to improve its flaws and resubmit it; while other major parties have scarcely taken any action on the Protection Bill or its alternatives.[22]

(2) NGOs: Japan Federation of Bar Associations

One major civil society initiative for the establishment of an NHRI was the adoption of the 'Outline of National Human Rights Institution Proposed by the Japan Federation of Bar Associations' (hereinafter referred to as 'JFBA Outline') on 18 November 2008.

Established in 1949, the Japan Federation of Bar Associations (JFBA) is an autonomous body comprised of the 52 bar associations in Japan, their individual members and professional corporations, and works to protect basic human rights. It receives complaints of violations across a wide range of areas, including serious human rights violations by governmental authorities. It investigates cases and issues warnings, recommendations and improvement requests to any parties found to have infringed human rights. The JFBA's track record in this area has earned it wide recognition from the general public as well as the United Nations and international human rights organizations.

The JFBA has published a number of statements calling for the establishment of an NHRI in accordance with the Paris Principles.

22 The Secretary General of the New Komeito Party said in January 2008 that he expected the Human Rights Protection Bill 'to pass in the current session'. See http://www.komei.or.jp/news/2008/0131/10667.html. The opposition Democratic Party of Japan (DPJ) drafted its own bill named 'Law on Remedies for and Prevention of Human Rights Violation' and submitted it to the 162nd Diet session on 1 April 2005. Available at http://www.dpj.or.jp/news/files/050801BOX_0063_hon.pdf.

It opposed the Human Rights Protection Bill submitted to the Diet in March 2002 largely because of its lack of independence from the government. In 2003, the JFBA responded to the Protection Bill with a set of 'Minimum Conditions for Assurance of the Independence of the Human Rights Commission'.

The JFBA Outline is intended to mobilize public debate on the NHRI and generate momentum toward its establishment. It lays down the framework and principles of the NHRI to be established in Japan with regard to its independence, mandate, scope to cover violations, functions, composition, resources, efficiency and accessibility.[23] The JFBA Outline was adopted in November 2008, publicized and submitted to the Minister of Justice in December 2008.

Though the JFBA Outline is not the only proposal for the framework of an NHRI to be submitted by civil society groups in Japan, it is hoped to be used as a reference point for the discussion; partly because of its draft bill-like format and concrete provisions; and partly because of the timing of its publication in December 2008, following the recommendations to the government on the establishment of an NHRI by the UN Human Rights Council and the Human Rights Committee.

Obstacles impeding the establishment of an NHRI

Despite civil society calls to establish an NHRI and repeated recommendations to do so by various UN human rights mechanisms, there has been little progress. Though the government publicly indicated its acceptance of the recommendation to establish an NHRI in its response to Japan's Universal Periodic Review in June 2008, it has made no effort to follow up this recommendation. There are several reasons for this.

Firstly, there is disagreement between government and civil society over what an 'independent' NHRI would actually look like. While the government is satisfied with the Protection Bill that

23 The full text of the JFBA Outline is available on the JFBA website and its English translation will be uploaded shortly.

puts the Human Rights Commission under the jurisdiction of the Ministry of Justice, major human rights NGOs in Japan argue that this would not comply with the independence requirement of the Paris Principles.

Secondly, after the Protection Bill failed to be adopted in the Diet, an active campaign against the creation of an NHRI has emerged and gained strength among conservative groups in Japan. These groups argue that the proposed Human Rights Commission envisaged by the Protection Bill—a new government body with enormous investigative power—is potentially dangerous. They suggest that it could be used to suppress the legitimate exercise of the right to freedom of expression in the name of 'human rights protection' or 'prohibition of discrimination', based on false allegations of human rights violations.

Thirdly, backed up by this anti-NHRI campaign, some Liberal Democratic Party parliament members and civil society groups have expressed concern about the proposed Human Rights Commission and proposed amendments to the Protection Bill. As mentioned earlier, LDP members leading the anti-NHRI campaign have even openly opposed the creation of an NHRI by organizing a symposium. Some observe that the LDP is so deeply divided on the establishment of an NHRI, and the issue has become so politicized, that there is no prospect of revitalizing any initiative toward the establishment of an NHRI within the LDP in the near future.

The current political atmosphere may also have contributed to the lack of initiative seen in both the government and civil society groups calling for the creation of an NHRI in Japan. Since the national election in July 2007, the opposition parties have enjoyed a majority in the House of Councilors. With the repeated resignations of political leaders and the low level of public support for the government, opposition parties are expected to succeed in the next general election of the House of Representatives, to be held in 2009. Some observers have commented that the current political climate offers no hope of progress; only after the opposition parties have come into the administration can Japan hope to establish an NHRI.

Independence

This section compares the Human Rights Commission proposed in the Human Rights Protection Bill and the model NHRI proposed by the JFBA Outline. Among several other civil society proposals for the framework of a Japanese NHRI, the JFBA Outline was chosen for analysis because it is the latest proposal and contains a concrete description of the model NHRI.

Relationship with the Executive, Judiciary, and Parliament

Human Rights Protection Bill

The Human Rights Commission will be established by the Human Rights Protection Bill and based on the National Administrative Organization Act (Article 5(1)). The Commission will be placed under the jurisdiction of the Minister of Justice (Article 5(2)) and is therefore not considered to be separate from the Executive. Article 39 provides that the Commission can conduct investigations in order to remedy the damage caused by human rights violations. It may ask the relevant administrative authorities to provide information, offer opinions, make explanations and generally cooperate where necessary. The Commission shall report on its performance annually to the Diet through the Prime Minster, and publicize a summary (Article 19). The Commission will have the power to subpoena relevant parties for special investigation (Article 44(1)-1). It will also have the right to intervene in cases pending before the courts on human rights violations on which it issued recommendations (Article 63).

JFBA Outline

The Human Rights Commission will be established by an Act and based on the Act Establishing the Cabinet Office (2-2(1)). It will be placed as an administrative committee with strong independence under the jurisdiction of the Prime Minister (2-2(2)). This would protect the Commission from the influence of different ministries. Public

authorities are required to cooperate with the Commission during its investigations (4-2(2)), and it will have the power of subpoena (4-2(1)). The Commission shall report annually to the Diet on its activities and the general human rights situation in the country (9).

Selection Process of Members

Human Rights Protection Bill

Commissioners will be appointed by the Prime Minister, with the consent of the House of Representatives and the House of Councilors, from among those who have noble personalities, human rights knowledge, and academic, legal or social experience (Article 9). There is no provision on public hearings to select Commissioners. It is not clear who can nominate candidates, and the selection process is neither rigorous nor transparent. Commissioners must have human rights knowledge, but need not be involved in civil society activities. The Protection Bill ensures gender balance, stipulating that Commissioners of both sexes must not be less than two in number, but does not otherwise provide that the Commission's composition must reflect pluralism by including representatives of minorities and excluded groups. Tenure is fixed for three years with the possibility of renewal (Article 10(1) (2)). While the Protection Bill stipulates both the grounds for dismissal and the person who has the power of dismissal—namely, the Prime Minister (Articles 11-12)—the actual dismissal process is not clear. Commissioners are required to act independently (Article 7) and prohibited from being actively involved in political activities (Article 13(2)). Commissioners are also prohibited from running a business (Article 13(3)). There is no code of ethics or any regulations on conduct except for these provisions and the obligation of confidentiality (Article 13(1)).

JFBA Outline

The selection process of Commissioners is similar to that of the Protection Bill, but more transparent: candidates are nominated by

a committee (2-4(1) (2)). The nomination committee shall ensure a transparent selection process by holding public hearings (2-4(4)). Commissioners must be human rights experts and possess specific knowledge and experience of human rights protection (2-5(1)). The Commission's composition must ensure that Commissioners of either sex do not exceed two-thirds of those of the other sex (2-5(2)). The candidates shall not be deemed ineligible based on their race, ethnicity, belief, social status, nationality, descent, disability, illness or sexual orientation (2-5(4)). Tenure is fixed for five years, with the possibility of renewal limited to one extra term (2-6(2)). The dismissal process is clearly provided and includes the grounds for dismissal and the person with the power of dismissal—again, the Prime Minister (2-6(3) - (6)). Commissioners are required to act independently (2-7(1)) and are prohibited from being a member of parliament or engaging in other jobs without the permission of the Commission (2-5(4)). There is no provision on a code of ethics.

Resourcing of the NHRI

Human Rights Protection Bill

There is no provision on the Commission's financial matters, except for a guarantee of compensation to the Commissioners as special government officers (Article 4, supplementary provisions). The Protection Bill does not give details on the budget for the Commission—how it will be secured; to what extent the Commission can determine its own budget; how it will be administered, and so on. However, since the Commission is placed under the Ministry of Justice, its budget will be administered though the Ministry of Justice. The Commission shall have its secretariat, but the recruitment process for secretariat staff is not provided.

JFBA Outline

The cost of the Human Rights Commission shall be included independently in the national budget (2-13), and the Commission may hire the staff independently (Article 2-9).

Effectiveness

Human Rights Protection Bill

The Commission has a complaints-handling mechanism by which anyone may file complaints of human rights violations and seek remedies or other appropriate measures (Article 38(1)). The Commission shall conduct necessary investigations without delay unless it deems a case inappropriate for investigation, or if a complaint is filed more than one year after the act (Article 38(2)). There are two types of remedy procedure available. General remedies include advice, reference to the relevant agencies, legal aid, guidance, conciliation, notification of the violation to the relevant administrative bodies, and reporting the crimes (Article 41). Special remedies include mediation, arbitration, recommendations and their publication, assistance for court cases and injunctions (Article 42-65). Local branches of the Commission secretariat will be established in major cities (Article 16).

JFBA Outline

The Commission has a mechanism by which victims of violations covered by the Act or their relatives may file complaints and seek appropriate remedies (4-1 (1)). The Commission shall initiate investigation unless there are grounds not to do so (4-1 (5)), and may refer cases for mediation or arbitration with the consent of the concerned parties (4-5-1 (1)). When an investigation confirms that a human rights violation has occurred, the Commission may issue warnings, recommendations, and requests (4-5-3 (1)). It may also request disciplinary measures if national or municipal government officers are found to have committed human rights violations (4-5-5 (1)). The Commission shall report crimes to the public prosecutors and may file an injunction under certain conditions (4-5-5 (2)). The Commission will be composed of a central commission based in the capital and local commissions to be set up in each prefecture (2-1 (1) (2)). Both central and local commissions shall have a secretariat (2-8).

Consultation and Cooperation with NGOs

Human Rights Protection Bill

The Commission may hold public hearings to gather the views of the general public when it deems this necessary in order to perform its functions (Article 17). Human rights volunteers appointed among community residents may assist in outreach activities (Article 21 – 36). However, there is no specific provision with regard to the formal relationship between the Human Rights Commission and civil society.

JFBA Outline

The Commission shall make efforts to hear the views of various human rights NGOs and reflect those views in the planning of basic measures related to human rights, implementing human rights education and providing remedies to human rights violations (7).

Conclusion and Recommendations

1. To reactivate the domestic debate among interested NGOs and civil society groups, using the NGO-proposed model of an NHRI, and initiate concrete steps toward its creation.
2. To call for support from the international community for such efforts at the domestic level.

Longstanding Concerns under the International Spotlight

Prepared by Suara Rakyat Malaysia (SUARAM) & Education and Research Association for Consumers (ERA Consumer)[1]

Introduction

Two major events in 2008 most notably impacted the work of the Human Rights Commission of Malaysia (SUHAKAM):

The one-year notice given by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) for SUHAKAM to make improvements with regard to its compliance to the Principles relating to the status of national human rights institutions (Paris Principles)[2] in April 2008.

The unprecedented result of the 12th General Election in March 2008.

The one-year notice given by the ICC in April 2008 and the possibility of being downgraded thrust SUHAKAM into the spotlight, both locally and internationally, especially in view of the Malaysia's

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2 The Paris Principles, adopted by the UN General Assembly resolution 48/134, sets out the international standards that should be adhered to in order to ensure the independence and effectiveness of national human rights institutions.

membership of the UN Human Rights Council. In Malaysia's Aide-Memoire on its candidature to the UN Human Rights Council in 2006, the government unequivocally stated that the establishment of SUHAKAM demonstrated its commitment to human rights.[3] The notice given by the ICC—an international body governing national human rights institutions—served as a reaffirmation of the concerns regarding SUHAKAM's independence and effectiveness that had already been articulated by various national human rights NGOs since the Commission's establishment. This resulted in renewed calls for SUHAKAM to be made more independent and conform to the Paris Principles.

On the other hand, in the general election held on 8 March 2008, the ruling National Front (Barisan Nasional) coalition suffered its biggest loss in Malaysian electoral history, with the opposition coalition, Pakatan Rakyat, winning 82 seats in the 222-seat parliament.[4] This election result was a manifestation of the popular call for reform, and of great disappointment over the increasing failure of state institutions like SUHAKAM to uphold human rights and democracy.

Post-election Malaysia saw increasing momentum in calls for greater respect for human rights. A number of member parties of the ruling coalition and cabinet ministers joined civil society in calling for the abolition of the Internal Security Act (ISA).[5] In response to these political realities, SUHAKAM put more emphasis and focus on its work in the area of civil and political rights.[6] After the General Election, SUHAKAM set up a new working group on civil and political rights, aiming to deepen its engagement with civil society.

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3 Malaysia (2006) 'Aide-Memoire; Malaysia's Candidature to the United Nations Human Rights Council', dated 28 April 2006 (p. 1).

4 This is only the second time since the country's independence in 1957 that the ruling coalition has been denied its two-thirds majority in parliament. The only other time that the ruling Barisan Nasional and its predecessor, the Alliance, failed to obtain a two-thirds majority in parliament was in 1969.

5 See SUARAM (2008) *Malaysia: Civil and Political Rights Report 2008 – Overview*, Petaling Jaya: SUARAM Kommunikasi (p. 8).

6 SUHAKAM (2009a) *2008 Annual Report*, Kuala Lumpur: SUHAKAM (p. 73).

Independence

A. The enabling law

SUHAKAM was established in 2000 under the Human Rights Commission of Malaysia Act 1999 (Act 597). It was set up to provide a channel for the public to submit complaints about infringements and violations of human rights, as well as to create awareness and understanding of human rights issues in Malaysia.[7] The idea of setting up this Commission was put forth by former Deputy Prime Minister Musa Hitam in 1993, when he personally urged then-Prime Minister Mahathir Mohamad to establish such a body, realizing the importance for Malaysia to have its own Human Rights Commission.[8] The Malaysian government's efforts to establish a national human rights institution of its own was precipitated by mounting international pressure for a greater respect for human rights between 1998 and 1999, a period which saw a significant clampdown on fundamental freedoms and liberties,[9] following a political crisis within the ruling political party (the United Malays National Organization, UMNO).[10]

The Act was rushed through parliament in September 1999 without any comprehensive consultation process with NGOs or other relevant parties. There were no opportunities given to the public to provide feedback on the draft bill. The Government also failed to address or consider the views of 34 NGOs and political parties that submitted a memorandum highlighting their concerns about the lack of consultation in the drafting of the bill and the

7 Approved text of the speech on the Human Rights Commission of Malaysia Bill 1999 delivered in the Dewan Rakyat on 15 July 1999 by Minister of Foreign Affairs Syed Hamid Bin Syed Jaafar Albar.

8 Keynote speech by Tan Sri Annuar Zainal Abidin during Forum on "Understanding the Human Rights Commission Act 1999" organized by ERA Consumer on 27 May 2000.

9 This period saw the sacking and jailing of then-Deputy Prime Minister Anwar Ibrahim, and the subsequent detention of many activists of the '*Reformasi*' movement. Prominent human rights lawyer Ramdas Tikamdas called the year 1998 'a period of the nightmare for human rights'. Cited in Lim Kit Siang (1999) 'Will the Human Rights Commission be Irrelevant?' In Tikamdas, R. & S. Sothi Rachagan (eds.) *Human Rights and the National Commission*, Kuala Lumpur: HAKAM (p. 114).

10 UMNO is the biggest political party within the ruling coalition, Barisan National.

independence and mandate of the proposed commission.[11]

In his speech during the tabling of the bill in parliament, then-Minister of Foreign Affairs Syed Hamid Albar stressed that the Paris Principles were used as a guideline for the proposed Human Rights Commission of Malaysia and that priority was given to its independence.[12] However, this remains highly questionable to this day.

The lack of consultation in the drafting of the enabling law demonstrates the lack of compliance with the Paris Principles at the earliest stages of SUHAKAM's existence. While the human rights community in Malaysia welcomes the establishment of a national human rights institution, its lack of independence—particularly from the government—remains a major concern. Specifically, SUHAKAM is put under the direct jurisdiction of the Prime Minister's Department, and there is a lack of transparency in the selection process of Commissioners. These glaring problems point to the fact that there is no provision in the law that adequately guarantees SUHAKAM's independence, especially from the government.

SUHAKAM has raised some concerns, proposing in 2002[13] to amend the enabling law so as to make itself a more independent NHRI and ensure greater compliance with the Paris Principles. However, the efforts of the Commission have failed to produce any effective and substantial results.[14] This is despite the fact that SUHAKAM is mandated by its enabling law to recommend changes in the law to the government.[15]

In April 2008, the Sub-Committee on Accreditation of the ICC (ICC-SCA) informed SUHAKAM of 'its intention to recommend to the ICC status B', giving it 'the opportunity to provide in writing,

11 Lim Kit Siang (1999) op. cit. (pp. 111-112).

12 Approved text of the speech on the Human Rights Commission of Malaysia Bill 1999 delivered in the Dewan Rakyat on 15 July 1999 by then-Minister of Foreign Affairs Syed Hamid Bin Syed Jaafar Albar

13 SUHAKAM (2003) *Annual Report 2002*, Kuala Lumpur: SUHAKAM (pp. 46-48).

14 On 25 March 2009, seven years after SUHAKAM first made its proposal, the Lower House of Parliament passed several amendments. However, these amendments also failed to make SUHAKAM more independent.

15 Section 4(2) Human Rights Commission of Malaysia Act 1999 (Act 597).

within one year of such notice, the documentary evidence deemed necessary to establish its continued conformity with the Paris Principles'.[16]

The recommendations and observations made by the ICC-SCA in relation to SUHAKAM were:

- The independence of the Commission needs to be strengthened by the provision of clear and transparent appointment and dismissal process in the founding legal documents, more in line with the Paris Principles.
- With regard to the appointment, the Sub-Committee notes the short term of office of the members of the Commission (two years).
- The Sub-Committee highlights the importance of ensuring the representation of different segments of society and their involvement in suggesting or recommending candidates to the governing body of the Commission.
- The Sub-Committee refers to General Observation 'Interaction with the International Human Rights System'.

Three of the four recommendations are in relation to the independence of the Commission. Implementation of these three recommendations also requires amendments to the current Human Rights Commission of Malaysia Act 1999.

Despite these recommendations, on 30 April 2008, 16 of the 18 current Commissioners were re-appointed for another two-year term by the Yang di-Pertuan Agong (King) on the recommendation of the Prime Minister. These 16 are currently serving out the first of their two-year terms, which will end in April 2010. Out of these 16, 10 are either retired civil servants or from state-run universities or academic institutions.[17]

16 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Sub-Committee on Accreditation', Geneva, 21-24 April 2008, (p. 5).

17 The commissioners' profiles are available on the Commission's official website: http://

While there were no visible efforts to act upon this notice throughout almost the entire one-year period given by the ICC, however,[18] on 24 March 2009, just two days before the ICC-SCA convened its meeting to review the re-accreditation of SUHAKAM, amendments were tabled and was hurriedly passed the next day, on 25 March 2009. Similar to the manner in which the original Act was passed, these amendments were made without any consultation with civil society. In fact, members of parliament themselves were given very little time to study and debate on the bill.[19]

B. Relationship with the Executive, Legislature, Judiciary and other specialized institutions in the country

When SUHAKAM was established in 2000, it was placed under the jurisdiction of the Minister of Foreign Affairs. Later in 2004, it was placed under the Prime Minister's department—a move which has seriously undermined the Commission's credibility and dispels claims that it has any semblance of structural autonomy from the Executive branch of the government.

The general level of cooperation between government officials and SUHAKAM can be described as one which lacks seriousness. For instance, the government responds to SUHAKAM's reports very infrequently and often after a long period of time. It did not send its response to SUHAKAM's 2001 and 2002 Annual Reports and other specific reports until 17 March 2003. It did not respond

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www.suhakam.org.my/en/about_com_member.asp (last accessed 23 February 2009).

18 The total lack of commitment of the government to strengthen SUHAKAM was clearly seen during the Universal Periodic Review (UPR) on Malaysia in February 2009. Here, recommendations of at least four countries to ensure the independence of SUHAKAM in accordance with the Paris Principles and also to widen the scope of SUHAKAM to cover all rights in the Universal Declaration of Human Rights were *merely noted* by the government of Malaysia, *but were not listed as those which enjoyed its support*.

19 In protest at the hasty and non-consultative manner in which the bill was pushed through, opposition member of parliament Lim Kit Siang said, 'We were not given proper notice and there was no consultation. We should have been given a day's notice to review the amendments… this is totally against the Standing Orders of the House.' The Speaker of the Lower House of Parliament subsequently suspended Lim temporarily when he pressed on further to challenge the manner in which the amendments were tabled.

to SUHAKAM's Annual Report 2003 until 17 January 2005. SUHAKAM's Chairman said in an interview in August 2008, 'Year after year, our reports to parliament detailing our activities and recommendations are never debated in parliament, much less acted upon by the relevant ministries. On the contrary, there is a tendency to undermine our independence by certain ministries.'[20] This tendency to undermine the work of SUHAKAM was also demonstrated in a statement by the minister in charge of law in the Prime Minister's Department, Nazri Aziz, who told parliament in March 2006, 'We have never planned to give any teeth to SUHAKAM. It does not have prosecuting powers because this can be done by other enforcement agencies. Thus, to give them more teeth has never been our proposal.'[21]

Although Act 597 compels the Commission to submit its annual report to parliament not later than the first meeting of parliament of the following year,[22] none of its eight annual reports and numerous other reports on specific human rights issues submitted between 2001 and 2008 have ever been debated in parliament.

With regard to its relationship with the judiciary, Act 597 does not give SUHAKAM any quasi-judicial powers to enable intervention in court proceedings either as amicus curiae ('friend of the court') or in any other capacity.

C. Membership and selection

One of the most glaring weaknesses of SUHAKAM is its appointment process. Act 597 gives the Prime Minister full discretion in the appointment of Commissioners. Section 5(2) of the Act states, 'Members of the Commission shall be appointed by the King on the recommendation of the Prime Minister.'

Under the Act, there is no prescribed manner in which the public or civil society can participate in the selection process. As such, there is no consultation with, or participation of, civil society

20 "Suhakam treads an arduous path", *New Straits Times*, 3 August 2008.

21 "Govt: We don't intend to give Suhakam teeth", *Malaysiakini*, 27 March 2006, http://www.malaysiakini.com/news/48965 (last accessed: 26 April 2009).

22 Section 21(1) Human Rights Commission of Malaysia Act 1999 (Act 597).

organizations in the selection of members of the Commission.

In April 2008, the ICC-SCA review of SUHAKAM stated, 'The independence of the Commission needs to be strengthened by the provision of clear and transparent appointment and dismissal process in the founding legal documents, more in line with the Paris Principles.'[23]

On 25 March 2009, the Lower House of Parliament amended Act 597 as follows: 'The members of the Commission shall be appointed by the King on the recommendation of the Prime Minister who shall, before tendering his advice, consult the committee referred to in Section 11A' (Section 5(2)). As of April 2009, these amendments are still pending at the Upper House of Parliament, after which a royal assent must be obtained before they become legislation.

In the amendments, the new Section 11A provides for the composition of a selection committee which shall be consulted by the Prime Minister before advising the King on the appointments of members of the Commission. The newly-inserted Section 11A states that the committee shall consist of the following persons:

- the Chief Secretary to the Government who shall be the Chairman of this committee;
- the Chairman of the Commission; and
- Three other members, from amongst eminent persons, to be appointed by the Prime Minister.

Despite the amendment to Section 5(2) and the insertion of the new Section 11A, the selection process of the Commission remains severely lacking in transparency. The selection process is still the sole prerogative of the Prime Minister, who has absolute discretion in the process. The composition of the selection committee is also problematic, as representation from civil society is not guaranteed. Further, the views or recommendations of this committee are not binding upon the Prime Minister, as provided in Section 11(A)(6) of the amended Act 597, hence rendering this new section meaningless.

23 International Coordinating Committee, op. cit. (p. 5).

Furthermore, Section 5(3) of Act 597 states that members of the Commission 'shall be appointed from amongst prominent personalities including those from various religious backgrounds'. Civil society groups have long raised concerns about this criterion, since 'prominent personalities' are not synonymous with integrity and competence. More importantly, human rights knowledge and experience are not stated as criteria for such appointments.

The April 2008 report of the ICC-SCA highlighted 'the importance of ensuring the representation of different segments of society and their involvement in suggesting or recommending candidates to the governing body of the Commission'.[24] Despite this and numerous calls for the criteria to include human rights knowledge and experience, the 16 Commissioners appointed by the King in 2006 were re-appointed, as noted above.

However, under this new Bill, the criteria of human rights knowledge and experience are included in Section 5(2). The amended Section 5(2) reads, 'The members of the Commission shall be appointed from amongst men and women of various religious, political, racial backgrounds who have knowledge of, or practical experience in, human rights matters.' Notwithstanding the insertion of the words 'men and women' in place of 'prominent personalities' in the law, gender balance is still not explicitly stated; nor is the issue of representation of minorities and vulnerable groups.

The question of pluralism was also addressed by the ICC-SCA, which advised ensuring 'the representation of different segments of society and their involvement in suggesting or recommending candidates to the governing body of the Commission'.[25] As noted above, there was no representation of different segments of society in the selection of members of the Commission, either in law or in practice.

The Commission currently comprises 16 Commissioners. Of the current composition of the 16, 10 are either retired civil servants or

24 Ibid.

25 Ibid.

from state-run universities or academic institutions. Only 5 of the 6 Commissioners (31%) are women.[26]

Currently, under Section 5(4) of Act 597, Commissioners hold office for two years and are eligible for re-appointment. Their re-appointments are at the prerogative of the Prime Minister, hence there is a real danger that Commissioners will practice self-censorship and conduct themselves in such a way that they secure renewal of tenure. The short term of tenure was also a source of concern for the ICC-SCA, as noted above. Only on 25 March 2009 were amendments made to increase the term of Commissioners from two to three years, and limit re-appointments to a maximum of one additional term.

SUHAKAM Commissioners continue to serve on a part-time basis and are not exclusively focused on human rights work. There is no requirement under its enabling law or regulations for SUHAKAM Commissioners to avoid outside interests or declare them publicly.

D. Resourcing of the NHRI

Section 19(1) of Act 597 stipulates that the Government shall provide the Commission with adequate funds for its operation while Section 19(2) prohibits the Commission from receiving foreign funding. Further, Section 19(3) only allows local funding from individuals or organizations for the purposes of promoting awareness or for human rights education. SUHAKAM's budget for 2008 was MYR 10,573,204 (approximately USD 2.96 million).[27]

Effectiveness

A. Complaints-handling and public inquiries

SUHAKAM has formed several working groups to enable the Commission to work more effectively. These working groups

26 The Commissioners' profiles are available on the Commission's official website: http://www.suhakam.org.my/en/about_com_member.asp

27 SUHAKAM (2009a) op. cit. (p. 222).

include education and promotion; economic, social and cultural rights; law reform and international treaties; research and policy; and complaints and inquiries. Part III of Act 597 clearly stipulates the powers of the Commission with regard to complaints and inquiries. Section 12(2) in particular gives powers to the Complaints and Inquiry Working Group (CIWG) to institute an inquiry on a complaint made to it by or on behalf of an aggrieved person or persons. The CIWG is also vested with powers to institute an inquiry of its own accord.[28]

The CIWG serves as an alternative to the courts for people to seek remedy for human rights violations. The Commission has its offices in Kuala Lumpur (for Peninsular Malaysia), Sabah and Sarawak. Most of their offices are located in the cities, making it difficult for people from suburban and rural areas to lodge their complaints. The CIWG has no mobile ground staff in these areas to reach out to local communities. Victims must therefore travel to their offices to file complaints.

The CIWG receives complaints through telephone, letters, and e-mails, as well as in person. From January to December 2008, the Commission received a total of 1,136 complaints. Of these, 532 are in relation to human rights violations, including complaints about law enforcement officers and the abuse of police power, detention under the Internal Security Act (ISA), the Dangerous Drugs Act (DDA), trafficking in persons, asylum seekers and refugees, and migrant workers. The other 604 complaints involved the administrative inefficiency of government agencies, crimes that require investigation and cases that were either pending trial or had been disposed by Court, which are not within their jurisdiction.[29]

The bulk of the complaints are from the Eastern Malaysian state of Sabah, with 314 cases recorded compared to 168 cases from Peninsular Malaysia and 50 from Sarawak. The majority of Sabah's cases relate to customary and native land rights followed by complaints against the National Registration Department.[30]

From the 532 complaints it received, 217 cases were investigated and completed while the rest are still under investigation. There

28 Section 12(1), Human Rights Commission of Malaysia Act 1999 (Act 597).

29 SUHAKAM (2009a) op. cit. (p. 35).

30 Ibid. (p. 36).

were 44 complaints about police abuse of power, brutality during interrogation and inaction regarding reports lodged. The Commission adopts different approaches to addressing each complaint. These may range from providing information or referring them to the relevant authorities, to conducting a public inquiries if the situation warrants it.

A recent example of a case referred to SUHAKAM concerned an incident that took place in Bandar Mahkota Cheras on 27 May 2008, Kuala Lumpur, where a police officer was alleged to have used excessive force. The Commission conducted a public inquiry and even exercised its power under Section 14(1)(c) of Act 597 to subpoena four police officers from the Kajang District of Police to give evidence.

The public inquiry into the incident in Bandar Mahkota Cheras was the only one held in 2008. It must be noted that the Commission failed to conduct a public inquiry into other serious human rights violation cases, despite being presented with concrete evidence.

On 15 May 2008, the Bar Council's Human Rights Committee, Suara Rakyat Malaysia (SUARAM) and Tenaganita handed a joint memorandum on a fire incident at Lenggeng Detention Centre to SUHAKAM. The memorandum revealed discrepancies between media reports and eyewitness accounts, as well as violations of the rights of detainees. Specifically, the memorandum revealed an incident of severe mistreatment of and violence against nine detainees by immigration officers on 20 April 2008.[31]

Upon receiving the memorandum, SUHAKAM Commissioner Siva Subramaniam stated that the Commission had visited the victims and that their findings concurred with the memorandum. He also commented that root cause of the incident was a violation of human rights and that the authorities tried to 'hide everything that has happened'. He also made a strong statement calling it 'one of the worst incidents that have taken place in Malaysia', stating that action must be taken against the officers who took part in the

31 See 'Memorandum Submitted to SUHAKAM on the Fire Incident at the Lenggeng Immigration Detention Centre', submitted by the Bar Council Human Rights Committee, SUARAM, and Tenaganita on 15 May 2008.

human rights violation. However, despite such strong statements by the Commissioner, in its June monthly meeting SUHAKAM decided to reject civil society's call for a public inquiry to be held.

B. Recommendations in formulating legislation and administrative directives and procedures

The year of 2008 saw increasing calls to abolish the ISA, a law which provides for detention without trial, especially after the arrest of a blogger, a member of parliament and a journalist—all three of whom were picked up within a period of 24 hours on 12 September 2008—as well as leaders of the Hindu Rights Action Force (HINDRAF) in December 2007.

Since 2003, SUHAKAM has consistently advocated that the ISA be repealed. The Commission maintains that no one should be detained without proper charge under appropriate law. Concerned with the increasing number of complaints about preventive laws, SUHAKAM proposed to invite relevant government ministries and agencies to participate in a closed-door discussion on the issue, but was rejected.[32] Despite SUHAKAM's consistent position and its numerous reports and recommendations pertaining to preventive detention, the government has not acted substantively on any of these. SUHAKAM's campaign against the ISA has not extended beyond reports and press statements—a demonstration of its limitations in this aspect of its promotional mandate.

In 2008, SUHAKAM conducted 37 visits to places of detention in accordance with its mandate in Section 4(2)(d) of Act 597.[33] Following these visits, the Commission made several important observations and recommendations to the Government regarding the general conditions and facilities of these places, including the quality of medical services and food served to detainees. They also recommended that the authorities to introduce more vocational courses and opportunities to continue formal education for young inmates and unaccompanied children in detention centers. However, SUHAKAM's reports have never been debated in parliament,

32 SUHAKAM (2009a) op. cit. (p. 38).

33 Ibid. (pp. 41-42).

and the government seldom acts upon its recommendations. The impact of these recommendations remains to be seen.

In SUHAKAM's report on its public inquiry into police violence at Bandar Mahkota Cheras, the Commission concluded that the police had used excessive force and breached international standards outlined in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officers.[34] SUHAKAM said:

'Similar recommendations made in SUHAKAM's Report of Public Inquiry into the Incident at KLCC on 28 May 2006 and SUHAKAM's Report on Freedom of Assembly have remained unheeded by the Police. This is evident by the recurrence of excessive use of force and unprofessional Police conduct in the dispersal of peaceful assemblies in the past and the incidents of heavy-handedness action of Federal Reserve Unit (FRU) personnel which was evident from this Public Inquiry.'[35]

SUHAKAM made three main conclusions:[36]

- That there was excessive use of force by law enforcement personnel against Chang Jiun Haur and Chan Siew Meng during the incident;
- That this use of force had violated the safety and security of Chang Jiun Haur and Chan Siew Meng; and
- That the police and FRU personnel were responsible for the violation of human rights in this incident.

SUHAKAM also recommended that:[37]

34 SUHAKAM (2009b) *Report of SUHAKAM Public Inquiry Into the Allegation of Excessive Use of Force by Law Enforcement Personnel During the Incident of 27th May 2008 at Persiaran Bandar Mahkota Cheras 1, Bandar Mahkota Cheras*, Kuala Lumpur: SUHAKAM.

35 Ibid.

36 Ibid.

37 Ibid.

- The police and FRU urgently implement the international standards as guidelines for their personnel on the use of force;
- The police and FRU require all their personnel to display their names and badge numbers visibly and clearly during field operations; and
- The police conduct their own investigations to ascertain which personnel used excessive violence with a view of taking disciplinary action against the said personnel and, where necessary, to recommend to the Public Prosecutor for further action.

Although these recommendations are appropriate and based on international standards, the fact that SUHAKAM reiterated its previous recommendations on police conduct during public assemblies demonstrates that the government had not acted substantially upon the Commission's previous recommendations, thus revealing the SUHAKAM's ineffectiveness.

Aside from government reluctance to implement SUHAKAM's recommendations, another problem is the Commission's failure to monitor public assemblies as part of its duty. Despite the fact that SUHAKAM has noted the excessive and unwarranted use of force by police in public assemblies on various occasions, it has not been willing to make itself visible during public assemblies to ensure that its recommendations are observed by law enforcement agencies. None of the SUHAKAM Commissioners were known to be present in any of the public assemblies in 2008 which involved arrests and the use of force by police.

C. Encouraging ratification of international human rights treaties

In the ICC's fourth recommendation to SUHAKAM, the international body stated that it 'would like to highlight the Human Rights Council and its mechanisms (Special Procedures Mandate Holders) and the United Nations Human Rights Treaty Bodies. This

means generally NHRIs making an input to, participating in these human rights mechanisms and following up at the national level to the recommendations resulting from the international human rights system. In addition, NHRIs should also actively engage with the ICC and its Sub-Committee on Accreditation, Bureau as well as regional coordinating bodies of NHRIs'.[38]

With regard to SUHAKAM's mandate to encourage the ratification of international human rights treaties and instruments,[39] results have been severely lacking. Of the nine core international human rights treaties, Malaysia has only ratified two, both of which with reservations. This disinterest on the part of the Malaysian government underscores the weakness of the Commission in this aspect of its mandate.

Consultation and Cooperation with Civil Society

While SUHAKAM has generally had an ambivalent relationship with human rights NGOs, many still see the importance of the Commission and continue to cooperate with it. One reason is that SUHAKAM has access to locations, such as places of detention, where human rights violations frequently occur and which are not easily accessible to civil society groups. However, the level of cooperation between SUHAKAM and NGOs varies from one group to another.

In May 2008, SUHAKAM set up a new working group on civil and political rights, whose work was to include organizing dialogues and roundtable discussions with both civil society organisations and political parties, and to obtain feedback from the public on civil and political rights.[40] This working group held four consultations and discussions with civil society throughout 2008, some jointly with other working groups of the Commission.

38 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, op. cit. (p. 10).

39 Section 4(1)(c) Human Rights Commission of Malaysia Act 1999 (Act 597).

40 SUHAKAM (2009a) op. cit. (p. 73).

They were:

- Dialogue session with NGOs in Sabah on 12 June 2008;
- Dialogue session with NGOs in Kuala Lumpur on 17 July 2008;
- Roundtable discussion with trade unions on 11 August 2008; and
- Dialogue session with NGOs and the media in Sarawak on 12 August 2008.

SUHAKAM organised other consultations with civil society groups during 2008 through its working groups, such as the Economic, Social and Cultural Rights Working Group.[41] While the Commission was beginning to make some efforts to improve its cooperation with civil society organizations, setting up the Civil and Political Rights Working Group and discussing the establishment of a mechanism under this working group to assist human rights defenders at risk in the course of their work,[42] later developments put its plans into ambiguity. This working group was subsequently merged with the Economic, Social and Cultural Rights Working Group and renamed the Economic, Social and Cultural Rights & Civil and Political Rights Working Group, making the future direction of SUHAKAM's cooperation with civil society organizations unclear. For instance, although this newly-merged working group announced that it has established a human rights defenders desk to improve its protection of human rights defenders,[43] to date, the desk has not been functioning actively.

41 Ibid. (p. 47-59).

42 SUHAKAM Civil and Political Rights Working Group, Discussion with NGOs, 8 October 2008. See also Report of Dialogue Session on Civil and Political Rights, 17 July 2008.

43 This was announced by Commissioner Michael Yeoh in a Roundtable Discussion with NGOs on 11 March 2009. According to the commissioner, '[T]he idea of setting up the Human Rights Defenders Desk arose from suggestions from participants of the previous civil and political rights session with NGOs held on 17 July 2008. As human rights defenders from NGOs and civil society face risks of arrest and harassments at public assemblies and demonstrations from law enforcement [personnel], participants urged SUHAKAM to publicise the need for protection of human rights defenders.' See Report of the Roundtable Discussion on Economic, Social and Cultural, Civil and Political Rights with NGOs, 11 March 2009 (p. 2).

There was some form of institutionalised cooperation between SUHAKAM and certain civil society groups on specific issues in 2008. For instance, in its work on the rights of women, particularly in monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Human Rights Education and Promotion Working Group of SUHAKAM established a Sub-Committee on Women's Rights in February 2008.[44] This Sub-Committee comprises representatives of the Ministry of Women, Family and Community Development, NGOs working on women's issues and a number of gender and women's rights experts. Among the major activities of this Sub-Committee in 2008 was a CEDAW Orientation Course for SUHAKAM staff and resident facilitators held in August 2008.[45]

On a less institutionalized level, SUHAKAM collaborated with some NGOs in conducting trainings and workshops on various human rights issues. For instance, in June 2008, SUHAKAM invited SUARAM to assist them in their human rights training session for police officers.

However, in most other areas of SUHAKAM's work, its cooperation and consultation with civil society groups can be described as irregular and lacking follow-up. In the past few years SUHAKAM has held roundtable discussions with civil society groups on numerous issues. In 2008, these included a consultation with NGOs on Malaysia's Universal Periodic Review held on 14 August 2008. However, many of these have not resulted in visible follow-ups or feedback on proposals made during the discussions. In the case of SUHAKAM's work on the UPR, for example, its consultation with NGOs held in August was not followed up with any further meetings. This problem was raised by several NGO representatives present at a roundtable discussion organized by the Economic, Social and Cultural Rights & Civil and Political Rights Working Group on 11 March 2009.

The year 2008 also saw instances where SUHAKAM chose not to engage at all with civil society groups on some important issues. For example, in response to the ICC's recommendations

44 SUHAKAM (2009a) op. cit. (p. 55).

45 Ibid. (p. 31).

NGOs were kept in the dark, unable to providing their input to the Commission. Moreover, the Commission did not engage with civil society groups on the implementation of the ICC's recommendations, despite the fact that various groups—some of which have long been working on issues relating to national human rights institutions—had earlier made proposals to the government to help strengthen and improve SUHAKAM.[46]

Recommendations

A. To the Government

- Further amend the Human Rights Commission of Malaysia Act 1999 (Act 597):
- to provide SUHAKAM with wider powers and mandate, which include all rights in the Universal Declaration of Human Rights and other international human rights laws—a concern which was raised during Malaysia's UPR on 11 February 2009;[47]
- to ensure transparency in the selection process of Commissioners, with full consultation with civil society by setting an independent committee to select Commissioners which includes civil society representatives;
- to ensure that all Commissioners are full-time;
- to clarify SUHAKAM's powers to prevent Section 12(2) from undermining its work by the simple means of taking matters to court, and to allow SUHAKAM the discretion to conduct an inquiry after disposal of the matter in court;

46 See, for instance, Joint press statement by 44 Malaysian civil society organizations, 'Imminent downgrading of SUHAKAM: Government must take action', 25 July 2008.
47 Draft Report of the Working Group on the Universal Periodic Review, "Malaysia", A/HRC/WG.6/4/L.16, Working Group on the Universal Periodic Review, Fourth Session, Geneva, 2-13 February 2009 (paragraph 106(7), p. 26).

- to give powers to SUHAKAM to conduct spot checks on places of detention;
- to ensure that SUHAKAM reports directly to parliament, rather than being placed directly under the Prime Minister's Department; and
- to compel SUHAKAM's reports to be officially tabled and debated in parliament.
- Hold full and meaningful consultations with civil society before any further amendments are tabled in parliament.

B. To Parliament

- Ensure meaningful debate on further amendments to Act 597, should they be tabled in parliament.
- Consult with civil society on further amendments to Act 597, should they be tabled in parliament.
- Push for debates in parliament whenever SUHAKAM releases its reports, which include annual, as well as thematic, reports.
- Monitor the performance of SUHAKAM with regard to its mandates and functions as an NHRI, as well as the government's implementation of SUHAKAM's recommendations.

C. To SUHAKAM

- Include civil society when making proposals to the government to improve the independence and effectiveness of SUHAKAM, including when proposing amendments to Act 597.
- Intensify public campaigns, especially on issues where recommendations have been ignored by the government.

- Play an intermediary role between civil society and relevant ministries or government departments by holding regular constructive meetings.
- Ensure prompt feedback and follow-up to outcomes of meetings with civil society.
- Share information and collaborate with civil society, particularly in areas where civil society lacks access, such as visits to prisons and other places of detention.
- Conduct regular monitoring on the ground, particularly in cases where there are imminent threats of human rights violations.
- Clarify the functions and mandates of the human rights defenders desk, which was reported to have been established, and intensify its activities to ensure better protection of, and closer collaboration with, human rights defenders around the country.

Postscript

On 26 March 2009, just one day after the amendments to the Human Rights Commission of Malaysia Act (Act 597) were hurriedly-passed by the Lower House of the Malaysian Parliament, the ICC-SCA convened its special review of SUHAKAM. In its special review, the ICC-SCA recommended 'that consideration of [the accreditation status] of SUHAKAM be deferred to its next session' as the amendments to the enabling law of SUHAKAM was still then before the Upper House of the Parliament.[48] The ICC-SCA also noted that 'some of the concerns it raised at its April 2008 session have been addressed (e.g. the expansion of the term of office to 3 years renewable)'.[49]

48 Under the Malaysian parliamentary system, a bill has to be passed firstly by the Lower House, followed by the Upper House. When a bill has completed these two parliamentary stages, it will need the Royal Assent by the King before being gazetted as a law.

49 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', Geneva, 26-30 March 2009 (p. 10).

The ICC-SCA further:[50]

- expressed its disappointment that the amendments do not make the process more transparent through a requirement for broad based participation in the nomination, review, and selection of Commissioners and recommended that the process be further strengthened through inclusion and participation of civil society;

- expressed its concern with regard to the inclusion of performance indicators, as established by the Prime Minister, used in relation to re-appointment or dismissal decisions, and stressed that such requirements must be clearly established; appropriately circumscribed, so as not to interfere in the independence of members; and made public; and

- stressed the need for SUHAKAM to continue to promote ratification and implementation of international human rights instruments.

On 22 June 2009, further amendments to Act 597 were tabled for the first reading in the Lower House of the Malaysian Parliament, in an apparent attempt by the government to prevent SUHAKAM from being downgraded by the ICC. However, the proposed amendments made only minor and minimal changes to the previous amendments passed in the Lower House of Parliament in March 2009. The only amendments proposed under the current bill were:[51]

- that the members of the Commission will now be appointed by the King of Malaysia on the advice of the Prime Minister, who in turn, consults with a proposed committee under the amendment bill consisting of the Chief Secretary of the Government as the Chairman, the Chairman of the Commission and three other members appointed from amongst civil society by the Prime Minister; and

50 Ibid.

51 Human Rights Commission of Malaysia (Amendments) (Amendments) Bill 2009.

- the omission of the provision in the March 2009 amendments which stated that the opinion, view or recommendation of the committee upon consultation by the Prime Minister will not be binding on the Prime Minister.

Despite the inclusion of members of civil society in the proposed committee, there remain concerns that no provision is included to ensure civil society's full and transparent participation in the process. Another concern is the possibility of government-organized NGOs being appointed by the Prime Minister to the proposed committee that will be consulted by the latter for appointments.

Furthermore, the amendments only address one of the several concerns raised by the ICC. Other concerns of the ICC, such as those pertaining to the transparency of performance indicators for Commissioners, as well as SUHAKAM's role in encouraging ratification of international human rights treaties, are ignored.

In response to these government-proposed amendments, on 1 July 2009, SUARAM and ERA Consumer submitted its own proposal for amendments to the Prime Minister's Department, noting that the two latest amendments made would not be adequate to ensure SUHAKAM's full compliance with the Paris Principles. With regard to the recommendations of the ICC-SCA in its March 2009 report, the two NGOs proposed the following amendments to Act 597:[52]

- A change in the composition and procedures of the proposed selection committee to ensure transparency and public participation, and the inclusion of a process for public nomination of candidates;

- The inclusion of a provision which ensures that the proposed performance indicators for commissioners are made public; and

- The inclusion of a provision which compels reports of SUHAKAM to be debated in Parliament to ensure

52 See Proposed Amendments to the Human Rights Commission of Malaysia Act (Act 597) by SUARAM and ERA Consumer, June 2009; and SUARAM, Letter to Datuk Seri Mohamed Nazri Abdul Aziz, 'Re: Proposals by Human Rights NGOs for Amendments to the Human Rights Commission of Malaysia Act', dated 1 July 2009.

that SUHAKAM's recommendations, including those pertaining to ratification to international human rights treaties are acted upon by the government.

Besides these, other longstanding concerns of civil society were also proposed by the two NGOs, including that all Commissioners serve full-time in office and to place SUHAKAM under the Parliament instead of the Prime Minister's Department so as to ensure structural autonomy from the Executive.[53]

However, none of these proposals were adopted by the government, and on 2 July 2009, the government-proposed amendments were passed by the Lower House of the Parliament.

53 Ibid.

Maldivian Civil Society Watches As Changes Surface

Prepared by the Maldivian Detainees Network (MDN)[1]

I - General Overview

The year 2008 was a crucial year for the Maldives. On 11 November, the Maldivian Democratic Party (MDP) took office as the country's first ever democratically elected government following its first multi-party presidential elections, President Mohamed Nasheed's party, the MDP had long emphasized the importance of human rights. August saw the ratification of the new Constitution, which many hope will pave the way for true democracy and safeguard human rights in the country.

Maldivian civil society remains cautious about the performance of the Human Rights Commission of the Maldives (HRCM) within the new government. People are focusing greater interest on the Commission members, all of whom were elected during the previous regime of Maumoon Abdul Gayoom, and who often seemed biased towards that regime, not least because of the Commission's ineffectiveness in dealing with major and obvious human rights violations perpetrated by the government. Their performance in 2009, in the first year of the transition of power after thirty years of repression, will be paramount in determining the independence and effectiveness of the Commission and its members.

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Another significant development is the appointment of Mr Mohamed Latheef as Human Rights Ambassador by President Nasheed in November 2008. Mr Latheef was one of the founders of the MDP and continued to serve the party, especially in liaising with international human rights actors. The Maldivian Detainee Network (MDN) was unable to obtain any details of Mr Latheef's role as regarding his mandate, current work, or activities carried out as Human Rights Ambassador. The President's Office informed the MDN that the existing (but as yet undisclosed) mandate of the Ambassador is currently being're-evaluated' internally, and was therefore unavailable. Further queries with the Commission led us to understand that the Ambassador will liaise between the government and the Commission, ensuring that the Commission's recommendations are followed up by the government. The Ambassador has also worked with the HRCM on a project regarding the increasing crime rate, although the MDN was unable to determine the extent of the Ambassador's involvement in these activities.

The HRCM's performance between January and December 2008 can be assessed by observing the major national human rights issues, and the actions taken by the HRCM regarding these issues. These are summarized in the table below.

	Key Issues	Action taken by the HRCM
1	In November 2008, the newly appointed President sent a delegation along with one NGO to the central prison the day after his inauguration. He made various promises to inmates, including the review of individual cases, as well as submitting a bill to parliament to review sentences for those detained on drug consumption charges.	None.
2	In January 2008, the Criminal Court ruled the case of the gang-rape of a 12 year old girl as one of consensual sex. The five perpetrators were sentenced to six months banishment to other inhabited islands. A local NGO contacted the HRCM to inquire whether they would be addressing the particular issue.	The HRCM met with a few NGOs to discuss issuing a press statement condemning the court ruling. At the meeting the HRCM's Vice President informed the NGOs that the HRCM would lose credibility if it partnered with NGOs in the statement; the NGOs expressed their view that the statement was too diplomatic and did not condemn the issue sufficiently. The HRCM disagreed and went ahead with the statement without the endorsement of civil society. A group of local NGOs subsequently issued a stronger press release.

3	In March 2008, a director of the former President's office was accused of sexually abusing his daughter and other children of his extended family.	No action was taken by the HRCM. The Prosecutor General filed the case at the Criminal Court in December 2008 and it is presently ongoing, though very slowly. Several more cases of severe child abuse have surfaced and no proper action has been taken. The HRCM has not made any statements about the slow pace of child abuse prosecution cases.
4	In March 2008, the government proposed amendments to the existing Civil Service Act which would compromise certain rights and freedoms of civil servants. Eight NGOs conducted a one-week campaign against the proposed amendments and lobbied parliament and the HRCM. Shortly after this campaign, parliament rejected all of the government's proposals.	The HRCM sent a representative to public forums organized by the NGOs, but did not take any further action regarding the issue.

5	Inmates at Maafushi prison rioted and protested on three separate occasions. One incident involved prisoners carrying out hunger strikes and setting fire to sections of the prison between January and April 2009.	The HRCM failed to monitor or visit the prison during the hunger strike, even though the HRCM is the National Preventive Mechanism under the Optional Protocol to the Convention Against Torture (OPCAT). However, on the advice of a visiting consultant that the HRCM should be present at such incidents, it did conduct visits during the later riots that followed the events of January 2009.
6	Nine murders relating to street violence occurred in very quick succession between February and April 2008.	The HRCM released a press statement raising the issue, but took no further action. Local NGOs, by contrast, wrote to relevant authorities offering assistance in raising awareness and met with some authorities in order to discuss concerns and make suggestions.

7	In August 2008, prison authorities brought a detainee to Hospital in Male' with a broken collarbone as a result of police brutality. The Maldivian Detainee Network contacted the President of the HRCM to investigate the matter.	The HRCM President informed the MDN that he would look into the matter the following day as the working day was over at that time, but eventually agreed for HRCM staff to visit the victim on the same day following further pressure from the NGO. As far as the MDN is aware, no other action was taken.
8	Prior to the October 2008 presidential elections, hundreds of voters found that their names were missing from the electoral roll. NGOs received several complaints regarding voter registration from voters who had also informed the HRCM and the Elections Commission.	Prior to the elections, the HRCM announced that they would not observe or monitor the elections as such, but would be present at the polling stations to assess whether any human rights were being violated.

	On polling day, hundreds of voters again found their names absent from the electoral roll. Although Maldivian detainees had been allowed to vote for the first time, and the Department of National Registration promised national identity cards to detainees two weeks prior to the elections, the cards had still not been received by detainees by noon on polling day. In the case of one Maafushi Detention Centre, only 250 of some 700 prisoners were able to vote. Meanwhile, many island inhabitants were unable to vote when only members of the then ruling party, the Dhivehi Rayyithunge Party, were processed in time to vote. There were several other complaints regarding missing ballot papers and ballot boxes being sealed prematurely while people were still in line to vote.	The HRCM took no action over the issue.
	The Elections Commission then decided to postpone the elections until the matter could be resolved. The opposition leader (and current president) intervened, demanding that the elections be carried out, stating that he had been present at several polling stations and questioned several voters. The Elections Commission subsequently overturned its announcement and voting was carried out as planned, despite several complaints to the Elections Commission and HRCM as well as disagreement from NGOs.	Although candidates are prohibited by law to enter polling stations except to cast their own votes, the HRCM failed to address the issue despite the fact that a Presidential Candidate announced his visits himself.

9	Human rights promotion.	The HRCM has always focused on the promotion of human rights as opposed to protection. It celebrates international human rights events such as International Human Rights Day and International Day for the Prevention of Child Abuse). During one-day events such as children's festivals, the HRCM may distribute information leaflets and posters but does not follow these activities with proper education of the public.
10	Defending human rights defenders (HRDs).	Three years after MDN requested protection for HRDs, the HRCM has still not created any such mechanism. MDN has requested that member of HRCM staff is allocated to the protection of defenders via a separate department or, at minimum, a dedicated desk from which defenders may seek assistance. The HRCM maintains that HRDs can follow the public complaints mechanism – submitting complaints directly to the HRCM offices or through its website.

11	The people of the Maldives have been unable to practice freedom of expression and participation during the fast-paced reform process following the change of government in October 2008. The reforms of the new government have been less than democratic. While essential bills – such as the Bill on Decentralisation which the government has proposed to the parliament – are being debated, and parts have already been implemented, these changes are often imposed on the population who remain largely unaware of the substance of the reforms. During his visit to the Maldives in March 2009, UN Special Rapporteur for Freedom of Opinion and Expression Mr Frank La Rue met with government, HRCM and the civil society members to assess the general situation of the country. In his recommendations Mr La Rue stated that the government needed to establish a system of communication and consultation in order to make the public more aware of the reforms taking place. Mr La Rue also advised parliament to resume the debate on freedom of expression legislation, which they had shelved after disagreements. http://www.minivannews.com/news_detail.php?id=6119	The HRCM has not given any suggestions to the government regarding the encouragement of the right of participation by the general public and civil society. Neither has it commented on the right to free expression about these reforms. The HRCM has not made any comments following Mr La Rue's recommendations while the government continues to make decisions without proper public consultation in the name of democratic reforms.

II - Independence

The HRCM was first established by presidential decree on 10 December 2003. It became a constitutionally established autonomous body on 18 August 2005 with the ratification of the Human Rights Commission Act, which was amended and passed by parliament as Law No: 6/2006 and ratified by the president on 17 August 2006.

During its first four years the HRCM claimed it was unable to effectively fulfill its mandate because it lacked adequate office space. However the Commission was already running administrative offices on three floors of an office building since the initial HRCM and employed sixteen staff members in 2007. On 1 May 2008, the Commission moved its staff to a sufficiently large office occupying two floors of a building in central Male', as well as employing 27 new staff including four at director level (one of whom later chose to leave). Even though the HRCM has the power and ability to select and choose its own staff, the MDN has discovered through conversations with ex-HRCM staff, that they often feel frustrated and undermined by the members of the Commission. It may prove worthwhile to examine the employee turnover at the Commission in future.

Relationship with the Executive, Legislature, Judiciary and other specialized institutions in the country

The Human Rights Commission Act gives the Commission the power to 'inquire into complaints on infringements of human rights filed against government authorities or private organisations'.2 Therefore, while the HRCM should have no restrictions on investigating the state, in practice the HRCM often fails to exercise completely its powers of inquiry. The only limits placed on the HRCM are outlined in Article 22, which states that the Commission shall inquire into the matter in its own capacity 'should a government authority fail within the given period of

2 Article 21 (f), The Human Rights Commission Act, ratified on 18 August 2005. [http://www.minivannews.com/news_detail.php?id=6119]

time to provide information or submit a report requested by the commission regarding a complaint filed at the commission'.3 Here, the limitation arises from the HRCM only being able to inquire into complaints that are filed at the Commission, where-else, in other instances, it is possible for agencies to obstruct the work of the Commission, if a complaint has not been lodged at the Commission. The HRCM's 2008 annual report does outline cases in which the Commission obtained and utilised information from various government and private authorities in their investigations into alleged human rights violations.

The Human Rights Commission Act also states: 'It is a duty of Maldivian citizens and persons within the jurisdiction of the Maldives… to obey orders to summon to the Commission, or provide information or submit a document … or act or refrain from committing an act required by the Commission…'4 It is significant that the law only mentions citizens and persons, not authorities. No mention is made anywhere else with regards to the role of authorities. In practice, the Commission has spoken out about the lack of co-operation by authorities in submitting information – information which may come late, or not at all. The Commission's reports are also given little consideration by authorities and its recommendations are routinely ignored, the HRCM's report on the housing situation in the Maldives being the most recent example.

The HRCM reports to parliament. Even though the Commission is given access to its Committees, Commission reports were rarely given serious consideration or debated in parliament. The Commission does not have regular sessions with parliament; instead, it has sessions with Parliamentary Committees on an ad hoc basis for individual cases of particular importance.

The Commission has never intervened during parliamentary deliberations on draft laws that would affect the human rights situation in Maldives, though this is not expressly prohibited under the Act. The HRCM continues, however, to comment on a number of draft laws that would affect the human rights situation before they are debated in Parliament. For example, the HRCM

3 Article 22 (b) 5, The Human Rights Commission Act.

4 Article 26 (a), The Human Rights Commission Act.

commented on the Bill on the Right to Freedom, stating the importance of defining 'the right to information' in the broadest terms possible. The Commission also recommended amending the bill to ensure that people requiring information are able to access it quickly and easily.

Many of the Commission's current staff had previously worked in the mainstream public service. The current ruling party has accused the Commission of being biased towards the previous government during their time in office.

The HRCM does not make effective use of its subpoena powers. In many cases information has been withheld from the HRCM, and it has been obstructed by the state in investigating matters, but the Commission has taken little or no action regarding these.

While the Government has not publicly declined to act on an HRCM recommendation, it often ignores these recommendations. As far as MDN is aware, the Commission does little more than issue a press release or inform the media about these issues.

The Government has both defended the independence of the HRCM and criticized the HRCM on separate occasions. Most recently, in a speech to the Commission at an event marking Human Rights Day 2008, the former president Mr Maumoon Abdul Gayyoom called for the Commission to criticize the government when necessary. In practice, however, the recommendations of the Commission are given little consideration by the government and are sometimes criticized outright – as in the case of a statement released by the Commission of 119 inmates of the Maafushi Island Prison being transferred to house arrest. The Commission followed an endorsement of a statement by the Attorney General which stated the transfer was unconstitutional. The government called the Commission being 'too legal' and dismissed the whole statement which condemned the illegal transfer.

Courts do recognize the status of the Commission. However, the MDN is not aware of any communications between the Commission and the courts. The HRCM does have a statutory right to intervene

in court cases under the Human Rights Commission Act, which states that the Commission can submit information in relation to an infringement of human rights of a person in an ongoing trial, with the permission of the presiding judge.5 Courts do receive cases from the Commission. However, the MDN is not aware of any cases in which courts have referred cases to the Commission.

The HRCM operates independently of the judiciary, and possesses no links to it in terms of the composition of its members or otherwise, and there is no existing culture of deference to the judiciary.

As of yet, the HRCM has not taken up a position challenging the government, either domestically or in the UN or any other international forum.

Membership and Selection

New members of the HRCM are selected as follows: the president forwards the names of new nominees to parliament. An ad hoc seven-member committee of parliament members then reviews these nominees and sends approved names to the general assembly for a vote.

Only the president can nominate new members of the HRCM. The President's Office announces vacancies for the Commission – as is the case with other independent commissions – and interested parties send in applications to the president. The President's Office normally conducts interviews with all applicants. The number of names recommended to parliament is at the president's discretion.

There are no public hearings to select and confirm new members. The qualifications for membership are specified by the Human Rights Commission Act, which states that members 'shall be appointed from human rights organisations and among persons who are active in promoting Human Rights in social and technical fields such as religion, law, society, economy and health'.6

5 Article 23, The Human Rights Commission Act.

6 Article 4 (b), The Human Rights Commission Act.

The Act does not stipulate that the composition of HRCM membership must reflect a pluralistic society, including gender balance and the representation of minorities and vulnerable groups. However, the current composition of the HRCM (three male and two female members) does represent gender balance.

The law does provide for a fixed term of office for Commission members. The Human Rights Commission Act provides for a five-year term for members,7 who may then be re-appointed for a further five years. The Act also lists circumstances in which a member's post shall be deemed vacant.8 The president may dismiss members by submitting the matter to parliament and gaining a two-thirds parliamentary majority9.

In listing the responsibilities of Commission members, the Human Rights Commission Act does not include a duty for members to act independently.10 However, conflicts of interest between responsibilities to the Commission and self-interest or personal gain are stated as legitimate grounds for dismissal.11

There has never been any instance where a member of the HRCM intervened in political life in a way that compromised the independence of the institution.

While there is no official code of ethics for members' conduct, the Human Rights Commission Act states that a member 'shall not involve to any extent, in a matter concerning their self-interest, personal involvement, or financial or any other personal gain…'12 The HRCM should be independent of vested interests: members cannot hold elected office or political positions, be employed in the government or private sector, be a member of a political party or involved in the activities of a political party.13

Commissioners are continually provided with human rights training from the time they are appointed. International consultants

7 Article 7, The Human Rights Commission Act.
8 Article 11, The Human Rights Commission Act.
9 Article 15, The Human Rights Commission Act.
10 Article 13, The Human Rights Commission Act.
11 Article 15, The Human Rights Commission Act.
12 Article 28, The Human Rights Commission Act.
13 Article 6, The Human Rights Commission Act.

and organisations, including The Raoul Wallenberg Institute for Human Rights and Humanitarian Law and the Asia Pacific Forum, also provide advice and assistance.

Most of the current members have little experience working in the field of human rights or engaging with civil society. They were all previously employed in the government sector, and some members have been informally accused by the general public of being biased towards certain political parties, though none of them are open supporters of these parties.

This lack of a sufficient background in human rights – going against the Human Rights Commission Act – is the most important issue regarding Commission membership. While some of the members have practiced law and are familiar with the civil service and educational sectors, MDN feels that a more apparent and demonstrated interest and background in human rights should be one of the fundamental characteristics of a Commission member. As it stands, the current membership often seem neglectful of their mandate and display disinterest in or unawareness of certain human rights issues. This is of great concern to the MDN.

Resourcing of the HRCM

The main obstacle to the independence of the HRCM is its dependence on the state treasury, which provides the Commission with funds for its day-to-day operation. Although the HRCM is legally separate from the Executive, the Commission continues to be hindered in accessing funds. Even though its budget is approved by parliament at the start of the fiscal year, civil society has come across instances where the HRCM has delayed payment to various private firms or individuals who have been employed by the HRCM on an independent basis. In addition to this, the Commission also receives funds from international agencies for various projects carried out within the HRCM. In 2008, the HRCM received US$43,900 from UN agencies under their Support to the Human Rights Commission of the Maldives Project. The HRCM was initially agreed annual budget of US$668,477.56, but, with

requested additions throughout the year, this eventually reached a total of US$1,661,512. The majority of the finances were utilised, as specified in the Commission's annual report [the report in Dhivehi is available at http://hrcm.org.mv/publications/annualreports/AnnualReport2008Dhi.pdf], to conduct awareness campaigns, staff training, human rights related inquiries, and official overseas visits by Commission members and staff, as well as office space and employee costs.

According to its annual report, the Commission submitted its estimated 2009 budget directly to parliament for approval, because the previous year the Ministry of Finance had greatly reduced the suggested amount prior to submission to parliament. While the HRCM requested a budget of US$1,822,066 the agreed budget for 2009 stands at US$766,236.15. MDN understands that the HRCM requires more than this amount for their budget, and has now been granted US$1,176,470.50 for its annual budget following debates in parliament. Discussions on increasing the 2009 HRCM budget further are still ongoing.

The budget is not legally protected from interference or reduction under the Human Rights Commission Act. Although the Act provides for the preparation of a financial statement of the Commission in consultation with the Auditor General to be presented to the president and parliament,14 the financial statements for 2007 and 2008 have not yet been made public.

As stated above, the HRCM does have the ability to select and manage its own staff.

III – Effectiveness

The HRCM is mandated to do concrete work in promoting and protecting human rights, with a focus on complaints handling.

The HRCM has a dedicated department for handling complaints regarding human rights violations. Once a complaint has been filed, the complaints director in this department decides which cases to

14 Article 30 (c), The Human Rights Commission Act.

accept or reject. Rejected complaints are taken to a Commission meeting where the rejection is confirmed and the complainant notified through writing. The director then assigns a complaints department staff to the cases that are accepted, who conducts the investigation. At the end of the investigation, the case is taken to the Commission where a decision is made. The HRCM often relies on information provided by individuals or organisations during their investigations, which can cause delays in the process. According to MDN's research, the Commission does not do enough to hasten the process other than sending out letters.

The capacity of the HRCM to protect and promote human rights and provide redress in cases of violations are limited, as it is reluctant to expand and use its powers to the fullest extent in order to promote international standards. The HRCM invariably cites national laws and religious customs to restrict human rights.

According to the HRCM, victims of human rights violations can file their complaints by post or using complaints forms on the Commission website. If the matter is urgent, they may also register complaints by telephone. However, it should be noted that not all islands have readily available internet access. Furthermore, complaints made from outer islands may allege that island authorities have violated their rights, and the only means of addressing a complaint would be through the island offices. There have been multiple complaints to the Commission itself regarding difficulties with filing complaints by phone because of the difficulty in reaching appropriate staff at the Commission. The MDN itself has faced several problems contacting appropriate personnel at the Commission in the writing of this report. Staff at the HRCM, although helpful, are often hesitant to offer information that should readily be available to members of the public.

The HRCM annual report states that it received 705 complaints during 2008. The majority of complaints regarded employment-related human rights infringements, followed by detention, violence, and housing issues. Of the total, 421 of these cases have now been completed and acted upon and the informant notified, and 284 cases are ongoing. Because those cases rejected by the Commission are misleadingly categorized under the

'completed' cases, MDN cannot verify the amount of cases that were rejected by the Commission. As it stands according to the annual report, the HRCM has either sufficiently dealt with, or is continuing investigations with 100% of the complaints lodged at the Commission in the year 2008.

Those cases not acted upon by the HRCM are dismissed if they fall outside of the jurisdiction of the Commission, if all other possible avenues of relief have not been exhausted (for example, by government authorities or police), or if sentencing for the case has already been carried out under a court of law.

The MDN cannot confirm the number of times the HRCM has exercised its powers of subpoena, although it must be noted that it is done very rarely. We are aware that it was used in the case of the custodial death of a detainee, where it was then ruled that the HRCM did not have the authority to do so. It was then filed at the High Court in April 2008. The MDN understands that the HRCM lost the case.

The HRCM does not currently conduct any analysis of the types of cases or complaints it receives. A table of the numbers and types of complaints received by the Commission is included in its annual report which is presented to parliament and made public.

IV – Consultation and Co-operation with Civil Society

There is no law formalizing a relationship between the HRCM and civil society groups. At the time of writing, there is little interaction between the HRCM and civil society groups. NGOs based in and around the capital are invited to certain human rights based training workshops conducted by the Commission. However, the Commission has very little interaction with civil society groups based in outer islands, apart from the few training workshops held in these islands.

The HRCM did not hold regular consultations with civil society groups in 2008. However, it did conduct one-off consultations with certain NGOs regarding individual issues relevant to these NGOs'

areas of expertise. No feedback was shared with NGOs after such consultations, although the NGOs did request such information. The Commission did collaborate with NGOs working in the field of child rights, along with relevant government authorities, to mark the World Day for the Prevention of Child Abuse 2008 and the Prevention Week 2008. This campaign will be ongoing in 2009 with the same partners as last year.

In April 2009, the HRCM did announce the establishment of a 'network of communication and co-operation among NGOs involved in the field of human rights in the Maldives'. The objectives of this endeavor, according to the HRCM, 'are to assist and support the capacity development of NGOs, provide encouragement for existing NGOs in carrying out their activities and for new NGOs to actively participate in programs aimed at protecting, sustaining and promoting human rights, create strong bridges between provincial NGOs by providing a platform for regular communication and discussion of related issues, encourage better coordination and the effective implementation of activities aimed at protecting, sustaining and promoting a high regard for human rights in the country, achieve universal access to services provided by HRCM with the assistance of focal points in Island based NGOs, set up provincial NGO connections that would provide logistical and qualitative assistance during monitoring visits by HRCM, and eventually build a solid foundation of active island based NGOs which would assist in the set up of HRCM provincial offices in the future.' However, after the initial announcement of the establishment of this network in April, there have been no further announcements regarding the NGO network from the HRCM.

In conclusion, the HRCM continues to be largely ineffective in fulfilling its mandate of promoting and safeguarding human rights to international standards mainly because of its refusal to fully exercise its powers of inquiry and subpoena. In addition, the independence and effectiveness of the Commission are hindered by the inability of Commission members to take sufficient action against perpetrators of human rights violations. The outlook for the Commission remains unclear – the newly elected parliament is obliged by law to review all members of existing independent commissions in the next three months, and MDN believes that

the HRCM could benefit from its members being individually assessed for their personal effectiveness and dedication. The next few months, therefore, may prove crucial for human rights in the Maldives.

Recommendations

1. We strongly urge the HRCM to take more specific and stronger actions to fulfill all three of the Commission's mandate: to promote, protect and uphold human rights in the country.

2. Strengthen the HRCM as the National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture: use experts and professionals as NPM members in order to conduct proper monitoring and evaluation of prisons and other detention facilities.

3. We again stress the importance of establishing a mechanism to defend human rights defenders in the Maldives.

4. We believe that human rights violations can be better monitored and handled with a mechanism that informs relevant active NGOs about human rights violations complaints that are filed at the commission relating to their particular field of expertise.

5. Equal opportunities to be given to NGOs when working with them on issues – currently there is a trend of the HRCM working with certain NGOs, and often, NGOs outside of the Capital, Male' are often ignored completely.

Be proactive and independent!

Prepared by the Centre for Human Rights and Development (CHRD)[1]

I. General Overview of the Country's Human Rights Situation

General description of the human rights situation in the country

Mongolia's parliamentary election on 28 June 2008 sparked huge public protests, leading the declaration of a state of emergency under which numerous human rights violations were committed. On 30 June 2008, when the preliminary result of the election was publicly announced, thousands of people gathered in front of the headquarters of the People's Revolutionary Party. These demonstrators were concerned about electoral fraud and widespread vote-buying by the ruling party. On the afternoon of 1 July, this peaceful demonstration was followed by public disorder. At 11pm that same day, the President of Mongolia declared a state of emergency and ordered the use of force to immediately disperse demonstrations, meetings and other public events. The use of radio enhancement equipment was also prohibited, in order to stop the activities of broadcast media, radio and TV.

Police killed five demonstrators, while hundreds more were injured and arrested. In total around 716 people were arrested

1 Contact persons: G. Urantsooj, Chairperson of CHRD and D. Erdenechimeg, Program Coordinator of Human Rights Advocacy Program

including 21 women and 26 children – and allegedly tortured during arrest and while in detention. Police has been investigated 257 people for the involvement of demonstration and the courts have sentenced a total of 157 of those offenders to jail terms ranging from two to five years. Many of these courts violated fundamental human rights and legal principles such as the principle of equality before the law and court, and the principle of justice. Several advocates and lawyers who involved in court processes were concerned that their clients were sentenced without appropriate or sufficient evidence. Mongolian civil society is therefore concerned about the independence of Mongolia's judiciary. On the other hand, the state has still not taken any responsibility for the five deaths during the crackdown on the demonstration. Since July 2009, the Parliament has been discussing the draft Law on the Compensation for Victims, which aims to pay compensation to those who victimized during the 1 July turmoil and use of force against demonstrators by the state.

Key issues with the NHRI

As the main state body dedicated to the protection and promotion of human rights in the country, the National Human Rights Commission of Mongolia (NHRCM) should have played a crucial role in maintaining human rights and security during the state of emergency, when the state used force against its own people. Unfortunately, the Commission showed an unwillingness to react against human rights violations and displayed a lack of capacity to work independently from the government.

The Chief Commissioner did visit the detention center with other Commission staff in order to monitor the situation of those detained, especially the children and women. Yet the Chief Commissioner also gave an interview on national television – which was operating under control of the ruling party at the time – and said that there were no human rights violations in the detention center. Family members of detainees and civil society organizations in Mongolia viewed this statement as a clear demonstration of the government's influence over the NHRCM, proving that the Commission is not fully independent from the

government. Moreover, it clearly shows the Commission's lack of human rights knowledge, experience and political will to conduct competent human rights monitoring in detention centers. The Commission has also remained silent on the state of Mongolia's judiciary, under which 157 people were sentenced in court without adequate evidence. As a result, Mongolian civil society has lost its trust in the NHRCM and is no longer willing to cooperate with it.

The Commission is always silent and never expressed its position during the emerging human rights situation or violations to avoid conflict with government, and public where people need prompt protection. They make neutral statement when issue is not hot.

Key issues that the NHRI has actively confronted

The Commission developed a new Strategic Plan for 2008-2011 to comply with the Millennium Development Goals (MDG) and National Development Policy.[2] According to its Strategic Plan, the NHRCM focused on the following human rights issues in 2008: the commemoration of the 60th Anniversary of the UDHR, human rights and state bureaucrats, public rights and the environment, the rights of victims, and combating human trafficking.

For the commemoration of the 60th Anniversary of the UDHR, the Commission held a number of promotion activities including 'Open Human Rights Day' held in two provinces, publishing the quarterly Human Rights Journal and distributing it to the public, holding a photo exhibition on the worst forms of child labor, and developing modules on the press and women's rights.

The Commission conducted a mining, environment, and human rights analysis to assess the violations of the right to a healthy and safe environment and protection against pollution and environmental imbalances in three areas. The Commission analyzed the violation of human rights caused by the granting of licenses to use toxic chemicals and inappropriate use of chemicals, and delivered recommendations to relevant government agencies.

2 The Annual Report of the NHRCM in 2008

Another area of focus for 2008 involved the human rights issues of disabled and elderly people. In March, the Commission visited a nursing home for the elderly and sent recommendations to the relevant state agencies to improve living conditions in the nursing home, to ensure the quality and quantity of food, and to increase the supply of clothes for elderly.

In addition to these activities, the Commission carried out a number of human rights promotional activities which will be discussed below.

II. Independence

A. Law or Act

Under its enabling law passed in 2000, the Commission is obliged to stand as an independent body in conducting its work.[3] The law specifically prohibits 'any business entity, organization, official or individuals' from influencing or interfering with the activities of the Commission and its members.[4] Under the law, therefore, the Commission appears to stand independently.

It should be noted, however, that those persons or entities that violate the provisions ensuring the Commission's independence are able to get away with small fines or administrative sanctions that do not have sufficient deterrent effect.[5] There is therefore a need to review the system of penalties to further ensure and enhance the independent operation of the Commission.

The fact that no parties have been held liable for interfering with the work of the Commission since its establishment could indicate that the Commission has been able to perform its duties without influence from the government, parliament, judiciary, or

3 Article 3.3 of the NHRCM Law

4 Article 3.4 of the NHRCM Law

5 Article 26.1.1 of the NHRCM Law: 'A citizen who has violated Art 3.4 of the Law shall be liable to a fine of Tg 5,000-40,000 (*approximately 4-34 USD*); an official to Tg 10,000-50,000 (*approximately 8-43 USD*); and a business entity or organization to Tg 50,000-150,000' (*approximately 43-130 USD*).

other organizations and individuals. However, in the middle of this year, the Commission issued a statement regarding the situation of 200 protesters in the July 2008 riots, saying that no human rights violations against detainees were observed during the visit of the Chief Commissioner. For the period of the state of emergency most NGOs and human rights activists were not able to operate due to restrictions by the state. The NHRCM was the only human rights body that could operate freely and monitor the human rights situation inside the detention centres. However, monitoring conducted by the Coalition of NGOs after the turmoil of July 2008 found evidence of human rights violations such as torture and malnutrition. Many human rights NGOs in the country therefore saw the Chief Commissioner's statement as a demonstration of the Commission's lack of dependence. The Commission's statement clearly supported the government's claim denying that human rights violations in the detention centre had been committed by police officers.

During the time covered by this report, some parliament members attempted to amend the Law on the National Human Rights Commission of Mongolia. The parliament member leading this process rejected the draft of the law even though the draft had already been submitted to parliament. The reason for his action is still unclear. Because of a lack of information, civil society did not have the opportunity to provide comments and proposals on the draft law. Even Commissioners have been excluded from the process of developing the amendments. One Commissioner has said that the draft law contains some negative provisions that do not improve the Commission's independence, raising concerns that their inclusion may serve political purposes. However, the initiators of these amendments explain that their proposals aim to improve the independence and efficiency of the Commission by increasing the number of Commissioners from three to five and by widening its power to investigate human rights violations occurring during the police and court stages.

B. Relationship with the Executive, Legislature, Judiciary, and other specialized institutions in the country

With the legislature

The NHRCM is mandated to present an annual report on the situation of human rights and freedoms in the country to the State Great Khural (SGK), Mongolia's parliament, in the first quarter of every year. Based on current practice, the report is first discussed at the level of the Human Rights Sub-Committee of the SGK, and then the Legal Standing Committee will decide to table it at a parliamentary plenary session. Under the law, the annual report must be published in the State Gazette. Copies are regularly distributed to human rights groups, providing widespread opportunities to assess the Commission's activities.

Previous reports have not always been discussed in the plenary session at the SGK, only reaching the committee stage. The 2006 annual report of the NHRCM was the first to be debated at the plenary session of the SGK. Human rights NGOs saw this as a major success for the Commission. The parliamentary debate on the 2008 annual report was delayed for uncertain reasons and discussed on 9 December 2008. It is open for NGOs to attend the parliamentary session to discuss the annual human rights report; however, NGOs have not been using this platform as an advocacy tool to improve the effectiveness of the Commission. Besides the Chief Commissioner, two Commissioners were not able to attend the parliamentary discussion in 2008 due to internal conflicts with the Chief Commissioner.

Mongolia ratified the UN Convention against Transnational Crimes and its Optional Protocols in 2008. This was the result of a joint effort between civil society and the NHRCM, which had lobbied parliament strongly to this end.

On 9 June 2009, the Parliamentarian Sub-committee on Human Right discussed about NHRCM's report which covered 2 main issues such as human rights concerns during 1 July

2008 event and human trafficking. The Sub-committee noted that a need of strengthening the capacity of the Commission in terms of legal environment, financial and human resource, and committed to establish a Working Group to implement recommendations of the Commission regarding the two issues in the report.

With the Government

The Commission works with the Government in several ways to provide training investigate violations within administrative processes and co-organize promotional events such as public forums. In 2008, the Commission also held several inspections on the human rights situation through visiting detention centers and prisons. For instance, during the period of the report, the commission held four visits to Penitentiaries 417, 461 and 413, submitting recommendations after each visit. However, the results and quality of the Commission's inspections are questionable. According to an interview with one of the Commissioners, the Chief Commissioner announced after her visit to one prison that the living condition of prisoners was adequate. Yet the District Special Inspection Agency found living conditions in the same prison to be inadequate during their inspection, just after the visit of the Chief Commissioner.

In collaboration with the Committee on the National Human Rights Action Plan within the Ministry of Justice and Home Affairs, the Commission is conducting a project on Access to Justice and Human Rights this year. This project aims to increase the capacity of impoverished and vulnerable groups to know, protect, and enjoy their rights by publicizing different types of legal services.

In 2008, the NHRCM delivered four policy-based recommendations and one demand to the relevant executive bodies, including the Minister of the Environment, Chairman of the National Council on Policy and Regulation of Toxic and Hazardous Chemicals, the General Department for Court Decision Enforcement, and the Head of the Labor and Welfare Agency.

With the Judiciary

According to the enacted law, Commissioners shall not receive complaints about criminal and civil cases or disputes that are at the stage of registration, inquiry, investigation or trial, or those which have already been decided. While this provision protects the independence of judiciary and police, it poses a barrier to the Commission in monitoring actions such as the excessive use of force by police during the investigation and trial stages of criminal proceedings.

However, the Commission does have powers under Article 18.3 of its law giving it access to decisions made in civil and criminal cases. The Commission may access documents relating to cases rejected by these authorities for the purpose of conducting research on human rights and making appropriate recommendations on police and court activities. However, the Commission is not willing to use this power to restore the rights of people who have been sentenced to jail for allegedly expressing thoughts on unfair election procedures or for involvement in the demonstration on 1 July 2008.

C. Membership and Selection

Under the law, NHRCM Commissioners should be nominated by the President, SGK, and Supreme Court. The SGK appoints the Commissioners, who, in turn, report back to the SGK. Each Commissioner, under the law, sits for a term of office of six years. Commissioners may be re-appointed only once. A Chief Commissioner is appointed for a term of three years from among the Commissioners.

During the nomination and selection process of the current set of Commissioners, civil society in Mongolia raised the issue that the process has not been transparent and there was no broad consultation with civil society. Civil society organisations were not able to observe the process that occurred at the SGK, nor were they able to contribute or participate in the process.

The Sub-Committee at the SGK claimed that the nomination process was conducted according to the law, but there was obviously no room to include NGOs. Commissioners are appointed only from government institutions, and conflicts of interest often emerge. There have been several instances when the Commission would refrain from expressing a position on a particular issue because the Commissioners claimed they do not want to politicize the issue.

In terms of internal conflicts, Commissioners and Commission staff appear to be divided into two factions. This is perceived by civil society groups in the country to impede the efficiency and effectiveness of the Commission. For instance, the Chief Commissioner has appointed her relatives as Commission staff and reduced the salary of Commissioners when they work out of the office for official purposes. Moreover, she has refused to provide cars for two other Commissioners on an official visit to the countryside to conduct training and other activities.

In accordance with the Law on the NHCRM, Commissioners may be dismissed by the SGK if found guilty of a crime in court.[6] However, no Commissioner has been dismissed under this Article to date.

Under the law, for a person to be nominated as a Commissioner of the NHRC, he or she must be 'a Mongolian citizen of high legal and political qualifications, with appropriate knowledge and experience in human rights, with [no] criminal record and who has reached the age of 35'. For many human rights NGOs in Mongolia, however, this provision appears to emphasize legal and political qualifications more than human rights experience. Most current Commissioners are lawyers who have practiced law as litigators or come from the prosecutor's office or the courts. It has been proposed by many human rights NGOs that the criteria should be revised to include a high level of knowledge on, commitment to, or experience with human rights. Human rights NGOs in Mongolia believe that this criteria would ensure the appointment of Commissioners who would be able to work independently and contribute to the improvement of human rights in the country.

6 Article 8 of the NHRCM Law

One positive aspect, however, in the current set of NHRCM Commissioners is that the new set demonstrates better gender representation than the last set of Commissioners. Although the law does not contain any provision to ensure gender balance in the Commission, in the previous term all three members were male. In the current composition, there is a notable progress on gender balance among Commissioners with two female Commissioners.

However, the draft law amendment submitted to the SGK by the NHRCM does not contain any developments to ensure gender balance in the Commission. The amendment only proposes increasing the number of Commissioners from three to five. This clearly shows that the Commission does not consider gender balance to be particularly important.

The pluralism of NHRCM staff should also be considered since, among 20 members of staff, not one has a civil society background. Vacancies at the NHRCM have never been publicly or widely advertised. According to the Law on Civil Service, staff of the Commission shall be selected among people who passed the exam for the civil services. There are no specific requirements for Commission staff such as knowledge of or commitment to human rights, or experience in the field.

D. Resourcing of the NHRI

With respect to financial autonomy, Article 22 of the NHRCM Law provides that the operational draft budget of the Commission shall be approved by the country's parliament, the SGK, and the funds are sourced from the national budget. It is important to note, however, that the Ministry of Finance has sole authority to allocate funds for the Commission's activities each year. Moreover, the Ministry of Finance often cuts the budget due to financial constraints, thereby affecting the Commission's ability to deliver on its mandate to promote and protect human rights.

Funding for the operation of the Commission for 2008 came to 199.5 million MNT (around USD 170,000). The funds for 2009

are 179.9 million MNT (around USD127.5 thousand), which were reduced by 20 per cent from the suggested amount due to the financial crisis. Information provided by the Commission reveals that it is unable to extend its operations to rural areas, or to organize training sessions and activities to promote public awareness and monitor human rights, despite the increasing demand for human rights protection in the country. For instance, in 2009 the budget for local trips was reduced by 45 per cent, while the budget for official visits to participate in international meeting and seminars were reduced by 50 per cent.

Budgets for human rights education and publicity were reduced the most. Funds required to publish the NHRCM's yearly human rights reports have not been included in its budget since its establishment. The Commission had published the yearly human rights report with the financial support of the UNDP in Mongolia; however, the UNDP project ended in 2007. Thus in 2008, the commission only published 300 copies of the report and is not able to distribute to the public or publish it in English. It is clear that the Commission is facing serious financial problems and that it needs to resolve this through more proactive means, such as seeking a wider base for funding sources or actively lobbying the government for an increase in its budget. However, although the Commission receives foreign funds, information about these funds has never been published.

III. Effectiveness

The Commission's mandate under the NHRCM Law (Article 3.1) is to:

- Promote and protect human rights; and
- Monitor the implementation of the provisions on human rights and freedoms provided in the Constitution of Mongolia, laws and international treaties of Mongolia.

A. The mandate in practice

As discussed above, according to Article 11.2 of the NHRCM Law, the Commission cannot receive complaints relating to criminal and civil cases which are at the stage of registration or inquiry, or where investigations or trials have been already decided. While this provision protects the judiciary and police from third-party influences, it also creates barriers for the Commission when it monitors violations such as the use of excessive force by police in cases that are already at the investigation or trial stage. The Commission is thus prohibited from being proactive in relation to certain human rights violations suffered by citizens. Although Commissioners and civil society groups are aware of this problem, nothing has yet been done to address it.

This does not mean that the Commission is completely unable to supervise police and court activities. It has powers under Article 18.3 of the NHRCM Law to access decisions made in civil and criminal cases. Unfortunately however, this is far less effective than conducting direct investigations, and does not allow the Commission to prevent the recurrence of violations.

The Commission has submitted proposals to amend the NHRCM law in a way that would expand its power to investigate human rights violations during police investigations, as well as at the court stage.

B. Quasi-jurisdictional competence

The Commission receives complaints about human rights violations that are guaranteed by the Constitution, domestic laws and international treaties ratified by Mongolia. In recent years, the number of complaints has been increasing.

There is no detailed information in the Commission's report on how many complaints were resolved by the Commission and how many of them were transferred to the relevant agencies. However it was mentioned that since 31 December 2008, the Commission has received 271 complaints and took necessary actions on 258 complaints (95.2 per cent), while the remaining 13 are under the investigation of the Commission.

Although the Commission is legally bound not to intervene in cases being investigated by the police and judiciary, it can assist complainants by referring them to the relevant authorities, giving legal advice and helping to mediate towards a compromise.

Two cases referred to the courts have been resolved. One involved a claim by five complainants that they were jailed for between 201 to 1,252 days on spurious charges for which there was no evidence. The court ruled that they were entitled to compensation.

The Commission was particularly successful in focusing attention on law reform, drawing its arguments from international conventions that prohibit torture and provide for compensation for damages involving the government and its officials, among other parties.

C. Programme for training and research

The Commission has been carrying out a number of awareness-raising activities such as workshops and seminars, both independently and in collaboration with other organizations. In 2008, the Commission held a total of 34 training courses for government officers. These included a training course on the participation of primary state authorities in ensuring and protecting human rights, a training course on capacity building of the NHRC and partner institutions, a roundtable discussion on the cooperation of law enforcement agencies in fighting human trafficking, and a training course on the realization of human rights in criminal procedure.

D. Encouraging ratification and implementation on international standards

According to its enabling law, the Commission has the responsibility to submit proposals on the implementation of international human rights treaties and the drafting of state party reports. However, during the NHRCM's existence, Mongolia has continuously failed to submit periodic reports on its implementation of international human rights treaties.

Mongolia is state party to the six core international human rights treaties and four optional protocols, but there is little implementation of these treaties and protocols on the ground. A number of periodic and initial reports have been delayed for years. For instance, the 5th periodic report to the International Covenant on Civil and Political Rights (ICCPR) has been delayed for five years, the 4th report to the International Covenant on Economic, Social and Cultural Rights (ICESCR) for four years. Around 20 periodic reports to the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) have been delayed since 2002, and the initial report to the Committee against Torture (CAT) has been delayed for six years. The Commission has not worked enough to push the government to submit these long overdue reports, even in terms of the CAT and the issue of torture which the NHRCM has been working on for a number of years.

In 2008, the Commission conducted an analysis of the state duty to report its implementation of international human rights treaties, and concluded that it is generally inadequate. This year, the Commission has given its comments on the 5th periodic report to the ICCPR, the initial report to the CAT, and the report to the Convention on the Elimination of all forms of Discrimination against Women.

Every year the Commission organizes a National Assembly on International Human Rights Day in cooperation with the Office of the President. The 2006 National Assembly was themed 'Disabled People's Rights,' while the 2007 Assembly addressed the 'Rights of Victims.' In 2008, the Assembly was entitled 'Human Rights and State Bureaucrats'. These events represent the effort of the NHRCM to encourage the ratification of international human rights instruments to which Mongolia is a party, and to ensure their effective implementation.

Unfortunately however, the NHRCM does not involve the SGK in these activities. If the Commission was to involve the SGK in the National Assembly, it could lead to better integration of human rights provisions in the legislative process.

Consultation and Cooperation with Civil Society

According to enabling law, the Commission has the Inform Committee of NGOs which supposed to give suggestions and advice to the Commission's strategies and activities and to conduct joint efforts in promoting and protecting human rights.[7]

Current Committee consists of Chief Commissioner, a staff of the Commission, and 9 representatives of NGOs. 5 of representatives of NGOs were elected from the widespread consultation of civil society, though another 4 were automatically appointed by the Commission itself, including the Advocates' Association, the trade union, 1 religious organization, Employers' Association. It is a critical that Commission appointed religious organization and Employers' Association as a member of Informal Committee however the Law on NHRCM says that Advocates' Association and trade union shall be include in the Committee.

The Commission is not active to work effectively with the Informal Committee and conducts no regular consultations or meetings. Therefore, the existing Committee is not contributing at all to improve Commissions effectiveness while there is need of civil society support not only to improve Commission activity, but also to ensure that the budget of the NHRCM not to be easily reduced. Despite this role less Informal Committee, the Commission cooperation with civil society is limited by only inviting NGOs to its trainings, seminars and conducting some researches jointly.

However, the issue of weak cooperation of the Commission and civil society was raised in the two previous reports of CHRD and submitted to the Commission, there is still no initiative by the Commission to improve its cooperation with NGOs. Therefore it should pay attention to build close partnership with human rights NGOs in order build more stronger and independent NHRI.

7 Article 24.3 of the NHRCM

Recommendations to the Commission:

- To be proactive and independent during the emerging human rights situation or violations.
- To take urgent measures for releasing those sentenced by courts without proper evidence for being involved in 1 July demonstrations.
- To initiate, with broad consultation with civil society, the amendments to its law to ensure its independence and for transparent appointment process.
- To improve the cooperation with civil society.

Enabling Law: A way to enhance effectiveness of the National Human Rights Commission of Nepal

Prepared by Informal Sector Service Centre (INSEC)[1]

1. General Overview

In May 2009, Nepal is at a crucial moment of political transformation. Following the historic Constituent Assembly elections on 10 April 2008, the Communist Party of Nepal-Maoists (CPN-M) formed and led a new coalition government, only for this to subsequently collapse to be replaced by a new coalition government led by the Communist Party of Nepal-Unified Marxist Leninist (CPN-UML).

This government is mandated to facilitate the drafting of a new constitution and consolidate the peace process in accordance with the Comprehensive Peace Agreement of 22 November 2006. It must also resolve past human rights violations and infractions of international humanitarian law, and demobilize and integrate former Maoist combatants currently in UN-monitored cantonments.

However, the failure of successive governments to address security issues has exacerbated lawlessness, violent political strikes and growing disenchantment with the government. Political

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violence is reportedly being perpetrated by Maoists and its young communist league, UML-affiliated youth groups, and various ethnic-political groups fighting for identity and autonomy.

Under the Maoist-led government, which ruled the country from August 2008 to May 2009, attacks against other political parties and efforts to weaken constitutional bodies including the judiciary and National Human Rights Commission (NHRC) continued. Although the 2007 Interim Constitution made the NHRC a constitutional body, the nature and functions of the Commission have not changed. The government's reluctance to implement Supreme Court directives and NHRC recommendations has further undermined human rights and the rule of law in the country. Its delay in passing the draft bill on the NHRC[2] also calls into question its commitment to ensuring the NHRC's independence in line with the Paris Principles. On the other hand, the NHRC itself has caused some controversy by amending Commission regulations based on the 1997 NHRC Act—legislation that has been rendered defunct since the Interim Constitution upgraded its status.

The government's control over the NHRC suggests a refusal to address the culture of impunity in Nepal. The NHRC is one of Nepal's only institutions that can effectively confront this problem: it is authorized to request governmental action, including the provision of compensation in cases of human rights violations and publicizing the names of those who fail to implement NHRC recommendations.[3] However, the government has prevented the Commission from intervening in many cases of human rights violations. Furthermore, instead of warning the government to address this problem, NHRC officials are seemingly encouraging the culture of impunity.[4]

There is great concern about the NHRC's relationship with civil society organizations (CSOs), victims and their organizations,

2 In October 2007, the NHRC convened a national workshop bringing together several representatives of Nepali civil society to draft a new enabling law for the NHRC. This draft legislation has still not been passed by parliament.

3 Article 132 (2) (h), Interim Constitution of Nepal, 2007

4 Chapagain, Bidhya, NGO Parallel Report on the Compliance of the Paris Principles of the National Human Rights Commission of Nepal, Asian NGOs Network on National Human Rights Institutions (ANNI), November 2008, p.5

and international agencies—particularly the Office of the High Commissioner for Human Rights (OHCHR) Nepal. The NHRC tends to react negatively and aggressively toward these other institutions. For example, the NHRC treats the OHCHR-Nepal as a competitive rather than complementary institution, standing against it in an effort to hide the NHRC's own weaknesses and ineffectiveness.[5]

Independence

The Interim Constitution entrusted NHRC with additional mandates. It now has the mandate to respect, protect, promote and enforce the human rights enshrined in the Constitution. It is also responsible for ensuring the implementation of laws and international human rights treaties to which Nepal is a state party. Unfortunately, inherent flaws in the Interim Constitution impede the effectiveness and independence of the Commission and leave it with no options when its recommendations are ignored.[6] It has not created any mechanisms binding the government to implement NHRC recommendations.[7] However, Article 132 of the Interim Constitution does grant the NHRC the right to publicize as human right violators the names of officials, persons or bodies which do not follow its directives. As a result, the NHRC is planning to blacklist certain government offices for disobeying or failing to implement its recommendations.[8]

According to the Interim Constitution, the NHRC shall exercise its power and abide by its duties as prescribed by law.[9] However, after more than two years, no steps have been taken to amend the law to regulate the activities of the Commission. The NHRC is still functioning under the 1997 National Human Rights Commission Act.

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5 'UN rights office awaits extension', http://www.kantipuronline.com/kolnews.php?&nid=188152

6 Chapagain, Bidhya, NGO Parallel Report on the Compliance of the Paris Principles of the National Human Rights Commission of Nepal, Asian NGOs Network on National Human Rights Institutions (ANNI), November 2008, p.2

7 Ibid.

8 'Rights commission to blacklist defiant offices', http://kanunisanchar.com/news/index1.php?Action=Full&NewsID=173

9 Article 132 (3) (m), Interim Constitution of Nepal, 2007

Despite pledging to create an independent constitutional body, the government has not implemented its commitment to strengthen the NHRC by passing vital amendments to its enabling law. Many of these vital amendments are included in the draft bill. The NHRC has been calling on the government to amend its status since it was recognized as a constitutional body. It is, for example, demanding more autonomy to appoint staff. At present, the Interim Constitution contains a provision requiring all constitutional bodies to appoint staff in consultation with the Public Service Commission.[10]

The NHRC has also been demanding higher salaries for its office bearers, compared with those of other constitutional bodies. However, the government rejected the demand, saying that it was not ready to create discrimination between the NHRC Commissioners and those of other constitutional bodies.[11] Although the NHRC Chief and other Commissioners have enjoyed the same status as the Chief Justice and Supreme Court Judges, the government wants to downgrade their salaries.

During 2008, the NHRC submitted its annual report to the President of Nepal. On 10 April, a Constituent Assembly was elected with the mandate to act as the legislative branch of government. However, due to the uncertainty of the Constituent Assembly meetings because of regular disturbance by the parties, it seems unlikely that the NHRC report will be discussed.

The NHRC is also mandated to provide feedback on the state's periodic reports to international treaty bodies, including the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Elimination of Discrimination against Women (CEDAW). However, the government has rarely sought feedback on these reports from the NHRC; nor has the NHRC proactively advocated for the government to include any of its recommendations. In March the government submitted the 17th and 18th periodic report on CERD without any consultation with the Commission. Later, after huge pressure from the NHRC and civil society, the government submitted the report to the NHRC. The government also sought feedback on the CEDAW state report.

10 Article 126 (1) and 153, Interim Constitution 2007

11 'Govt, NHRC at odds over chief's salary', The Himalayan, 1 September 2008

The Paris Principles stipulate that a national human rights institution (NHRI) should have full control over its finances and financial management, and that the budget must not be used as an instrument to impede its independence and effectiveness. The Interim Constitution, however, is silent on the matter of financial independence, and contains no guarantee of adequate funding for the NHRC.

The NHRC's budget allocation for the fiscal year 2008/09 is NRS 55.562 million (USD 751,258.54), which includes NRS 25 million for salaries and NRS 1 million for staff training.[12] However, the allocated budget seems inadequate to fund the expansion of programs anticipated by the NHRC's 2008-2010 Strategic Plan. As the NHRC had expected to receive a budgetary increase of 55% (approximately USD 1,000,000),[13] its allocated budget is insufficient for it to function effectively.

Effectiveness

According to article 132 (2) of the Interim Constitution, the NHRC has a duty to ensure the protection and promotion of human rights through effective implementation. However, without any mechanism by which the NHRC can bind the government to comply with its recommendations—except for reminding the government about its recommendations and publishing the names of officials who fail to comply—it achieves very little in practice. Of 64 statements issued during 2008, just two were related to the implementation of its recommendations. The NHRC has also conducted discussions with government officials regarding the implementation of its recommendations.

During the election of the Constituent Assembly in April 2008, the NHRC deployed its staff in 69 of 75 districts to monitor possible human rights violations. In a few instances the NHRC asked government officials, including the Home Minister, about the implementation of NHRC recommendations and the security

12 Ministry of Finance (www.mof.gov.np)

13 Brief for the Sub-Committee to Consider the Accreditation Status of the National Human Rights Commission of Nepal, November 2008, http://www.nhri.net/2009/NEPAL%20-%20Special%20Review%20Brief%20-%20FINAL.pdf

situation in the country. One of these recommendations demanded that the government take stern action against three security officials—including the Chief District Officer in Dhanusha—for allegedly breaching the human rights accord in October 2003 through involvement in extrajudicial killings. However, no response has been made by the government.

The NHRC's processing of complaints is inefficient. According to its 2008 annual report, armed groups killed 216 people that year. The NHRC registered a total of 1,949 complaints during fiscal year 2007/08[14]—fewer than the number registered the previous year. Of the total complaints registered, 728 were under investigation, 376 have been finalized, 21 have been scrapped, seven were pending, and recommendations have been made on 73 cases.

In practice, there are obstacles to visiting army barracks or unofficial detention centers used by the government to detain those arrested during the years of armed conflict. This is also true of the cantonments where former Maoist combatants have been detained under UN supervision. For example, on 25 May 2008, Maoists prevented the NHRC from entering Shaktikhor Cantonment in Chitwan to investigate the death of the businessman Ram Hari Shrestha. He had allegedly been killed by, among others, Mr. Kali Bahadur Kham (aka Vividh), commander of the third division of Maoist combatants kept in the cantonment.

The personal integrity of the Commissioners has also come under public scrutiny. In its report published on 10 June 2009, the National Vigilance Center (NVC) of Nepal found that NHRC Commissioners, including the Chairperson, had violated the Corruption Control Act by not submitting property details to the relevant government bodies.[15] This submission is mandatory for all public service holders, including the Chairperson and members of the Commission. On 11 June the NHRC issued a statement about the submission of property details by NHRC staff

14 Annual Report, National Human Rights Commission, October 2008

15 'NHRC, PSC officials among 1,257 law violators', Republica Daily, 11 June 2009, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=6160

and Commissioners.[16] However, it has yet to be submitted to the NVC.[17] These incidents contribute to a negative public image of the institution, limit the moral strength of the whole organization, and damage its credibility and effectiveness.

According to a study conducted by Advocacy Forum and the International Centre for Transitional Justice, only 10% of victims and their families file complaints of human rights violations with the NHRC. Most victims file complaints with the Bar Association, human rights organizations, the police, courts, community leaders, and Chief District Officers.[18] The public perceives the NHRC as lacking the political will to pursue significant cases involving government officials, police officers and members of the military. Victims often criticize the NHRC for its slow and insufficient investigation of their complaints.

The government is preventing the NHRC from exercising its mandate effectively, intervening arbitrarily and refusing to recognize its independent status. For example, during the election of the Constituent Assembly, the Election Commission (EC) made it mandatory for NHRC to acquire permission from the concerned authority in order to monitor the election. By contrast, the EC gave special privilege to international organizations such as the United Nations Mission in Nepal, International Committee of the Red Cross and OHCHR, allowing them free movement on the day without requiring any passes.

The Chairperson of the NHRC complained that severe infrastructure inadequacy is preventing the NHRC from evolving as an effective institution.[19] He objects to staffing practices compelling the NHRC to work with several government employees who lack the necessary job security—many are working on an ad hoc basis and some are on

16 'NHRC officials submitted property details already', NHRC, 11 June 2009

17 The statement issued on 12 June says that 'the details are kept safe with the commission and can be submitted to the NVC when needed.'

18 'Nepali Voices: Perceptions of Truth, Justice, Reconciliation, Reparations and the Transition in Nepal', Advocacy Forum and the International Centre for Transitional Justice, March 2008, http://www.ictj.org/images/content/8/3/830.pdf

19 'Statistics detail growing lawlessness: Blot on NHRC's record in Human Rights Yearbook 2009', The Himalayan, 19 February 2009

contract—which is reflected in a lack of motivation among the workforce. The NHRC amended regulations on its staff conditions in order to recruit and upgrade staff working on a contract basis. However, this amendment was made on the basis of the 1997 NHRC Act which is no longer active following the commencement of the Interim Constitution. Moreover, human rights groups are critical of the NHRC move and urge it not to become an 'office of the job seekers'[20].

The Commission has four regional offices located in Biratnagar, Pokhara, Nepalgunj and Dhangadhi for the Eastern, Western, Mid-Western and Far-Western regions respectively. These were established with the aim of increasing access to human rights services in the field. A further five ad hoc contact offices are located in Khotang, Dhanusha, Rupandehi, Rolpa and Jumla districts. The Commission recently decided to establish seven sub-regional offices by integrating the current contact offices into them. It is now in the process of opening sub-regional offices in Ilam, Khotang, Janakpur, Katmandu, Butwal, Dang, and Jumla to expand its outreach programs. In addition, the office of the National Rapporteur on Trafficking has been functioning as an important wing within the NHRC Central Office for the prevention and control of human trafficking in the country.

The NHRC has established special desks to deal with certain thematic issues including disappearances and internally displaced persons, and has recently set up a separate monitoring desk in an effort to guarantee senior citizens' rights in the new Constitution.

The International Coordination Committee (ICC) Sub-committee on Accreditation confirmed 'A' status accreditation for the NHRC in November 2008. The ICC recommended the NHRC to promote the development of legislation in full compliance with the Paris Principles and to increase its cooperation with statutory institutions for the promotion and protection of human rights, as well as civil society organizations.

20 'Statistics detail growing lawlessness: Blot on NHRC's record' in Human Rights Year Book 2009, Himalayan News Service, 18 February 2009

Consultation and Cooperation with NGOs

Consultation and Cooperation with National NGOs

There is limited collaboration between the Commission and national NGOs in terms of joint activities and initiatives. Only in a few matters—such as discussions on treaty reporting, internally displaced persons, transitional justice mechanisms and issues of impunity—has the NHRC established co-operation through invitations to its programmes. However, there are no consultative mechanisms that could facilitate regular discussion and communication with NGOs on issues at the national level.

The Interim Constitution and the draft NHRC Act provide for it to work jointly and in a coordinated manner with civil society to enhance awareness on human rights. However, there are very few instances of coordinated activities initiated by the Commission.

Consultation and Cooperation with International Organizations including OHCHR-Nepal

Given the apalling human rights situation in Nepal, there is a clear need for a UN body to investigate, monitor and promote human rights. Concerns that this would merely duplicate the work of the NHRC are less valid given the NHRC's ineffectiveness on the ground. There needs to be greater clarity over the role of different institutions—the NHRC, a national institution; OHCHR-Nepal, a UN human rights body; and CSOs/NGOs, national and international organizations working in the field of human rights. The role of each organization must be clearly defined in order to create the conditions for understanding and cooperation among all the stakeholders working for human rights. The NHRC should promote such understanding although, at this stage, it still falls far short.

On 20 February 2009, OHCHR-Nepal and the NHRC signed an agreement to collaborate and cooperate in promoting and protecting human rights. These guidelines state that OHCHR-Nepal will provide technical assistance helping to build the capacity of the

NHRC, sharing education, training and publicity materials. The guidelines will remain valid as long as the agreement between the Nepal Government and OHCHR-Geneva exists.[21]

With national institutions virtually dormant, the state more unwilling than ever to protect human rights, and a number of worsening human rights crises and emerging challenges rampant all over the country, OHCHR's presence until the end of the peace process is imperative. However, there is some tension between the OHCHR and the NHRC. The NHRC has complained that it was not consulted when the government gave permission to OHCHR-Nepal to work in Nepal, and that OHCHR-Nepal has interfered in its area of work. Some Commissioners expressed their dissatisfaction over the OHCHR's extended tenure.[22]

Further, one NHRC member accused OHCHR-Nepal of playing games to weaken the NHRC and of trying to stay for a longer period of time.[23] The Commissioner recently stated that 'the time is due for Nepal to say good bye to the OHCHR.'[24] NHRC members argue that OHCHR-Nepal is no longer needed given the changed context, and that the NHRC as a constitutional body has gained enough strength after the dawn of democracy in 2006. In fact, one member stated that the very presence of OHCHR in Nepal sends a 'negative message to the world about the rights situation.'[25] However, the wider human rights community has criticized this logic as being politically-motivated.

This scenario illustrates the importance of the NHRC and its members for establishing cooperation with international agencies. At this critical point, personal, politically-motivated and institution-

21 Point 9, Guidelines for cooperation between the National Human Rights Commission (NHRC) and the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal), 20 February 2009

22 'UN rights office awaits extension', http://www.kantipuronline.com/kolnews.php?&nid=188152

23 'OHCHR tenure over: NHRC: Commissioner says it has been weakening rights movement here', http://www.thehimalayantimes.com/fullstory.asp?filename=aFanata0sgqzpca7Ra0a8a.axamal&folder=aHaoamW&Name=Home&dtSiteDate=20080712

24 'Nepal based OHCHR needs no tenure extension: HR activist', http://www.telegraphnepal.com/news_det.php?news_id=5156

25 'UN rights office awaits extension', http://www.kantipuronline.com/kolnews.php?&nid=188152

centric approaches may worsen the human rights situation in Nepal. Challenging OHCHR-Nepal revealed the NHRC's unilateral approach, showing how it bypasses civil society and other stakeholders. The NHRC has neglected wider consultative processes and lacks the necessary objectivity to commit to efforts at collaboration. And yet a more vibrant and effective NHRC continues to depend on the level of cooperation with national and international actors working for the protection of human rights in Nepal.

Conclusion and Recommendations

The NHRC has an important role to play in ensuring accountability for past crimes, developing transitional justice strategies and fostering national reconciliation in a country emerging from conflict. At the moment it has the additional responsibility of influencing the Constituent Assembly to frame a 'human rights friendly' constitution.

However, human rights groups and the general public have not seen Nepal's NHRC playing a meaningful and effective role in promoting and protecting human rights and facilitating the peace process. It has issued lots of recommendations, but only through press statements. It has failed to gain government cooperation to implement these recommendations. It remains weak without a mechanism in its enabling law to enforce its mandate, and it doesn't have the political will to proactively lobby the government to strengthen its enabling law and implement its recommendations. Amending NHRC regulation while ignoring the constitutional provision has only proved controversial.

As NHRC Commissioners are pushing for OHCHR to leave Nepal and distancing the Commission from civil society, strengthening the relationship with these primary national and international stakeholders seems difficult. The NHRC's approach ignores crucial opportunities to maintain momentum toward a human rights culture in Nepal. In the current political environment, the NHRC alone cannot address all existing post-conflict justice and human rights concerns. Complementing and cooperating with other institutions and stakeholders must become a priority.

Recommendations to government:

- Amend flaws in the Interim Constitution that are related to the independent functioning of the NHRC;
- Take immediate action to forward the pending amendment bill to parliament for its approval;
- Implement all NHRC recommendations;
- Give clear powers to the NHRC to directly refer cases for prosecution to the Attorney General's Department;
- Allocate additional resources for the operation of the NHRC.
- Recommendations to the NHRC:
- Lobby for the approval of the pending amendment bill and for the implementation of NHRC recommendations;
- Engage extensively with civil society, victims' groups, human rights defenders, political parties, government bodies and the international community, including OHCHR-Nepal, to broaden efficiency;
- Create and strengthen internal mechanisms, and build capacity to deliver multiple functions, especially in relation to facilitating the peace process and implementing NHRC recommendations;
- Engage with the Constituent Assembly to frame a 'human rights based' constitution.

Old Challenges for a New Commission

Prepared by LIBERTÁS[1]

General Overview

Behind the calm façade of stability, civil society organizations are increasingly worried by the pervading disregard of the rule of law and the seeming impunity of human rights violators in the Philippines. It is now widely known that a number of extrajudicial killings are committed in the Philippines each year.[2] Most of these killings are carried out in secret, and made known only by the discovery of mutilated bodies in wastelands and rivers.

While there have been relatively fewer reported extrajudicial killings in 2008,[3] and more cases are being prosecuted, no one

1 Head Writer and Contact person: Atty. Vincent Pepito F. Yambao, Jr. (*Director, Civil Liberties and Human Rights Desk*).

2 See Report of the Melo Commission, electronic copy of which may be accessed at <http://www.inquirer.net/verbatim/Meloreport.pdf>; Report of the International Federation of Human Rights, electronic copy of which may be accessed at <http://www.fidh.org/IMG/pdf/philippines-mission.pdf>.

3 See Amnesty International Report (2008) at < http://www.amnesty.org/en/region/philippines/report-2008>. See also "RP cases of extrajudicial killing declined by 85% in 2008 – police," 8 February 2009. Electronic copy of the article may be accessed at < http://www.gmanews.tv/story/147874/RP-cases-of-extrajudicial-killing-declined-by-85-in-2008---police>. In the said article, Task Force Usig claimed that incidence of extrajudicial killings dropped by 85% , from 41 incidents in 2006 to 6 incidents in 2008.

has been convicted so far.[4] The Writs of Amparo[5] and Habeas Data,[6] twin peremptory writs compelling state security forces to release information on disappeared people and requiring access to military and police files, have been insufficient to address the problem of extrajudicial killing and enforced disappearances.[7]

Human rights violators have become more aggressive in recent years; their violations are now committed in full view of the public. There have been numerous incidents involving the highly visible killings of suspected criminals by members of the Philippine National Police (PNP); some of which were even caught on video and aired on national televisions, prompting the Commission on Human Rights of the Philippines (CHRP or CHR) to conduct parallel investigations.

We also note a shift in the pattern of abuses: coercive laws and processes are being increasingly and arbitrarily used to silence dissent. Congressman Lorenzo "Erin" Tañada III, Chairman of the House of Representatives Human Rights Committee, observed that "the tactics are changing. There is a 'purge' against human rights defenders, with criminal charges

4 Asian Human Rights Commission (2008), "The State of Human Rights in the Philippines," p. 5. Electronic copy of the document may be accessed at <http://material.ahrchk.net/hrreport/2008/AHRC-SPR-015-2008-Philippines_AHRR2008.pdf>.

5 A.M. No. 07-9-12-SC. As of 4 June 2008, 42 petitions have been filed, of which 16 have been decided. 5 petitions were granted while 11 were either dismissed or withdrawn. 26 petitions remain pending. Data culled from the speech delivered by Atty. Jose Maidas Marquez, Chief of the Public Information Office of the Supreme Court on 4 June 2008 entitled "The Writ of Amparo and the Habeas Data: Seven Months After," on the occasion of the National Workshop on the Writ of Amparo and Writ of Habeas Data, 4 June 2008. Electronic copy of the document may be accessed at: < http://www.nupl.net/amparo.php?subaction=showfull&id=1212826952&archive=&start_from=&ucat=10& >.

6 A.M. Mo. 08-1-16-SC. As of 4 June 2008, 4 petitions have been filed; all of which are still pending.

7 See speech delivered by Atty. Rex Fernandez entitled "The Seventh Month After," delivered on the occasion of National Workshop on the Writ of Amparo and Writ of Habeas Data, 4 June 2008. Electronic copy of the document may be accessed at: < http://www.nupl.net/amparo.php?subaction=showfull&id=1212826952&archive=&start_from=&ucat=10& >. See also comments of the Asian Human Rights Commission (AHRC), electronic copy of which can be accessed at < http://www.gmanews.tv/story/62409/Writ-of-amparo-not-enough--Hong-Kong-rights-group >.

being filed against them."[8] One human rights group reported that from January to October 2008, around 124 persons were charged and arrested under dubious circumstances, with 84 of them reportedly jailed or kept under the custody of national security agents.[9]

The escalation of violence in Southern Philippines in August 2008, following the aborted signing of the Memorandum of Agreement on Ancestral Domain (MOA-AD)[10], shattered the relative peace during the first half of the year.[11] Around 78 civilians were killed in crossfire between the Armed Forces of the Philippines (AFP) and the Moro Islamic Liberation Front (MILF). Additionally, an estimated 528,693 persons from different conflict-affected areas were displaced from their villages during the height of hostilities from August to September 2008.[12]

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8 Purple S. Romero, "Report: Human rights violations switched from 'blood' to 'bars'," ABSC-CBN News Online, 09 December 2008. Electronic copy of the article may be accessed at <http://www.abs-cbnnews.com/print/32383>.

9 Id.

10 The MOA-AD is the culmination of stages of negotiations between the Moro Islamic Liberation Front (MILF) and the Philippine government . The agreement proposed the creation of a Bangsamoro Juridical Entity (BJE) with defined territorial boundaries, subject to plebiscite in the affected areas. However, the Supreme Court issued a Temporary Restraining Order disallowing the Philippine Government from signing the document. In T*he Province of North Cotabato v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain* (G.R. Nos. 183591, 183752, 183893 & 183951, 14 October 2008), the Supreme Court voided the agreement and declared it unconstitutional.

11 In 2003, the MILF entered into a ceasefire agreement with the Philippine Government subject to supervision by an International Monitoring Team led by Malaysia. Mindanao had enjoyed considerable calm and reduced violence on account of this ceasefire. The aborted signing of the MOA-AD triggered clashes between government forces and the MILF.

12 The number of internally displaced persons had been reduced to 308,175 persons by 29 December 2008. See 2008 Human Rights Report of the U.S. Department of State on the Philippines. Electronic copy of the document may be accessed at < http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119054.htm#>. For a more comprehensive analysis of the impact of the renewed fighting in Mindanao, see "Mindanao Fact Finding Mission: Unraveling Stories of Human Rights Violations," prepared by the Philippine Alliance of Human Rights Advocates (PAHRA). Electronic copy of the report may be accessed at: <http://www.philippinehumanrights.org/images/stories/pdf/MINDANAO_FFM_final_result.pdf>.

The escalation of conflict in Southern Philippines and the intensification of counter-insurgency campaigns against communist rebels also resulted in the rapid growth of armed civilian groups under the pretext of defending civilian communities.[13]

Amidst these worrying trends, civil society groups, legislators, and other sectors of society are optimistic about the appointment of Chairperson Leila de Lima as chairperson of the CHRP, despite some initial concerns. This general optimism, however, is often eclipsed by the institutional and fiscal limitations of the Commission. As of this writing, the five-person Commission still lacks one member; the seat has been vacant since May 2008.[14] Civil society organizations also criticize the disappointing performance of other Commission members, questioning whether the Fourth CHRP Commission can sustain public confidence considering that the CHRP is supposed to function as a collegial body.

Some government officials have publicly challenged CHRP's exercise of its constitutional powers. In July armed men reportedly fired on a CHRP investigator in Zamboanga City who was investigating the murder of human rights activist Madal Barorong.[15] Military and police have also hindered CHRP work: in September, the AFP refused entry to a joint CHRP-Congressional delegation visiting detainees in a military detention facility, while the Public Attorney's Office Chief Percida Acosta publicly rebuked an investigation being conducted by the Commission into a shooting incident involving policemen and suspected carjackers.[16]

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13 Asian Human Rights Commission (2008), "The State of Human Rights in the Philippines," p. 1. Electronic copy of the document may be accessed at <http://material.ahrchk.net/hrreport/2008/AHRC-SPR-015-2008-Philippines_AHRR2008.pdf>.

14 At the time of writing, President Arroyo is rumoured to have appointed Atty. Jose Manuel S. Mamauag as the final member of the Commission. However, no public announcement has yet been made.

15 < http://www.forum-asia.org/index.php?Itemid=32&id=1931&option=com_content&task=view >.

16 "PAO asks CHR to inhibit from EDSA 'rubout' case," 11 March 2009. Electronic copy of the article may be accessed at : < http://news.abs-cbn.com/nation/metro-manila/03/11/09/pao-asks-chr-inhibit-edsa-rubout-case >.

INDEPENDENCE

Law or Act

The CHRP is an independent body which is able to operate even during a state of emergency. The Philippine Constitution defines the powers and functions of CHRP, although Congress is authorized to prescribe other duties and functions to CHRP.[17]

President Corazon C. Aquino promulgated Executive Order 163, CHRP's legislative charter, while she was still exercising legislative power.[18] More than twenty years since the first Congress was convened, the legislature has yet to amend Executive Order 163 to effect changes that will enhance the performance of the CHRP in promoting, protecting and fulfilling human rights.

CHRP is characterized as an independent constitutional body, but not on the same level as other independent constitutional bodies. Unlike the Commission on Audit, the Commission on Elections and the Civil Service Commission, the CHRP possesses no inherent quasi-judicial functions; nor does it have any prosecutorial power. It has limited fiscal autonomy[19] and, unlike other officials of constitutional bodies who are removable by impeachment, CHRP Commissioners may be removed by the operation of ordinary Civil Service laws.[20]

Since the CHRP's creation in 1987, the Supreme Court has repeatedly limited the exercise of its powers. It has ruled against the CHRP adjudicating matters relating to striking teachers, issuing restraining orders and writs of injunction, or extending its investigative powers beyond civil and political rights.[21] However,

17 1987 Constitution, Art. XIII, section 18 (11).

18 Issued on 5 May 1987. Pursuant to Article XVIII, section 6 of the 1987 Constitution, Pres. Corazon C. Aquino continued exercising legislative power until the first Congress convened in June 30, 1987.

19 *CHREA v. CHR*, G.R. No. 155336, 21 July 2006.

20 1987 Constitution, Art. XI, sec. 2. provides an exclusive list of impeachable officers including the President, the Vice President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman.

21 *Cariño v. Commission on Human Rights* (G.R. No. 96681, 2 December 1991); *Export Processing Zone Authority v. Commission on Human Rights* (G.R. N o. 101476, 14 April

the CHRP may soon be allowed to exercise quasi-judicial powers in aid of its investigative functions. Examining Supreme Court decisions and the debates of the Constitutional Commission, the CHRP has found grounds to assert the exercise of its powers to provide preventive and protective legal measures.[22] The CHRP has found allies in the House of Representatives Justice and Human Rights Committee, which announced that the Committee is even willing to give the CHRP "residual" prosecutory powers in case the Department of Justice or the Ombudsman fail to act on human rights violations.[23]

Relationship with the Executive, Legislature, Judiciary and other specialized agencies

The CHRP is independent of the Executive, Legislature, Judiciary and other specialized institutions in the country. Nevertheless, it works closely with these agencies in varying capacities. As the institution tasked to monitor the Philippine Government's compliance with international human rights treaties, the CHRP has participated as advisor in the drafting of some reports submitted by the Philippine Government to various international bodies, although it also submitted its own independent comments critical of the government. In case of the Philippine Report on the Implementation of the Covenant on Economic, Social and Cultural Rights (ESCR), the CHRP commented on lack of participation and consultation of civil society organizations in the drafting stage of the state reporting process, as well as the Philippine Government's reluctance to provide the CHRP and NGOs with the official copy of this report.

1994); Simon v. Commission on Human Rights (229 SCRA 117[1994]).

22 Referring to the debates of the members of the Constitutional Commission which drafted the 1987 Constitution, Chairperson De Lima stated in a public hearing of the House Justice and Human Rights Committee held on 4 February 2009 that the records support the CHRP's exercise of quasi-judicial powers such as the issuance of mandatory or prohibitory powers in exercise of its investigative powers. Chairperson De Lima requested the House Committee to spell out these ancillary powers in the proposed revised charter of the CHRP.

23 Lira Dalangin-Fernandez, "House eyes prosecutorial powers for CHR," 14 April 2009. Electronic copy of the article may be accessed at < http://newsinfo.inquirer.net/breakingnews/nation/view/20090414-199264/House-eyes-prosecutorial-powers-for-CHR>.

The CHRP also commented on certain government policies impeding the measurement of the progressive realization of ESCR in the Philippines.

Additionally, the CHRP has issued advisories, position papers and resolutions to assist the Philippine Government in reflecting human rights standards in policies, programs and administrative measures. These have included advisories on national human rights issues such as military operations and forced evictions, condemnations of specific cases of enforced disappearance, and resolutions relating to international human rights mechanisms.[24]

Consistent with its mandate to recommend to Congress effective measures to promote human rights, the CHRP transmitted a human rights legislative agenda to the 14th Congress. The CHRP also gave its comments on bills pending in Congress and participated in public hearings.[25] CHRP has conducted collaborative programs with the Supreme Court on the issue of extrajudicial killings and enforced disappearances, as well as providing Rights-Based Approach training workshops to various government agencies and local governments.

The CHRP and Congressional members attempted to conduct a joint delegation to a military detention facility during September 2008. However, Lt. Col. Ilumindao Lumakad, Commanding Officer of the Philippine Marine Corps Batallion denied entrance and prevented the CHRP contingent of doctors, lawyers and special investigators along with seven Congressional Representatives from proceeding. In a letter of protest, Chairperson Leila De Lima said that the incident was a denigration of the visitorial powers of the Commission under Art. XIII, Section 18 (4) of the 1987 Constitution.[26]

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24 Electronic copies may be accessed at < http://www.chr.gov.ph >.

25 The CHRP submitted position papers on the following bills: Senate Bill No. 1972 and Senate Bill No. 2040 on Whistleblower Bill of Rights; House Bill No. 566 on Extra-Judicial Killing; on the proposed "Anti-Torture Act"; and on the proposed "Anti-Enforced Disappearance Act," among others.

26 Electronic copy of the press release issued by the CHRP Chairperson De Lima regarding the incident may be accessed at: < http://www.chr.gov.ph/MAIN%20PAGES/news/news_23sept08.htm >.

Membership and Selection

The CHRP is a collegial body created by the Philippine Constitution, composed of a Chairperson and four Commissioners.[27] The Chairperson and Commissioners must be natural-born citizens of the Philippines and a majority should be members of the Bar.[28] At the time of their appointment, they must be least 35 years of age, and must not have been candidates for any elected position immediately preceding their appointment.[29]

The Chairperson and Commission members are appointed by the President and have a fixed term of seven years, without reappointment.[30] They receive the same salary as the Chairman and Members of the Constitutional Commissions. Their salaries cannot be decreased during their term of office. They are prohibited from holding any other office or employment and from engaging in the practice of any profession or in the active management or control of any business which may be affected by the functions of their office. They are also prohibited from being financially interested in any contract or privilege granted by the government or any of its sub-divisions and agencies.[31]

Both the constitutional provisions creating the CHRP and its enabling law are silent on the process of choosing the Chairperson and the members of the Commission. There are no published rules of procedure for the nomination, application, selection and appointment of the new Commissioners. There is likewise no system in place for civil society participation in the selection process. All appointments of Chairperson or Commissioners—including those of present Commission members—has been criticized for lack of transparency and consultation.

Commissioners are not required to have prior knowledge of human rights, and there is no provision ensuring pluralism and gender balance. Nevertheless, the Commissioners come from diverse backgrounds, and the majority of Commission members

27 1987 Phil. Const., Art. XIII, sec. 17 (2).
28 Ibid.
29 Ibid.
30 Executive Order No. 163, sec. 2 (c).
31 Executive Order No. 163, sec. 2 (b).

are women. The Commission Secretary and Executive Director are women, as are the directors of six of the ten major offices and three of the four appointed CHRP members.

Instead of appointing Commissioners simultaneously, President Arroyo delayed the appointment of some Commissioners and still has yet to appoint the final member, thereby seriously impeding the work of the CHRP. This grave abuse in the exercise of appointing authority cast doubts on the sincerity of the Arroyo administration to seriously address human rights abuses in the Philippines.

The appointment of Chairperson de Lima was heavily criticized as she was "well known as an election lawyer [rather] than for the practice in the human rights field."[32] But while Chairperson De Lima was able to redeem herself, civil society organizations and even some CHRP insiders have expressed disappointment at the performance of the other Commissioners.

Resources

CHRP is grossly underfunded and understaffed with a budget of only 214.269 million pesos (US$5.553 million) in 2008[33]—even less than its 2007 budget of 216.491 million pesos (US$4.595 million).[34] This budget accounts for the payment of personal services (74%), maintenance and operating expenses (23.6%), and capital outlays (2.4%) for the whole Commission, including both the CHRP national office and 15 regional offices.

Unlike other government departments, in which the budget can be released directly to the regional offices, there is no distinct allocation for each CHRP regional office. Thus the allocation for each regional office has to pass through the national office.

32 Philippine Alliance of Human Rights Advocates, "Human rights groups express disappointment with the selection process of the CHR chairperson," 15 May 2008. Electronic copy of the article can be accessed at < http://www.philippinehumanrights.org/release/43.html >.

33 Rep. Act No. 9498, also known as, "The General Appropriations Act of 2008." Electronic copy can be accessed at < http://www.dbm.gov.ph/gaa2008/Disk29/CHR.pdf >

34 Rep. Act No. 9401, also known as , "The General Appropriations Act of 2007." Electronic copy can be accessed at < http://www.dbm.gov.ph/dbm_publications/gaa2007/CHR/CHR.pdf >.

The Philippine Constitution provides for approved annual appropriations for the CHRP to be automatically and regularly released.[35] In reality, however, the CHRP faces bureaucratic procedures with the Department of Budget and Management for the release of its appropriations. Moreover, with the Supreme Court pronouncement that the CHRP has only "limited fiscal autonomy,"[36] the Commission of Audit has recently issued a Memorandum to the CHRP stating that the Commission should be treated as a regular national agency and thus follow government accounting rules and regulations.[37] This means that the CHRP does not enjoy full fiscal independence in terms of budget preparation and implementation, flexibility in fund utilization of approved appropriations and use of savings and disposition of receipts.[38]

Furthermore, while the CHRP can appoint its personnel, it is subject to Civil Service rules. The CHRP does not have the authority to reclassify, upgrade, or create positions without approval of the Department of Budget Management.[39]

The CHRP receives funding from international organizations and agencies for some of its activities. For 2008, the CHRP partnered with the European Commission, New Zealand Human Rights Commission, Swedish International Development Agency and United Nations Development Program.[40] At the time of writing, data on the total funds received by the CHRP as well as its expenditures have not yet been made available.

To aid in its investigations, the CHRP has a separate forensics office in its national office; however, it is ill-equipped and understaffed. It has therefore been the practice of CHRP to hire private forensics experts in some cases.

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35 1987 Phil. Const., Art. XIII, sec. 17 (4).

36 *Commission on Human Rights Employees Association v. Commission on Human Rights*, G.R. No. 155336, 21 July 2006.

37 CHR-AOM-013-2008-101, 25 Sept. 2008.

38 *CHREA v. CHR*, G.R. No. 155336, 21 July 2006.

39 *Ibid*.

40 Data from the CHRP Strategic Development and Planning Office.

EFFECTIVENESS

A. Mandate and powers

The CHRP is constitutionally mandated to promote and protect human rights.[41] Its primary function is investigative in nature. Either independently or in response to a complaint, the CHRP can investigate all forms of human rights violation, including civil and political rights.[42] In accordance with its

41 1987 Phil. Const., Art. XIII, sec. 18 (5).

42 1987 Phil. Const, Art. XIII, sec, 18 (1). CHR Resolution No. A96-005 outlines a non-exclusive list of violations within the jurisdiction of the CHRP, as follows:

1. Rights of prisoners or detainees against physical, psychological and degrading punishment resulting in the commission of crimes against persons as provided in Title 8 of RA 3815, as amended, and other related special laws;
2. Constitutional guarantees provided against the use of torture, force, violence, threat, intimidation and other means that vitiate the free will of any person or force him to do anything or sign any document against his will;
3. Right to a fair and public trial as recognized under the Constitution, applicable laws and statutes and jurisprudence;
4. Right to life without due process of law, where its commission is tantamount to summary execution and/or extra judicial execution (salvaging);
5. Liberty of abode and of changing the same within limits prescribed by law except upon lawful order of the court, where the acts committed constitute hamletting, force eviction/illegal demolition, or development aggression;
6. Right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures as defined in Article 124, 125, 126, 127, 128, 129 and 130 of Title 2 and in Article 269, 280, 282, 286, 287 of Title 9 of RA 3815, as amended, and other related special laws, where said acts are committed in the course or by reason thereof or when involuntary or enforced disappearance as defined under applicable laws or international treaty obligations on human rights resulted or was the reason for the violations;
7. Rights of persons arrested, detained or under custodial investigation as well as the duties of the arresting, detaining and investigating officers defined under RA 7438;
8. Right of the people to peaceably assemble and petition the government for redress of grievances which are defined in Art. 131 under Title 2 of RA 3815, as amended, and other related special laws;
9. Right of the people to be free from involuntary servitude in relation to Section 18 (2) of Article 272, 273, 274 of Title 9, Art. 341 of Title XI of RA 3815, as amended, and other related special laws;
10. Free exercise and enjoyment of religious profession and worship, without discrimination of religion in relation to offenses defined in Art. 132 and 133 of Title 2 of RA 3815, as amended, and other related special laws, including offenses against the religious, such as the desecration of places of worship and or acts notoriously offensive to the feelings of the faithful, or are by their very nature, easily and readily discernible

operational guidelines and rules of procedure, the CHRP can cite for contempt in accordance with the rules of Court.[43] It also has the power to provide legal measures for the protection of human rights; to provide for preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection;[44] and to grant immunity to any person whose testimony or other evidence is necessary to determine the truth.[45]

The CHRP's visitorial powers over prisons and detention facilities[46] allowed it to conduct 685 jail visitations covering 31,682 prisoners/detainees and provide legal assistance to 494 prisoners/detainees during 2008.[47] It is also mandated to establish an education and information program to enhance respect for human rights[48] and, in 2008, was able to hold 440 seminars and trainings to various sectors and 310 lectures on human rights topics. Additionally, the CHRP distributed 43,527 information materials, 3 human rights posters, 13,340 human rights flyers, 3,340 human rights primers; 340 handbooks/ briefers; and 26,504 other information materials. Under its powers to provide compensation to victims of human rights violations or their families,[49] the CHRP extended financial assistance to 252 victims and their families to a total of 2.361 million pesos (US$50,032) in 2008.

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as palpable transgressions of any of the basic rights of a human being as defined in the Universal Declaration on Human Rights and International covenants and treaties on human rights to which the Philippines is a signatory and should therefore, be investigated or given due course by the Commission without unnecessary delay.
Rights of the prisoners and detainees against physical, psychological and degrading punishment resulting in the commission of crimes against persons as provided for in Title Eight of Act No. 3815, as amended, and related laws;
Constitutional guarantees against the use of torture, force, violence, threat, intimidation, and other means

43 1987 Phil. Const., Art. XIII, sec. 18 (2)
44 1987 Phil. Const., Art. XIII, sec. 18 (3).
45 1987 Phil. Const., Art. XIII, sec. 18 (8).
46 1987 Phil. Const., Art. XIII, sec. 18 (4).
47 Data provided by the Strategic Division and Planning Office of the CHRP.
48 1987 Phil. Const., Art. XIII, sec. 18 (5).
49 1987 Phil. Const., Art. XIII, sec. 18 (6).

B. Procedure for Investigation

There are no published rules of procedure for the conduct of CHRP investigations.[50] The CHRP investigators are merely guided by an Operations Manual[51] in the handling of complaints and the investigation's conduct.

In accordance with this Operations Manual, the CHRP can take cognizance of the case in four ways: (1) by a complaint directly filed with the CHRP regional office by the victim, family or friends of the victim, or any other concerned citizen or group; (2) in cases taken up by the CHRP of its own accord—whether provoked by media stories or phoned-in reports; (3) in response to complaints received from the Barangay Human Rights Action Center (BHRAC); and (4) to investigate sectoral conditions.[52]

Each regional office has an investigation and legal office. The investigator must verify complaints of human rights violations and gather evidence to be used against the violator in a court of law or administrative proceedings. The investigation office is also duty-bound to monitor conditions affecting economic, social and cultural rights—especially those of vulnerable groups such as children, women, and indigenous cultural communities.[53]

As a rule, CHRP investigators are encouraged to resort to conciliation and mediation to resolve a case.[54] An investigation will be carried out only when the conciliatory approach is deemed insufficient, either because the violation is too serious, or because one or both party refuses to submit to conciliation or mediation proceedings. The Operations Manual does not spell out the procedure for conducting the investigation, although certain guidelines on data gathering, documentation and reporting are provided.

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50 The CHRP has produced an Omnibus Rules for the conduct of investigation but, at the time of writing, this has not been finalized and adopted by the Commission en banc.

51 CHRP Operations Manual on Investigation and Case Management Process (2001).

52 *Id*., p. 13.

53 *Id*., p. 10.

54 *Id*., p. 23.

The CHRP Regional Office is duty-bound to monitor the status of cases referred to the court or other agencies, and to file the necessary reports with Central Office.[55]

C. Human Rights Cases Investigated

Statistics on human rights violations vary. There is no established protocol for the sharing of data on human rights cases between NGOs and the CHRP. Data from the CHRP merely reflects cases which were directly filed with the Commission or taken up of its own accord.

Data gathered from the Strategic Development and Planning Office (SDPO) of the CHRP is incomplete. It does not contain a breakdown of the nature of human rights violations investigated by its regional office, nor does it provide information on the status of these cases. According to SDPO Director Nerissa M. Navarro-Piamonte, the release of complete data is being delayed by the CHRP's shift to Martus-based reporting.[56] The CHRP hopes to standardize the reporting and analysis of human rights violations once the Martus system is fully implemented.

According to an investigator in the National Capital Region, regional offices are also finding it difficult to track the status of cases they recommended for appropriate actions to different agencies. There is no established system between the CHRP and these agencies to record the status of cases referred by the CHRP.

In 2008 the CHRP documented 954 new complaints for human rights violations.[57] Its date identifies police officers as top human rights violators while the victims are mostly civilians, including activists, members of the media and suspected criminals.[58]

55 *Ibid*.

56 *Martus* is Greek for "witness". Martus is an open-source software providing encryption technology that can be used by human rights organizations to capture, store, and disseminate information on human rights abuses.

57 Data from the Computer Data Bank of the Commission of Human Rights of the Philippines.

58 *Id. See* also, Alcuin Papa, *PNP top violator of human rights in RP--CHR chief*, Philippine Daily Inquirer, 14 July 2008. Electronic copy of the article may be accessed at: http://newsinfo.inquirer.net/breakingnews/nation/view/20080714-148388/PNP-top-

Table 1: Breakdown of Cases Investigated or Recorded by the CHRP by Region and By Case Type (Filed from January to December 2008)

Region	Case Type					
	Murder/ Homicide/ Execution	Illegal/ Arbitrary Detention	Disappearance	Torture	Other	Total
I	3	1			12	16
II	8			1	45	54
III	11	8	2		32	53
IV	20	2	1		37	60
V	15	4			17	36
VI	13	6			71	90
VII	8	9			42	59
VIII	41	4	7		56	108
IX	16	5	1	2	85	109
X	9	2			17	28
XI	79	2	1	3	44	129
XII	4	4			7	15
NCR	6	36	4	2	120	168
CAR			1	1	2	4
CARAGA	3	2	1		19	25
TOTAL	236	85	18	9	606	954

Extrajudicial Killings and Enforced Disappearances

Extrajudicial killings and enforced disappearances remain a problem, although the number of reported cases has declined. The CHRP has investigated around 152 incidents of extrajudicial killings from 2007 to 2008, with a total of 213 victims belonging to activist groups, labor organizations and other political associations. Meanwhile, the CHRP documented 44 cases of enforced disappearance or kidnapping in 2007 to 2008, with 61 victims

violator-of-human-rights-in-RP--CHR-chief.

mostly from the Eastern Visayas Region and Central Luzon.

The CHRP has investigated several shootouts between members of the Philippine National Police and suspected criminals. On 21 May 2008, three alleged criminals were killed by PNP operatives in Tanuan, Batangas. After investigating the case, the CHR Composite Team ruled that that no shootout could have possibly transpired as claimed by the PNP and that there are strong indications to suggest a 'rub-out' (or extrajudicial killing) in this case.[59] The CHRP also launched an investigation into the death of two civilians, including a seven-year old girl, and the wounding of three others in a deadly shootout between police and alleged members of a bank robbery group in Parañaque in December 2008.[60]

Meanwhile, on 17 February 2009, a video presented by the broadcaster ABS-CBN showed plainclothes policemen armed with assault rifles firing at the suspects at point blank range. Police claimed there was a car chase and a firefight, and that those killed were members of a notorious gang of thieves. The video footage showed the vehicle, which had already stopped, with two suspects inside and another sprawled on the ground; all appeared motionless. The CHRP is currently investigating the case.[61]

Torture of prisoners, detainees and suspects

Although the Philippine Constitution prohibits torture[62] and the Philippine Government is a State Party to the Convention Against Torture (CAT),[63] there is no law criminalizing it. Anti-torture bills

59 Electronic copy of the CHR Resolution on the case may be accessed at <http://www.chr.gov.ph/MAIN%20PAGES/about%20hr/position%20papers/resoln_24July2008.htm>.

60 See "CHR to probe possible police lapses in Parañaque shootout," 7 December 2008. Copy of the article may be accessed at < http://news.abs-cbn.com/nation/metro-manila/12/07/08/chr-probe-possible-police-lapses-para%C3%B1aque-shootout>.

61 See Abigail Kwok, "CHR chair will continue QC 'shootout' probe," 10 March 2009. Electronic copy of the article may be accessed at <http://newsinfo.inquirer.net/topstories/topstories/view/20090310-193372/CHR-chair-will-continue-QC-shootout-probe>.

62 1987 Const., Art. III, sec. 12 (2). "No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited."

63 *Joint Civil Society Report on torture and other cruel, inhuman or degrading*

have been filed since the 11th Congress (1998-2001), but have never been a legislative priority for the administration. In the current 14th Congress (2007-2010), House Bill No. 5846 has been approved on third reading by the House of Representatives but the Senate's counterpart anti-torture bill, Senate Bill No. 1978, is still awaiting the endorsement of the members of the Committee on Justice and Human Rights. Torture remains prevalent in the the country and is virtually a daily occurrence in ordinary precincts and police stations.[64]

The Task Force Detainees of the Philippines (TFDP) has been recording torture cases since at least 1982, and has documented 139 torture cases affecting 285 individuals between January 2001 and December 2008.[65] CHRP documented 16 cases of torture from its nine regional offices during 2008. Victims of torture include political activists and even petty criminals.[66]

Other Cases

The CHRP also investigated reports on arbitrary arrest, illegal detention, inhumane treatment of prisoners/detainees, and other violations of human rights. Statistics on these cases, however, are not indicated in SDPO data.

D. Actions on Complaints

In 2008 the CHRP resolved 675 cases, 274 of which were filed in courts or referred to the Prosecutor's Office, or to other agencies for prosecution and administrative action. There is no indication of the recent status of these cases. Meanwhile, 367 cases were terminated and 34 cases were archived, although no reasons for these decisions are given.

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treatment and punishment in the Philippines submitted in time for the consideration of the Philippine State Party's consolidated 2nd to 5th reports by the UN Committee Against Torture on its 42nd session from 27 April to 15 May 2009.

64 *Ibid*.

65 *Ibid*.

66 "Torture prevalent in the Philippines -rights body," 23 September 2008. Electronic copy of the article may be accessed at <http://www.alertnet.org/thenews/newsdesk/MAN318158.htm>.

CONSULTATION AND COOPERATION WITH NGOS

The Philippine Constitution recognizes the right of the people to participate at all levels of decision-making and mandates the State to facilitate the creation of adequate consultation mechanisms.[67] However, neither the specific constitutional provisions creating the CHRP nor the CHRP's Charter (Executive Order No. 163) provide for any such mechanism.

The CHRP has created a special NGO, Civil Society and Media Linkages Cooperation Office to to coordinate cooperation with non-governmental and civil society organizations and use the media to support advocacy efforts and the dissemination of information. Operationally, however, this office is not involved in consultation for policy or program formulation; it is more of a public relations or media unit of the CHRP. The post for Director at this Office is currently vacant.

Recently, the CHRP has mapped out focal persons and offices along thematic mandates of the Human Rights Council, including enforced or involuntary disappearances; extrajudicial, summary or arbitrary executions; indigenous people; minority issues; torture; transnational corporations and other business enterprises; and human rights defenders, among others. According to a CHRP official, these focal persons and offices are expected to consult and work with NGOs and CSOs involved with these specific themes.

RECOMMENDATIONS

To enhance the independence of the CHRP

To Congress:

i. Pass the revised CHRP Charter to ensure its independence. This revised charter must contain clear provisions for:

67 1987 Const., Art. XIII, sec. 15.

- a selection process for the nomination/application and appointment of the Chairperson and Commissioners that ensures pluralism and civil society participation;
- the adoption of a rotational scheme of appointment;
- the granting of full fiscal autonomy to CHRP.

ii. Give additional funding to CHRP for the purchase of equipment necessary to enhance its investigative functions, including the improvement of its forensics division.

To the President:

iii. Make appointments immediately as a vacancy occurs in the membership of the Commission.

To enhance the effectiveness of the CHRP

To Congress:

iv. Clarify the mandate of the CHRP and ensure that it is given ample powers to carry out its functions effectively, including provisions for issuing mandatory, prohibitive and protective writs.

To the CHRP:

v. Improve investigative and complaints-handling mechanisms.

vi. Finalize and publish the CHRP Rules of Procedure to appraise both complainants and respondents of the processes involved.

vii. Enhance the CHRP reporting mechanism to reflect accurate data which can be a basis for policy formulation.

viii. Establish an automatic mechanism in cooperation with other government agencies to report on the status of cases referred to the CHRP.

ix. Establish data-sharing mechanisms with NGOs and automatic reporting mechanisms on human rights violations investigated or documented by NGOs.

x. Conduct qualitative analysis of court-decided cases that the CHRP has investigated and endorsed for prosecution. This will guide the CHRP in taking steps to enhance its chances of obtaining criminal convictions. In particular, it should look into its quality of handling and preserving evidence, including testimony, objects and documents.

xi. Be prepared to cite contempt whenever necessary to obtain all available information on cases under investigation.

xii. Grant immunity to witnesses to ensure that alleged human rights violators are brought to justice.

xiii. Solicit Executive aid, such as the use of government medical and forensics experts, to facilitate CHRP functions.

xiv. Pro-actively engage the courts and submit its opinions, as amicus curiae ('friend of the court'), on cases involving human rights.

To the Supreme Court:

xv. Take into consideration the intent of the framers of the Constitution in deciding cases involving issues relating to the powers of the CHRP, to the end that human rights be fully enjoyed, protected and fulfilled.

Deep Setbacks on Human Rights in the Republic of Korea

Prepared by Korean House for International Solidarity[1]

1. General Overview on Human Rights Situation in 2008 and NHRCK's Responses

There is serious concern about both the general human rights situation in the country, and the current threat to the independence of the National Human Rights Commission of the Republic of Korea (NHRCK).

When he took office in early 2008, President Lee Myung-Bak described the past ten years as the 'lost decade' and promised to rebuild the Republic of Korea and help the people regain their lost smiles. He pledged to increase efficiency through the rule of the market, and to establish public order through the rule of law. In reality, however, these strategies have increasingly been at the expense of socially marginalized people and meant the repression of public opinion. Democracy and human rights have actually declined compared with the situation ten years ago.

The mass candlelight demonstrations from May to September 2008 against the Lee government's decision to approve the importation of US beef provide a telling example. Police used

1 Report prepared by Jung Kyoung Soo (Sookmyung Women's University), Hong Sung Soo (Sookmyung Women's University), and Kim Jong Chul (Somyoung Law Firm).

unnecessary force to disperse the protesters, beating protesters with batons and police shields and arbitrarily arresting bystanders.

In a more recent example from January 2009, police used excessive force to disperse protesters demonstrating against forced demolitions that were being carried out by the government to make way for Yongsan redevelopment. Five protesters and one police officer were killed in the blaze. Police are still attempting to blame the protesters for the tragedy, arguing that the crackdown was justified.

A blogger named 'Minerva' was targeted for continuously criticizing the Lee government's economic policies on a prominent internet discussion board between March 2008 and January 2009. On 7 January 2009, he was arrested and charged with 'spreading false information on the internet,' though he was finally found not guilty in court and released from jail in April 2009.

Prosecutors also arrested the producer of the investigative television program 'PD's Notebook' at the country's second-biggest television station in March 2009. They accused him of reporting 'misleading' information about the problems of US beef imports and leading Korea into chaos by inflaming massive street demonstrations against the government's decision.

The Ministry of National Defense created a list of banned books, including best sellers and academic books, in order to prevent 'seditious' books from entering the military. A few military judicial officers filed a constitutional petition arguing that such disciplinary measures violate the 'right to know', but they were discharged from the military against their will.

The human rights of socially marginalized groups, such as migrant workers most vulnerable to the effects of the worldwide recession, have been violated even more frequently than before. During his presidential election campaign, President Lee promised the eventual legalization of irregular migrant workers; immediately after the election, he ordered the deportation of 20,000 undocumented migrant workers by the end of 2008. As a result, immigration officials began a harsh

crackdown on migrant workers, often making strategic arrests to meet their quota. They even detained refugee applicants for working without permits, despite the fact that the government provides neither financial aid nor the right to work during the long process to determine refugee status.

Police even arrested the heads of the Migrant Workers Trade Union. While the NHRCK was in the process of investigating whether their arrests and subsequent investigation involved coercive treatment, the government suddenly deported the union leaders to their original countries without any prior notice.

Faced with these difficult human right issues, the NHRCK has expressed some recommendations and regrets over the major incidents. After the dispersal of the candlelight demonstration, the NHRCK recommended that Chief of Police (1) punish the police officers responsible for human rights violations when dispersing the demonstrators; (2) prohibit riot police from spraying fire extinguishers directly onto demonstrators; and (3) not arrest or block mere bystanders who were not involved in the demonstration. In response to the Ministry of National Defense blacklists, the NHRCK gave its opinion that choosing a book to read is a fundamental human right enshrined by the Constitution in Article 19 (freedom of conscience) and Article 21 (freedom of expression), so that creating a list of banned books should be reconsidered in pursuance with the spirit of the Constitution. The NHRCK also expressed its regret to the Ministry of Justice after the expulsion of the Migrant Workers Trade Union heads.

2. Independence

A. Law

After series of heated debates and long discussions between the Ministry of Justice and civil society on the independence of the NHRCK, the NHRCK Act was passed in April 2001. Accordingly, the NHRCK was established on 25 November 2001.

Although an early attempt to place the NHRCK under the Ministry of Justice failed, the NHRCK could not be created as a constitutional institution because revising a constitutional amendment requires a referendum. Article 3 of the NHRCK Act does stipulate that the 'NHRCK conduct its activities independently in accordance with its mandate', suggesting independence from the Executive, the Legislature and the Judiciary. However, because the NHRCK Act does not clearly state that the NHRCK should not belong to any of the three powers, the NHRCK has been constantly in danger of losing its independence. Though it failed, in early 2008 the Lee government tried to place the Commission under the control of the president as a sub-agency. In March 2009, the government combined the NHRCK with the Education and Policy bureaus by revising the relevant executive decree, reducing the organization's size by 20 per cent (the number of staff was reduced from 208 to 164).

This attempt was possible because Article 18 of the NHRCK Act states that 'matters necessary for the organization of the Commission shall be prescribed by 'Presidential Executive Decree' and those necessary for its operation shall be prescribed by the rule of the Commission'. Consequently, the Ministry of Public Administration and Security (MOPAS) asserts that reorganization of the NHRCK is justified because it is based both on Article 18 and on the Lee government's 'slim government, big market' policy. But since the Commission is an independent body, due process in reorganization should be strictly respected.

It should be noted that the Committee of Fair Trade, the Ministry of Justice and the Ministry of Labor were downsized by just 2 per cent; only the NHRCK was reduced by 20 per cent. This suggests that the reorganization of the NHRCK was not, in fact, part of the 'slim government, big market' policy, but rather the government's retaliation for the Commission's official position statement criticizing the way that police treated protesters during the candlelight demonstration. Furthermore, it is clearly illegitimate to reorganize the Commission by a unilateral decision.

B. Relationship with the Executive, Legislature, Judiciary and other specialized institutions

According to the NHRCK Act (Article 20: 2-3), the Commission may request the consultation of relevant government organizations if it considers it necessary for the performance of its duties. Those organizations must comply with any such request unless they have a justifiable reason not to. In addition, the Act states that the NHRCK should submit an annual report to the National Assembly and the president.

The NHRCK has no authority to draft bills. The only way that the NHRCK can be involved in the lawmaking process is by consulting with government agencies attempting to create and amend legislation related to human rights matters.

While the NHRCK Act does not mention the extent of the Commission's jurisdiction, the NHRCK shall reject complaints already pending in the courts or the Constitutional Court. It is allowed to submit opinions or amicus briefs to the courts, although it has rarely done so in practice. Last year, the NHRCK issued its opinions on just four cases pending in the courts.

There are other national human rights institutions (NHRIs) besides the NHRCK, such as the Anti-Corruption and Civil Rights Commission. This was launched on 29 February 2008 by the integration of the Ombudsman of Korea, the Korea Independent Commission against Corruption and the Administrative Appeals Commission. Its activities and duties overlap with those of the NHRCK. According to the enforcement decree of the NHRCK Act, the Commission should also conduct human rights policy conferences to promote active interaction between government agencies and human rights activists. Even though the NHRCK has concluded a kind of memorandum of understanding with other NHRIs, it is still necessary to create a concrete mechanism by which the NHRCK can cooperate with these other institutions more efficiently.

Significantly, the overlapping of activities and duties is one of the official reasons given by MOPAS to justify the significant reduction of NHRCK staff this year. But the NHRCK plays a unique, leading

role in both conducting education and public awareness activities on human rights and influencing human rights policy. Moreover, when it comes to investigation and remedy, the jurisdiction of the NHRCK is much broader than other NHRIs. In fact, one of reasons for the NHRCK's creation was that the abovementioned institutions had not fulfilled their objectives. The claim by MOPAS that downsizing the NHRCK's organization was due to an overlap with other NHRIs therefore lacks credibility.

C. Members

The Commission is composed of 11 members: one Chairperson, three standing Commissioners, and seven non-standing Commissioners. The president appoints all 11 Commissioners, on nomination from four persons selected by the National Assembly, four persons nominated by the president, and three persons nominated by the Chief Justice of the Supreme Court.

The nomination and appointment processes are not published and there is no participation of the public or civil society organizations. The Commission committee neither advertises nor arranges public nominations for vacancies. However, the Chairperson position is equivalent to that of a minister of state, and the Commissioner position is also very important. The appointment process of all Commissioner positions should therefore require mandatory public hearings at the National Assembly, and there should be institutional mechanisms that allow civil society to consult and review the candidates' qualifications. In fact, the National Assembly goes through the voting process when selecting Commissioners for nomination, but there is no such verification process for either the president or the Chief Justice of the Supreme Court.

According to Article 7 of the NHRCK Act, Commissioners are appointed for an initial three-year term, which may be extended for an additional three years. Even when the current term expires, Commissioners must continue to perform their duties until a successor is appointed.

The NHRCK Act does not stipulate the immunity of Commissioners. However, in terms of removal, the Article 8 of the NHRCK Act states that a Commissioner shall not be removed from office without their consent unless they have been sentenced to imprisonment without labor or a heavier punishment. When it becomes difficult or impossible for a Commissioner to perform their duties due to any physical or mental handicap, he or she may be dismissed from office with the agreement of two-thirds or more of the Commission.

Article 10 of the NHRCK Act does not allow a Commissioner to take office at the National Assembly or any local council or government, join a political party or participate in political activities. Accordingly, one Commissioner had to resign for simultaneously holding a position in an advisory committee of the majority party, following strong pressure to do so from human rights organizations.

The Act specifies that at least four or more of the Commissioners must be women, but does not mention the principle of pluralism in general. The NHRCK currently has four female Commissioners and one Commissioner with a physical disability, but the professional backgrounds of all the Commissioners are not yet diverse enough. Most of them are from legal professions—being attorneys, judges, law professors, and prosecutors—while others come from non-legal backgrounds, including one journalist and a religious leader.

According to the NHRCK Act, Commissioners should have professional knowledge and experience of human rights matters; and they should be able to perform their duties for the protection and promotion of human rights justly and independently. Some current Commissioners do not meet this standard in terms of professional knowledge and experience. When it comes to being just and independent, it must be noted that one current Commissioner has a history of embezzling funds as a facility director for disabled people, while another former Commissioner had maintained a committee advisor position with the ruling party when appointed as a Commissioner, as mentioned above.

The NHRCK does not provide any human rights training to Commissioners, or any training relating to the principle of independence.

D. Resources

The NHRCK depends on government funds, with no other financial sources. The 2007 budget was 21.9 billion KRW (approximately 16.3 million USD), while the 2008 budget was 23.3 billion KRW (approximately 17.4 million USD). Of that total, 11.1 billion KRW (8.3 million USD) was used for labor, 7.2 billion KRW (5.4 million USD) for basic general expenses, and 5 billion KRW (3.8 million USD) for main activities.

The NHRCK does not have the power to determine the budget for its activities. It may only report its budget proposal to the Ministry of Finance and Planning, and consult with them. The Ministry then submits the National Budget draft—which includes the NHRCK budget—to the National Assembly, after which the National Assembly finalizes the budget.

Although the NHRCK does not determine its annual budget, it does have control over its budget expenditure based on reasonable agreement with the National Fiscal Act. The fact that the Commission is under the supervision of the Board of Audit and Inspection, as well as being scrutinized by NGOs, provides some safeguard against corruption and ensures a certain level of transparency in operation.

This year's NHRCK budget has not yet been reduced in line with its downsizing; the downsizing occurred after the National Assembly had already passed the budget for 2009. However, we expect the 2010 budget to be reduced in accordance with the reduced capacity of the NHRCK.

The NHRCK's ability to select and manage its own staff is very restricted because the NHRCK Act stipulates that the Commission's operation is determined by executive decree. As mentioned earlier, the Lee government abused this authority to significantly reduce the size of the Commission without consulting the Commission.

3. Effectiveness

The NHRCK's main activities can be categorized into: (1) investigating human rights violations or discriminatory acts; (2) researching and providing recommendations or opinions on human rights policies; and (3) raising public awareness on human rights through educational and press work.

The ability to subpoena for information is crucial for NHRCK investigations to be most effective. Although the NHRCK does not have authority to issue a subpoena, Articles 22 and 63 of the NHRCK Act do enable the Commission to collect information necessary for its own analysis and recommendations. Those who refuse to submit the required information may be punished by a fine of up to 10,000 USD. For example, the NHRCK fined one psychiatric hospital last year for refusing to submit the requested information.

The investigation of human rights violation or discriminatory act can be initiated by the Commission itself, but is usually undertaken in response to a complaint filed with the Committee. People can file a complaint with the NHRCK by: (1) visiting one of the three regional Human Rights Counseling Centers located in three major cities, as well as the main office in Seoul; or (2) contacting the offices by fax, telephone, or email. Those in detention centers for foreigners, jail or mental hospitals can (3) arrange a face-to-face interview with an NHRCK staff member; and (4) use a human rights complaints box installed by the NHRCK in each facility.

The NHRCK received a total of 6309 cases in 2008. Of these, around 2000 cases were filed by post, 1500 using the internet, and 1000 by site visits. 77.5 per cent (4892 cases) of complaints were regarding human rights violations, while the rest were related to discriminatory acts and others.

The NHRCK investigated 5288 of Violation Rectification cases during 2008, a decrease of 3.5 per cent compared to the previous year. The number of cases investigated by the Commission's Discrimination Remedy Department increased from 1159 in 2007 to 1380 in 2008, due to the increasing number of complaints after

the enactment of the Anti-Discrimination Against People with Disabilities Act.

Investigating human rights violation cases in 2008, the NHRCK accepted 308, dismissed 1644, rejected 3177 and transferred 99.2 While most recommendations issued by the Commission were respected, the police department, a mental health hospital and military academy rejected some recommendations regarding the violation of freedom of assembly and communication. The NHRCK investigated 1390 discrimination cases, of which 119 were accepted, 240 dismissed, and 765 rejected. The Commission issued recommendations on 90 cases, of which 11 were not implemented and many were only partly implemented. When recommendations are not implemented, there is no way to enforce them. The only way to press recipients to accept NHRCK recommendations is by applying moral, political or public pressure by publicizing non-implementation.

The NHRCK's six major tasks in 2008 included protecting human rights of: (1) people with disabilities, including mental disabilities;3 (2) migrants; (3) vulnerable social groups, including children, young people and older people; (4) the impoverished; (5) North Koreans; and (6) personal information holders.

In response to the number of petitions requesting to be discharged from mental health institutions, the NHRCK hosted a discussion forum on the conclusions of an inquiry into the

2 As for the difference between rejection and dismissal, Article 39 of the NHRCK Act states that the Commission shall dismiss a petition in the case: (1) the contents of a petition are false or there is no evidence to support the contents; (2) a petition is proven to be unrelated to any human rights violation or discriminatory act; and (3) it is deemed that any further remedy is not required because any injury related to the petition has already been relieved. Article 32 provides that the Commission shall reject a petition in the case: (1) the contents of a petition do not fall within the scope of the matters subject to investigation by the Commission; (2) the contents of a petition are deemed manifestly false or ill-founded; (3) a petition is filed by any person other than the victim, but it is manifest that the victim does not desire the investigation thereof; (4) a petition is filed under any pseudonym or anonym; (5) a petition is withdrawn by the complainant who filed it; (5) a petition, with the facts identical to any other petition which has already been dismissed by the Commission, is filed, etc.

3 The Act on Prohibition of Discrimination against People with Disabilities and Relief took effect on 11 April 2008.

human rights conditions of the mentally disabled. According to this inquiry, guardians, provincial governors and the police had forcefully admitted 82.5 per cent of patients in psychiatric hospitals or rehabilitation centers. The NHRCK also informed the Prosecutor General that one hospital president illegally hospitalized, forcibly medicated, and physically assaulted a patient. As a result, the NHRCK recommended that: (1) the Minister for Health, Welfare and Family Affairs take administrative action concerning false medical records and recurrence prevention measures; and (2) the hospital president in question immediately redress its violations of the Mental Health Act.

In response to a harsh crackdown by the Ministry of Justice on irregular or undocumented migrant workers, the NHRCK carried out on-site and fact-finding investigations. It concluded that the actions of the immigration officials constituted a human rights violation and recommended that the Ministry of Justice devise measures to prevent similar incidents happening in future. It also recommended that the Prime Minister and the Minister of Labor reduce the restrictions placed on legitimate migrant workers, which only allow foreign workers to transfer to other workplaces three times in 'extremely unusual' cases when there are 'unavoidable causes'—such as a business closing or an employer terminating a labor contract. The NHRCK also held a forum on the 'human rights of refugees in Korea' based on research comprising surveys and in-depth interviews with more than 300 asylum seekers and refugees. It recommended that the Ministry of Justice and the Ministry of Health and Welfare should allow foreigners to work if permitted to stay in Korea for humanitarian reasons.

To improve children's rights, the NHRCK conducted many human rights training courses for teachers and students, as well as designing human rights education guidebooks for students. It also investigated welfare facilities for older people to improve their human rights conditions. Concerned by the deepening social polarization caused by the global recession, the NHRCK issued many recommendations to the Minister of Labor, including one that the Labor Standard Act, which ensures a minimum standard of working conditions, should be extended to smaller business with fewer than five employees.

The NHRCK held many meetings, forums and consultations on the human rights of North Koreans, and delivered recommendations that the Minister of Foreign Affairs and Trade should make greater efforts to stop the enforced repatriation of North Korean defectors in China.

While there were no notable activities by the NHRCK on the protection of personal information—though this had been designated as one of their major tasks for 2008, as mentioned above—it did conduct many important activities in other areas. These included making inquiries into the human rights situation of athletes; hosting a panel discussion on the Universal Periodic Review; recommending that the Minister of National Defense introduce alternative military service for conscientious objectors; and carrying out research on the human rights policies of major corporations, 'Korean-style' business and human rights guidelines.

4. Cooperation and Consultation with Civil Society

According Article 19 of the NHRCK Act, the NHRCK should cooperate with: (1) organizations and individuals engaged in any activity for the protection and promotion of human rights; and (2) international organizations related to human rights and human rights institutions of other countries. It holds consultations with civil society and organizes thematic committees that include civil society experts. It also conducts cooperation projects with human rights NGOs every year; last year, it sponsored NGOs to the tune of approximately 300 million KRW (0.2 million USD).

The NHRCK cooperates with the full range of civil society, including NGOs, trade unions, professional organizations, individuals and organizations espousing trends in philosophical or religious thought, universities and qualified experts. In addition, there are regular consultations conducted by the NHRCK together with other civil society groups. The NHRCK holds an annual consultation at the beginning of the year, in which it asks for an evaluation of the previous year and provides advice on a 'New Year's plan' to civil society. Additionally, the NHRCK has a Communication and Cooperation Division as a focal point for human rights defenders.

It must be noted that the Lee government and the conservative right-wing leadership opposed the use of the NHRCK budget to support left-wing organizations, and thus insisted on the reduction of the NHRCK, which was eventually achieved by revising the enforcement decree.

5. Conclusion and Recommendations

While downsizing the Commission by 20 per cent increases the threat to its independence, it is still too early to conclude that the Commission has lost its independence. The NHRCK's sharp criticism of the government on various issues in spite of this threat can be interpreted as its attempt to protect its independence. In response to the government's actions, the NHRCK Chairperson has filed a competence dispute at the Constitutional Court and is currently waiting for the result. We expect the Constitutional Court to realize the importance of the NHRCK's independence, and rule that it is unlawful for MOPAS to undermine the independence of the NHRCK by taking a unilateral decision to reduce it.

Finally, we recommend as follows:

The appointment process of Commissioners should require mandatory public hearings at the National Assembly and institutional mechanisms that allow civil society to review the candidates' qualifications;

The provision of the NHRCK Act stipulating that the Commission's operation is determined by executive decree should be revised for the independence of the Commission;

The Commission should be sensitive to the possibility of human rights violation by the judiciary, and be willing to present its opinions to the courts on relevant cases.

The Human Rights Commission of Sri Lanka In 2008

Prepared by B. Skanthakumar[1]

I. General Overview[2]

A culture of serious human rights violations prevailed in Sri Lanka in 2008. Violations of international humanitarian law, extra-judicial killings, abductions and 'disappearances', verbal and physical attacks on journalists and human rights defenders, increasing intolerance for dissent and the dissemination of information embarrassing to State actors, and wanton disregard for constitutional provisions and democratic norms were once again features of this year.[3]

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1 Economic, Social & Cultural Rights Programme, Law & Society Trust (LST), Colombo, Sri Lanka. Note from the author: I am grateful to HRCSL staff in two regional offices visited in May 2009 for sharing information on their activities and challenges, human rights defenders in those districts for their observations on, and Sudarshana Gunawardana (Rights Now – Collective for Democracy) for his insights into, the Commission. The views expressed are my own.

2 This paper is structured according to guiding questions and indicators developed by the Asian NGOs Network on National Human Rights Institutions (ANNI) for its 2009 Report.

3 Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices: Sri Lanka 2008, US State Department*, Washington D. C. 2009 http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119140.htm; B. Skanthakumar, "'The Enemy Within': Human Rights Defenders in Sri Lanka", *LST Review*, Vol. 19, Issue No. 253 (November 2008), pp. 1-15.

The Government of Sri Lanka's (GoSL) unilateral abrogation of the Cease-Fire Agreement with the armed separatist Liberation Tigers of Tamil Eelam (LTTE), though effective from 16 January 2008, only confirmed the irrevocable breakdown of the 2002-2005 'Peace Process' in the intervening period, and shook off the last fetter on the full-blown prosecution of war.[4]

In this context, the challenge before national human rights institutions, specifically the Human Rights Commission of Sri Lanka (HRCSL), is inevitably greater, and its alarming unwillingness to recognise the urgency and seriousness of the human rights crisis and consequently its ineffectual performance, of greater disappointment and concern. The "cautious optimism"[5] once expressed in the envisaged role and desired contribution of this national human rights institution has evaporated without a trace.

In stark contrast to the challenges of ongoing human rights violations, the HRCSL chose to avoid directly addressing conflict-related human rights violations and therefore confrontation with the GoSL.

The sources of the malaise affecting the HRCSL reside in the selection, composition and calibre of its Commissioners; the bureaucratic approach of staff to human rights concerns and violations; the chronic shortage of human, financial and infrastructural resources especially in regional offices and particularly those in conflict-affected regions; and the poor relationship between its head office and many human rights organisations.

In 2007, the HRCSL's non-compliance with the Paris Principles (Relating to the Status and Functioning of the National Institutions for the Protection and Promotion of Human Rights) led to its downgrading from Status 'A' to Status 'B' member by the International Coordinating Committee of National Institutions

4 Jayadeva Uyangoda, *The Way We Are: Politics of Sri Lanka 2007 – 2008*, Social Scientists Association, Colombo 2008.

5 Mario Gomez, "Sri Lanka's New Human Rights Commission", *Human Rights Quarterly*, Vol. 20, No. 1 (1998), pp. 281-302 at p. 302.

for the Promotion and Protection of Human Rights (ICC).6 The HRCSL's subsequent failure to institute the reforms recommended by the ICC's Sub-Committee on Accreditation led to confirmation of its 'B' status on its review in March 2009. Only 'A' status institutions are considered full members of the ICC with voting rights and receive concomitant recognition by the United Nations Human Rights Council within its structures and processes.

The gravity of the crisis affecting the Human Rights Commission of Sri Lanka is illuminated by the non-appointment of its Commissioners since May 2009 following the end of the previous term of office of the sitting Commissioners. There has been no statement from the GoSL as to its intentions. Therefore, the premier national human rights institution in the country is presently leaderless and directionless.

II. Independence

A. Legal Framework

The Human Rights Commission of Sri Lanka (HRCSL) is a statutory institution created by an Act of Parliament[7] in August 1996, though it only began functioning almost a year later, in July 1997.[8] In 2001, the HRCSL among a number of other statutory bodies arguably received constitutional recognition, when it was listed in the Schedule to the 17th Amendment to the Constitution.

During the drafting of the Act and in its legislative passage there was active debate on it among human rights organisations and legal academics, as well as limited discussion among Parliamentarians. Weaknesses in language and administrative and procedural defects were identified, for example in the criteria for selection of Commissioners; and the enforcement powers of the Commission.

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6 Kishali Pinto-Jayawardena, "Telling truths and political brinkmanship", *The Sunday Times*, 16 December 2007.

7 *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

8 Mario Gomez, "Great Expectations: The Sri Lankan Human Rights Commission", *LST Review* Vol. 9 Issue No. 131 (September 1998), pp. 30-40 at p. 30.

An extremely serious defect is that the scope of the Commission's inquiries and investigations is confined to infringement or imminent infringements of fundamental rights alone and not human rights as a whole.

The Sri Lankan Constitution has a chapter on fundamental rights (that is, civil and political including linguistic rights) that are deemed to be justiciable in contrast with the chapter on directive principles of state policy (that is, economic, social and cultural rights).

However, the fundamental rights chapter does not include the gamut of even civil and political rights that Sri Lanka has acceded to through international treaty law notably the right to life. Further, by confining the Commission's mandate to fundamental rights, its vision of human rights is confined to those rights expressly protected in the Sri Lankan Constitution[9] rather than the large body of human rights conventions that Sri Lanka has ratified or acceded to, and its interpretation of human rights too has also been restricted by the domestic jurisprudence on human rights that has been timid and conservative in comparison to that of neighbouring India.

'Human rights' is only referred to in a promotional and not protective context viz. human rights education and is also defined in the enabling law as "rights declared and recognised by the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights",[10] to the exclusion of other core international human rights treaties such as the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child (all ratified or acceded by Sri Lanka); the Universal Declaration of Human Rights; International Labour Organisation Conventions and customary international law relating to human rights.

Of great concern is the power vested in an unspecified "Minister" (presumably the Minister of Justice earlier and perhaps the Minister for Disaster Management and Human Rights now) to make regulations "prescribing the procedure

9 'Fundamental right' is defined tautologically in the enabling law as "… a fundamental right declared and recognised by the Constitution", s. 33, *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

10 S. 33, *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

to be followed in the conduct of investigations …"[11] This is in addition to the Minister's wide discretionary authority to make regulations "in respect of any matter which is required by the [Human Rights Commission of Sri Lanka] Act to be prescribed"[12.]

These critiques though raised by civil society organisations in the discussions around the draft Act[13] were ignored with predictably, perhaps intentionally, ruinous consequences for the independence and effectiveness of this national human rights institution.

There are limited and clearly defined grounds for removal of Commissioners by the President[14] or Parliament[15]. The Commissioners' salaries are voted by parliament and not the Executive; are charged to the Consolidated Fund rather than any departmental or ministry budget; and cannot be reduced during their term of office.[16]

These safeguards offer some measure of independence from Executive pressure and interference but are premised on legislators themselves being independent of Government; imbued with a human rights consciousness; and supportive of national human rights institutions: none of which has been much in evidence for several years, if not decades.

Although, there is no express statutory provision to this effect, the Commission has always had regional offices and this is perhaps its greatest strength. This structure and many of the senior personnel were inherited from the Human Rights Task Force that preceded the Commission.

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11 S. 31 (2), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

12 S. 31 (1), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996. Interpolation is mine.

13 See Deepika Udagama, "Human Rights Commission Bill (1995)", *LST Review* Vol. 6, Issue No. 96 (October 1995), pp. 13-17 and the themed issue on the 'Human Rights Commission Bill and the Proposed Amendments", *LST Review*, Vol. 6, Issue No. 100 (February 1996).

14 S. 4 (1) (a) (i – vi), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

15 S. 4 (1) (b), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

16 S. 8, *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

Presently, there are 10 offices in Ampara, Anuradhapura, Badulla, Batticaloa, Jaffna, Kalmunai, Kandy, Matara, Trincomalee and Vavuniya. Since 2002 there has also been a thematic unit on Internally Displaced Persons founded under the 'National Protection and Durable Solutions for Internally Displaced Persons Project'. Following the December 2004 Tsunami, the Commission created a Disaster Relief and Monitoring Unit to investigate and redress human rights violations of Tsunami-affected communities.

The HRCSL has a long way to go before the ethnic pluralism of Sri Lanka is reflected in its staff cadre. Outside of the Tamil-speaking majority Northern and Eastern Provinces, there are few Tamils and Muslims in its offices elsewhere. However, the majority of Tamil-speakers live outside of the North and East. None of the senior staff at its head office in Colombo are from minority communities.

An island-wide state of emergency was re-imposed on 13 August 2005[17] immediately following the LTTE's assassination of Foreign Minister Lakshman Kadirgamar, and has been renewed without respite thereafter. Most of Sri Lanka's post-colonial rule has been under a state of emergency. The HRCSL has continued to operate without any legal restrictions on its functioning, mandate and methods of work during this period.

Regrettably, it has not made any comments on the scope and application of emergency powers. Neither has it acknowledged the extra-legal constraints that affect human rights protection, and the work of human rights defenders, in Sri Lanka as a consequence of emergency laws. This should be contrasted with the expectation, "that, in the situation of … a state of emergency, an NHRI will conduct itself with a heightened level of vigilance and independence in the exercise of their mandate".[18]

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17 *Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 (sic) of 2005*, Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary No. 1405/14 – August 13, 2005, 1A-25A. For commentary see Saliya Edirisinghe, 'Emergency Rule' in *Sri Lanka: State of Human Rights 2006*, Law & Society Trust, Colombo 2007, esp. pp. 196-221.

18 General Observation 5.1, ICC S*ub-Committee on Accreditation*, June 2009.

B. Relationship with State Organs and Other National Human Rights Institutions

There is no statutory requirement for public authorities to cooperate with the Human Rights Commission of Sri Lanka. While in the year under review there were no publicly disclosed incidents of obstruction of HRCSL officers by state agencies, such that for example, routine inspections of police stations and prisons took place, the public perception is that the Commission does not enjoy the full cooperation of government.

Following a fact-finding mission to Boossa Detention Camp, near Galle in the Southern Province, which is a notorious facility for Tamils arrested under the Prevention of Terrorism Act and emergency regulations, the HRCSL was forthright in concluding that conditions there and the treatment of detainees did not conform to international standards.[19] The Camp is administered by the Terrorism Investigation Division (TID) which reports to the omnipotent Defence Secretary (a former army officer and brother to the President). Unfortunately, the HRCSL has not objected to the presence of the TID in consultations between detainee and legal counsel.

The HRCSL does not have access under its enabling law or emergency regulations to military and para-military (that is, armed groups aligned to the State) camps where Tamil youth suspected of association with the LTTE have been removed for interrogation through torture and subsequently 'disappeared'. Neither, has it publicly requested the extension of its right to make unannounced visits to such unofficial detention centres, and more to the point, demand that this practise is ended.

In common with many other public, private and non-governmental institutions for public accountability – in the context of the prevailing national security ideology where the State presents itself as besieged from within and without and reacts with ruthlessness against real and imagined critics – the HRCSL avoids imputing any connection between serious and gross violations of

19 "To ascertain conditions of the detainees: HRC visits Boossa camp", *Daily News*, 25 February 2008.

human rights and state security agencies and their sub-contractors in para-military and other criminal organisations.

Although the HRCSL has chosen to remain silent in the face of state-sponsored violations of human rights, there was one exception in October 2008 when in a terse statement it condemned the grenade attacks on the home of leading human rights lawyer and civil society activist, J. C. Weliamuna.[20] However, the statement stopped short of any admonition to state authorities or recommendations to the Government. Needless to add, no arrests have been made, nor any progress with investigations disclosed. There has been no further comment by the Commission on impunity for this and other abuses.

In 2008 and in the first quarter of 2009 HRCSL regional staff was particularly on the receiving end of verbal intimidation including threats of death in the course of their inquiries and investigation into complaints.[21] In the recent past, HRCSL investigating officers have been verbally and physically threatened by uniformed law enforcement personnel (from the military and police) as well as individuals and groups believed to be operating under the protection and even direction of state security agencies,[22] leading to temporary closure of offices, transfers of affected staff, resignations, and at least one asylum application in 2008.

The Human Rights Commission is statutorily required to submit an annual report to Parliament listing all matters referred to it and detailing action taken as well as recommendations that it made.[23] However, the HRCSL has a poor record in the prompt preparation of its annual report; and in any case its reports are primarily focused on its activities to the exclusion of analyses of current human rights concerns and prescriptions for legal, institutional and policy reform.

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20 "... HRC condemns attack", *The Island*, 01 October 2008.

21 Kurulu Kariyakarawana, "HRC Kalmunai Regional Coordinator threatened with death", *Daily Mirror*, 30 April 2009.

22 In December 2007, death threats were received by staff of the Mannar and Trincomalee HRCSL regional offices, "Human Rights Commission officers threatened", *Daily News*, 24 December 2007.

23 S. 30, *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

For several years, between 2002 and 2006, no report was published. Recently, undoubtedly in response to critical observations of the ICC's Sub-Committee on Accreditation, the HRCSL has sought to catch up by publishing its joint 2006 & 2007 and 2004-5 report in quick succession. However, as of end June 2009, the 2008 report was still unavailable.

The HRCSL's website – limited though it is in terms of information uploaded, incorrect addresses for some regional offices, and non-functional mirror sites in Sinhala and Tamil – is the only web portal through which the annual reports, which are otherwise poorly disseminated and unavailable elsewhere to members of the public, may be accessed. Since May 2009 this website has not been functional.

Under the terms of its enabling law, the HRCSL is entitled to submit periodic or special reports to Parliament "in respect of any particular matter, or matters referred to it, and the action taken in respect thereof".[24] However, in 2008, no avail was made of this provision.

There is no evidence in parliamentary records of discussion of the HRCSL's 2006-7 report. There is little interest in raising human rights related issues among governing coalition parliamentarians who view mere mention of 'human rights' as a coded or direct attack on their Government's conduct of military operations against the Liberation Tigers of Tamil Eelam (LTTE) in the theatre of war, as well as its authoritarianism and repression of dissent elsewhere in the island. The allergy has reached such proportions that even reference to the state-sponsored Human Rights Commission appears to be non-existent in the legislature.

Opposition parliamentarians have themselves sought the intervention of the Human Rights Commission in 2008; but view human rights in instrumental fashion and presently a handy stick with which to beat the Government in the court of domestic and international opinion. The unhappy record of the parties they support, in perpetrating egregious violations of human rights and fostering impunity while in office, does not inspire confidence in their commitment to undertake the institutional and systemic reforms necessary for the Commission to become a robust human rights actor.

24 S. 30, *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

In August 2008 the HRCSL's project on Internally Displaced Persons (that practically functions in a semi-autonomous fashion in relation to the Commission) prepared and presented a Bill[25] towards the creation of an Internally Displaced Persons (IDP) Authority. There appears to be no urgency on the part of the Government to consider this Bill as it has made no public comment on it nor listed it on the Order Paper of Parliament for debate. Nevertheless, the initiative taken by the HRCSL's IDP project must be recognised and congratulated, particularly in the absence of any similar initiative by the parent Commission, or even more modest submissions on draft legislation in the year under review.

There is no structured relationship between the HRCSL and specialised institutions such as the Office of the Parliamentary Commission on Administration (Ombudsman), the National Child Protection Authority, the National Police Commission, and the Official Languages Commission among others. There is cross-referral of complaints and complainants but no transparent procedure nor necessary coordination and consultation of shared matters of interest and concern. There are only ad-hoc joint activities, centred on human rights promotion, and no common interventions as regards human rights protection for e.g. joint fact-finding missions, joint submissions to the GoSL, joint reports and statements etc. When they should be swimming together, they are choosing to sink separately.

C. Membership and Selection

The importance accorded by the Paris Principles to the selection and pluralism of Commissioners of national human rights institutions is justified by the sorry experience of the Sri Lankan Human Rights Commission.

25 The full title of the Bill which also conveys its scope is "An Act to provide for the Establishment of an Internally Displaced Persons Authority, to set out the Powers and Functions of such Authority and to provide Protection from Arbitrary Eviction and Displacement, and to provide for the Protection of Persons under Risk of Displacement and Internally Displaced Persons, and for matters connected therewith or incidental thereto", http://www.idpsrilanka.lk/html/SpecialProgrammes/IDP%20Bill/2008%20Aug%2008%20-%20Draft%20IDP%20Bill.pdf

In April 2006, new Commissioners were appointed directly by the Executive President in blatant violation of the 17th Amendment to the Constitution that prescribes the lawful method of their appointment;[26] and even the procedure defined by the HRCSL's enabling law whereby in the absence of the Constitutional Council (established through the aforementioned Constitutional amendment), members of the Commission are "appointed by the President on the recommendation of the Prime Minister in consultation with the Speaker and the Leader of the Opposition"[27]. In fact, the appointments were made solely by the President.

There are five Commissioners[28], none of whom are full-time as there is no such requirement in the enabling law. Each Commissioner holds office for a fixed term of three years and may only be removed according to appropriately restrictive and limited criteria such as insolvency; conflict of interest through paid employment; infirmity of mind or body; prolonged absence without leave; and so on.[29]

The criterion for their selection is that they be "chosen from among persons having knowledge, of, or practical experience in, matters relating to human rights"[30]. This is weaker than the language proposed by civil society activists who had recommended instead, "proven expertise and competence in the field of protecting and promoting human rights", following recommendations developed by Amnesty International.

None of the most recent Commissioners are recognised human rights defenders, and on their watch the reputation of the Commission has plummeted owing to its near invisibility at national-level, poor performance and ineffectiveness.

The only prescription as to pluralism in the selection of Commissioners is as to the "necessity" for the representation of

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26 See, Kishali Pinto Jayawardena, "One Step Forwards and Two Steps Backwards: The Problematic Functioning of Sri Lanka's National Human Rights Commission (NHRC)", *LST Review,* Vol. 16, Issue No. 225 (July 2006), pp. 23-27, esp. pp. 23-25.

27 S. 3 (2), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

28 S. 3 (1), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

29 S. 4 (1) (a), (b) & 4 (2), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

30 S. 3 (1), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

"the minorities",[31] who are undefined but commonly understood to be the ethnic minorities. However, nowhere are "the minorities" enumerated, which is to the disadvantage of numerically smaller minorities and minorities within minorities who generally go unrepresented.

Thus, the most recent batch of Commissioners included two ethnic minority member communities, that is a Northern Tamil and a Muslim, the former of whom was also appointed by the President[32] as Chairman of the Commission as is his discretionary authority under the enabling law. Previous Commissions have always had Tamil and Muslim representation.

There is no requirement as to the representation of women. Thus, the first Commission did not have even a single woman commissioner and the most recent, only one. There is no bar to the reappointment of Commissioners[33] on the expiry of their term of office, and no limit on the number of terms they may serve.

Fortunately, for purposes of certainty and authority, any defect in the appointment of Commissioners or any vacancy among their number does not invalidate any act or proceeding of the Commission.[34]

Generally, the composition of the Commissioners has been unsatisfactory as their members are drawn from a narrow strata of society based in Colombo such as lawyers, legal academics,

31 S. 3 (3), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

32 S. 3 (4), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996. His predecessor, also appointed by the present President, too was a Northern Tamil and also a former Justice of the Supreme Court: the aim in both instances being to award the plum position to a Tamil and trumpet this fact as evidence of the Government's fairness to ethnic minorities. Both incumbents were also safe choices in that neither was associated with the expansion of the bench's human rights jurisprudence nor adverse judgements against the State on politically sensitive matters. When the Chairman of the Commission took a leave of absence in January 2009 to go abroad for an extended period, his Muslim colleague was selected by the President, as empowered under s. 6 (3) of the Human Rights Commission of Sri Lanka, Act No. 21 of 1996, to act as Chairman, ("Bafiq appointed Acting Chairman of Human Rights Commission", *The Morning Leader*, 04 February 2009) and remained so until the expiry of the Commissioners' term of office in April 2009.

33 S. 5, *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

34 S. 7, *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

prominent civil society activists and retired judges and former senior civil servants.

The composition of the 2006-9 Commission was probably the nadir in this respect as all five of its members were legal professionals: a former Supreme Court Justice; a former Justice of the Court of Appeal; a former High Court Judge; and two legal practitioners; and none of whom were associated in the public eye with human rights protection and promotion.

Inevitably, the professional background of the Commissioners moulds the culture of the Commission, which functions in the manner of a quasi-judicial tribunal rather than an investigative and prosecutorial agency.

D. Resourcing

The Human Rights Commission of Sri Lanka is enabled to hire its own staff. The senior-most executive officer is designated the Secretary to the Commission. Some staff, particularly at senior level in its regional offices was inherited from the Human Rights Task Force. Otherwise recruitment is through open advertisement and competition. Public servants may be seconded from government service for either temporary or permanent appointment.35

Its staff cadre is below strength and the problem is worst in regional offices in the conflict-affected areas, where it is difficult to retain staff. One reason for this problem, aside from the obvious reluctance to place oneself in a risky situation, is that the recruitment of staff takes place in Colombo and those living there rarely wish to transfer elsewhere because of superior schooling, employment opportunities and other facilities for family members.

In 2007, the Commission received Rs94 million from the Government of Sri Lanka, as compared to Rs74 million in 2006. It also received Rs54.2 million from donors in 2007, as compared to Rs55.7 million in 2006. The Commission had requested Rs170 million from the GoSL.

35 S. 25 (1), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

Its members complained that extracting even the modest amount allocated by the Treasury is a continuous battle: "We do not get all the money which has been approved at once. We are given two instalments every month but even this is not easy to get. Someone has to go to the Treasury regularly and beg for the money."36

Its donors in 2007 included The Asia Foundation (TAF), Oxfam-GB, United Nations Children Fund (UNICEF) United Nations Development Programme (UNDP), and the United Nations High Commissioner for Refugees (UNHCR).

The Commission also confronted difficulties in attracting and extending donor funding from bilateral and international non-governmental sources because of disquiet over the selection and appointment of its members and consequently perceived lack of independence from the GoSL.

The disproportion between donor funding and state support is of extreme concern. The funds that are received from the public exchequer are evidently insufficient for the Commission to meet its core functions of human rights protection and promotion, as they are allocated to salaries and fixed costs, whereas donor funding supports project and programme costs but often based upon donor priorities rather than those of the Commission.

III. Effectiveness

A. Mandate and Powers

In assessing the effectiveness and performance of the Human Rights Commission of Sri Lanka, it will be useful to review its mandate and powers so as to identify the scope and limits of its authority.

36 Sarasi Wijeratne, "Human Rights Commission lacks vital resources", *The Morning Leader*, 16 May 2007.

The mandate of the Commission is as follows:[37]

- To conduct inquiries and investigations into (administrative) procedures to ensure compliance with fundamental rights and respect for, and observance of, fundamental rights;
- To inquire into and investigate complaints of infringements or imminent infringements of fundamental rights and their resolution through conciliation and mediation;
- To advise and assist Government in the preparation of legislation and administrative directives and procedures for the promotion and protection of human rights;
- To recommend to Government, measures to ensure that national laws and administrative procedures are consistent with international human rights norms and standards;
- To recommend to Government, treaties and other international human rights instruments to which Sri Lanka should subscribe or accede;
- To promote awareness of, and provide education on, human rights.

When compared to the responsibilities identified for national human rights institutions in the Paris Principles[38], the mandate is unsatisfactory. For instance, the Commission ought to be encouraged to publicise its recommendations and opinions. The HRCSL does not. The Commission should act as an early warning signal drawing the Government's attention to systematic human rights violations and make recommendations for their end. The HRCSL does not.

The Commission should cooperate with the United Nations and its specialised agencies; regional institutions and other national institutions. The HRCSL's engagement with the

37 S. 10 (a – f) respectively, *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

38 Para. 3 (a – g), *Paris Principles relating to the Status of National Institutions*.

UN system has been low and has declined even further since 2006: confined most recently to the collection and provision of information on child soldiers pursuant to Security Council Resolution 1612. It should be noted that this is an issue that has the support of the GoSL because of the LTTE's practise of under-age recruitment.

Thus, the HRCSL did not submit a report to the Human Rights Council's Universal Periodic Review of Sri Lanka in 2008. The HRCSL has not submitted reports to UN Special Procedures Mandate Holders in the recent past. The HRCSL also did not engage with the Durban Review Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance in April 2009 despite the express mention of the importance of combating racial discrimination in the Paris Principles and the national context of a 25 year old war that was both cause and consequence of human rights violations experienced by ethnic minority Tamils.

Meanwhile, the powers of the Commission are as follows:[39]

- To investigate any infringement or imminent infringement of fundamental rights;
- To appoint Provincial-level sub-committees, as necessary, to exercise powers of the Commission as delegated by it;
- To intervene, with the permission of court, in any judicial proceedings relating to the infringement or imminent infringement of fundamental rights;
- To monitor the welfare of persons detained by judicial order or otherwise, by regular inspection of their places of detention, and to make recommendations as necessary for the improvement of their conditions;
- To take such steps as may be directed by the Supreme Court, in respect of any matter referred to it by the Supreme Court;

39 S. 11 (a – h) respectively, *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

- To undertake research into, and promote awareness of, human rights by conducting programmes, seminars, and workshops, and disseminating the results of such research;

- To award such sums of money as it may decide to a complainant or person acting on behalf of the complainant to defray the expenses incurred in making a complaint alleging the infringement or imminent infringement of a fundamental right of the person concerned.

- To do "all such other things as are necessary or conducive to the discharge of its functions".

The HRCSL since inception has failed to exercise all of its powers and to the maximum degree possible. For instance, it has not sought opportunities to intervene in an amicus curiae capacity in the course of fundamental rights applications. Instead, it has been content for the Supreme Court to refer certain issues in cases before the Court to the Commission and then offer its opinions on it. Neither has it delegated its powers at Provincial-level that would have helped bring the Commission closer to victims and strengthen the authority of its regional offices there.

The HRCSL must be informed, within 48 hours, of the arrest or detention of any person pursuant to the Prevention of Terrorism Act and emergency regulations under the Public Security Ordinance as well as the place of detention.[40] The Commission must also be informed of release or transfer of the detainee.

The HRCSL maintains a database of those detained under these provisions so that their relatives can trace them, and recorded 2681 Detention Orders in 2007 alone.[41] Although it is an offence not to inform the Commission of such arrest or detention or to obstruct the Commission, punishable by imprisonment for a period not exceeding one year or a fine of Rs5 000 or both,[42] it is known that many such arrests in particular are not notified to them. In these

40 S. 28 (1), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

41 Human Rights Commission of Sri Lanka, *Annual Report 2006 & 2007*, Colombo 2008, p. 25.

42 S. 28 (3), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

instances the lives of those arrested are at greatest risk because they have often been earmarked for extra-judicial killing.

The investigative powers of the Commission are elaborated further in its enabling law as follows:

To inquire and report into any matter that may be referred to it by the Supreme Court in its hearing of a fundamental rights application;[43]

To investigate an allegation of infringement or imminent infringement of a fundamental right of a person or group of persons either on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or on its own motion. This complaint may arise through executive or administrative action or an act committed by any person that constitutes an offence under the Prevention of Terrorism Act.[44]

There are two points of interest here. Firstly, the Commission is authorised to initiate suo moto (own motion applications), even in the absence of a complaint being received. The HRCSL has not used this authority as boldly as it could. Instead, it takes a reactive approach of waiting for a complaint to be lodged even in the case of an incident in the public domain. Frequently, its officers when questioned as to their inaction pronounce themselves helpless to act without a formal complaint having been filed. Yet, these officers know very well that the victims of violations fear confronting their abuser, knowing that the Commission is unable to protect them from intimidation and further harm. It is therefore all the more pernicious that in many instances the identity of complainants has not been protected by HRCSL officers from the local police, when the perpetrator is often a police officer or is protected by the police, leading to further retribution.

Secondly, the HRCSL is empowered to entertain complaints against non-state actors where the offences committed constitute an offence under the Prevention of Terrorism Act. This clause was clearly inserted to "balance" violations by state and non-state actors, specifically the armed separatist Liberation Tigers of

43 S. 12 (1), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

44 S. 14, *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

Tamil Eelam (LTTE). However, in practice, this power has not been invoked by the HRCSL because it is unable to compel a non-state actor that is not within the jurisdiction of the State to be present for inquiries, or to undertake investigations where those violations were committed in areas under LTTE control.

B. Complaints Handling

The complaints handling process as provided in the enabling law is that the Commission should conduct an investigation upon receipt of a complaint and inform the complainant within 30 days if it decides the complaint does not fall within its mandate.[45] However, there is no duty on the Commission to give reasons for its decision.

There is no time bar imposed by the HRCSL's enabling law within which a complaint must be filed. Therefore, human rights organisations were shocked when the HRCSL's Commissioners determined that complaints would be entertained only within three months of the alleged wrong or harm (Circular No. 7 of 20 June 2007).

The justification advanced by one of the Commissioners was that this rule is intended to reduce the number of "false complaints"[46] received. In response to the furore that erupted, the HRCSL claimed to be flexible and to accept complaints within one year of the incident.

However, as recently as 01 April 2009, the Commission refused to entertain a complaint (regarding police inaction following a brutal assault on the complainant by thugs under the direction of a police informant), on the basis that it had been communicated more than three months after the incident.[47] The self-imposed time limit is arbitrary and capricious and unjust to the powerless with nowhere to turn for relief and redress.

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45 S. 15 (1), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.

46 Isuri Kaviratne, "Human Rights Commission under fire", *The Sunday Times*, 29 June 2008.

47 Asian Human Rights Commission, *SRI LANKA: A local criminal disables a man and police fail to act*, AHRC-UAC-057-2009, 10 June 2009.

Where the Commission decides to proceed with the complaint, it has several options: it may (i) refer the matter for conciliation or mediation;[48] (ii) recommend prosecution of the offending party to the relevant authorities;[49] (iii) refer the matter to any court with appropriate jurisdiction;[50] (iv) make recommendations to the relevant authority with a view to preventing or remedying the infringement or its continuance.[51]

The belief of Commission staff is that recourse to conciliation or mediation is always preferable and always to be encouraged. This has extended to even complaints arising from serious violations of human rights. One of the difficulties is that the Commission identifies too closely with the State and the public bureaucracy and is loath to take punitive action against other public servants. It is often conciliatory when it should be uncompromising; and often meek when it should be aggressive.

It is also true that the Commission has been hampered in exercising its power of referral to a judicial tribunal by the absence of Supreme Court Rules on procedure more than 10 years since its creation. However, it has not pushed for such rules either.

Where conciliation or mediation is not possible or practical, the Commission having conducted its inquiries will issue its recommendations. The Commission may direct any state authority or person or persons to report to it with a specified period of the action taken to give effect to its recommendation.[52]

The HRCSL lacks the power to enforce its own recommendations. Instead, the only sanction at its disposal, when its recommendation is ignored or partially followed, is to make a report to the President on the matter, and the President in turn is bound to place such report before Parliament. In 2007 alone some 66 reports were communicated to the President.[53] There is no procedure for the action to be taken by the legislature and the time frame within

48 S. 15 (2), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.
49 S. 15 (3) (a), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.
50 S. 15 (3) (b), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.
51 S. 15 (3) (c), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.
52 S. 15 (7), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996.
53 Human Rights Commission of Sri Lanka, *Annual Report 2006 & 2007*, Colombo 2008, p. 4.

which Parliament must do so. In fact, the legislature has not intervened in the face of executive or administrative inaction on HRCSL recommendations.

In December 2007, the Minister for Disaster Management and Human Rights claimed that reforms to the Commission's enabling law would be introduced to enforce its recommendations.[54] The reference made to judicial powers is disconcerting as national human rights institutions are explicitly not intended to be judicial forums. However, no such amendments have been presented to date, and they are unlikely to have the political support of an over-mighty Executive that resents any encroachment on its power and patronage.

In 2007, the Commission's Head Office in Colombo received 7611 complaints of which 4615 were determined to be within its mandate. 1850 of those complaints were disposed of within the year, along with 4650 complaints from preceding years.[55]

Between January and September 2008, the HRCSL disclosed it had received 2719 complaints.[56] Of this number, some 391 cases concerned alleged illegal arrests; 213 cases concerned alleged torture or inhuman and degrading treatment; and five cases concerned killings. The armed forces were the respondent in 40 cases and the police in 35 cases.

The majority of complaints (600) were directed against various central government institutions; a further 62 specifically against the Education Ministry; 85 against school principals; 79 against Divisional Secretaries (local government administrators); and 66 against municipal councils.

There are a number of issues that flow from these statistics. Firstly, most complaints received by the HRCSL relate to alleged mala fide administrative acts of public officials and the complainant may be another public servant. The case-load of the

54 Thushari Kalubowila, "Judicial powers to enforce Human Rights Commission recommendations", *Divaina*, 09 December 2007 (in Sinhala).

55 Human Rights Commission of Sri Lanka, *Annual Report 2006 & 2007*, Colombo 2008, p.20.

56 Jayantha Samarakoon, "The Human Rights Commission has received 2719 complaints within the last 9 months", *Lankadeepa*, 27 October 2008 (in Sinhala).

Commission therefore comprises, in the main, complaints relating to public sector employment (for example, transfers, promotions, confirmation of permanent employment etc.), school admissions (filed by aggrieved parents), and the acts or omissions of local government institutions and officials.

Secondly, the low level of complaints of serious human rights violations jars with the ugly reality of high incidence of extra-judicial killings, involuntary or enforced disappearances, and the routine use of torture by law enforcement agencies.

Thirdly, these statistics should be compared to data released by the Commission's regional offices to obtain a fuller picture.

Thus, the Vavuniya regional office which is in the conflict affected Northern Province reported 1760 complaints in 2008 alone: mainly pertaining to abductions, extortion; and intimidation.[57] In Batticaloa, in the conflict affected Eastern Province, an anonymous source at the HRCSL regional office reported 100 serious violations in the first three months of 2008 alone, of which 20 related to 'white van' abductions of youth.[58] The Trincomalee regional office, also in the Eastern Province reported four abductions (2 male and 2 female) alone in separate incidents within the space of only five days in May 2008.[59]

It should be underlined that there has been no let up in this trend: data obtained from police stations in the now 'pacified' Eastern Province by the Presidential Commission on Abductions and Disappearances revealed that in the first five months of 2009, some 331 cases of abductions, disappearances, unidentified bodies and unsolved killings were recorded.[60]

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57 Dinsena Rathugamage, "Rights violations in Vavuniya and Mannar", *The Island*, 13 December 2008.

58 Jamila Najmuddin, "Human Right violations on the rise in Batticaloa", *Daily Mirror*, 17 April 2008.

59 Amadoru Amarajeeva, "After the election in the East, 4 youths have been abducted – Human Rights Commission states", *Lankadeepa*, 16 May 2008 (in Sinhala).

60 Shamindra Fernando, "Batticaloa still a cause for concern", *The Island*, 17 June 2009. The one-person Commission is headed by a former member of the Human Rights Commission (2006-9) and retired High Court Judge, Mahanama Tilakaratne.

IV. Consultation and Cooperation with Civil Society Organisations

There has been a highly strained relationship between the members of the Human Rights Commission of Sri Lanka and human rights organisations since 2006 as a direct result of their unconstitutional appointment.

The attitude of the Commission has ranged from non-cooperation to outright hostility and even a thinly veiled threat to impose an offence of contempt against organisations that contest the legality of the appointment of its members.[61]

"[W]e refuse to have any dealings with those [NGOs] who consider us not lawfully appointed", said the Commission with candour in response to one of the reasons for its downgrading by the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights (ICC) in 2007.[62]

In a separate communiqué to the ICC, the HRCSL alleged that critical NGOs had lobbied for its reaccreditation in order to "prevent donor aid" to the Commission, and with a view to "obtaining more funds for their activities".[63] The missive was infused with prejudice, hostility and misinformation on those human rights NGOs and accused most of them of being unlawful organisations through non-registration with the GoSL's NGO Secretariat.

As regards the first charge, it should be noted that at no time has any human rights organisation in Sri Lanka challenged the legality of the Human Rights Commission itself, the objection has always been confined to the legitimacy of the Commissioners directly appointed after 2006. The second charge is too risible to merit rebuttal.

61 Amal de Chickera with Kishali Pinto Jayawardena, 'The Human Rights Commission of Sri Lanka: Sombre Reflections and a Critical Evaluation' in Asian NGOs Network on National Institutions (ed.), *ANNI 2008 Report on the Performance and Establishment of National Human Rights Institutions in Asia*, FORUM-ASIA, Bangkok 2008, pp. 161-178 at pp. 170-171.

62 "HRC responds to 'downgrading'", *Daily News*, 10 March 2008.

63 "Biased conclusions irk HR Commission", *Daily News*, 04 February 2008.

Since the beginning of 2009, there has been a positive but still partial change of attitude within the Commission on this score, with three consultations with civil society organisations in January, March and June 2009, leading most concretely to a focal point within the Commission on human rights defenders. However, the HRCSL has chosen to confine its dealings to selected organisations and to avoid advocacy organisations that have been most vocal in their criticism of the Commission.

In evaluating the HRCSL's relationship with civil society organisations, it is also necessary to differentiate between the attitudes of the Commissioners, head office staff, and the regional office staff.

It is the Commissioners (especially those from the judiciary) who have been most antagonistic towards local civil society organisations and most scornful of engagement with them. Of course, for reasons of financial support, international non-governmental organisations and UN agencies have been treated differently. Even the HRCSL's officers recognise that this is unhelpful and understand the need for cooperation and even collaboration. However, they are answerable to the Commissioners and cannot without their support re-orient the Commission.

The regional offices have little option but to maintain cordial relations with civil society organisations in their districts because they are isolated, defenceless and starved of resources. It is NGOs who facilitate much of the public education and awareness-raising that HRCSL staff do on human rights in the provinces. It is NGOs who are often most sympathetic to the infrastructure needs of the regional offices. However, even at regional level and taking their cue from the head office, there is little structured consultation between the HRCSL and civil society groups. Instead, relationships are personalised when they should be institutionalised.

On the whole, the overall approach of the Commission has fallen short of the ICC SCA's General Observation on the importance of maintaining "consistent relationships with civil society"[64] and the imperative for national institutions to "develop relations with

64 General Observation 2.1, *ICC Sub-Committee on Accreditation*, June 2009.

the non-governmental organisations devoted to protecting and promoting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialised areas"[65].

V. Conclusion

The non-appointment of new Commissioners to the Human Rights Commission of Sri Lanka since May 2009 is a new and ominous development. It follows on the Government of Sri Lanka's decision not to renew the mandate of the Udalagama Commission into Serious Violations of Human Rights though that Commission had not been able to complete its investigations into most of the cases before it. In the flush of its comprehensive military defeat of the Liberation Tigers of Tamil Eelam, the GoSL appears to have decided that it no longer needs even the 'window dressing' of commissions of inquiry to demonstrate its domestic capacity and willingness to respond to the human rights crisis and therefore deflect pressure for international human rights monitoring. In this transformed context both the Human Rights Commission of Sri Lanka and civil society organisations need to re-think their mode of interaction while acknowledging the tensions and differences between them. The alternative to mutual engagement is mutual irrelevance.

65 Para. 6 (g), *Paris Principles relating to the Status of National Institutions*.

The New Draft Bill in Taiwan

Prpared by Taiwan Association for Human Rights (TAHR)[1]

I. General Overview

The year 2008 was a turbulent one for Taiwan. There was the second transfer of political power from the Democratic Progressive Party (DPP) to the old regime Chinese Nationalist Party (Kuomintang, KMT), the global economic depression, and the efforts to have closer ties with mainland China under the new government's policy have all challenged Taiwan's fragile democracy.

In November, protests against the visit of the Chinese envoy Chen Yun-Lin were met with a violent crackdown by the KMT government. The shocking human rights violations that occurred reminded Taiwanese society how the human rights situation in the country could drastically decline overnight. Local civil society demonstrations, including by the Wild Strawberry student movement,[2] were accompanied by international demonstrations of solidarity. Freedom House[3]

1 Contact Persons: Prof. Fort Fu-Te Liao and Tsou Tzung-Han, Taiwan Association for Human Rights (TAHR)

2 The official website of the Wild Strawberry Student Movement: http://action1106.blogspot.com/

3 [Press Release] Freedom House Calls for Inquiry into Taiwan Clashes. 21 November, 2008.

in New York, the International Federation for Human Rights[4] in Paris, and other international human rights groups all expressed their deep concern.

Arrests, confession by extortion, and the leak of information during the trial process of present and former DPP officials also deeply stirred people on the island. International scholars, expressing their concern regarding the erosion of the judicial system in Taiwan, wrote three open letters to convey their worries.[5]

In addition to the political unrest, personal data leakage, indirect discrimination, and the oppression of minorities have all been key issues in 2008. Without a National Human Rights Commission in Taiwan, various NGOs took on the responsibilities of receiving complaints of human rights violations, and tried to seek remedies with limited resources. Civil society hopes for local human rights mechanism that can counter human rights violations both in public and private sectors, and promote human rights in spite of Taiwan's isolation from global human rights mechanisms.

In 2000, the NGO Alliance came up with the NGO bill[6] proposing the establishment of an NHRI. Soon after, KMT legislators submitted the KMT Bill which contained few differences from the bill proposed by NGOs. In October of the same year, Vice President Lu formed the Human Rights Advisory Group under the Office of the President to hasten the establishment of an NHRI. After many consultations and debates, it submitted the Government Bill in 2002 with compromises on jurisdiction and protection. However, none of these three bills passed three readings in the legislative branch of government. Taiwanese people and civil society had witnessed the government fail to carry out its vow to set up a National Human Rights Commission (NHRC). The Democratic Progressive Party (DPP) turned out to be feeble when faced with criticism, and self-contradictory when asked to follow the Paris Principles. It did not seem to progress human rights work as much as everyone had expected. By contrast, in 2008 the newly-elected KMT party

4 Open Letter to the President and Premiere of Taiwan. 19 November, 2008.

5 Open Letters on Erosion of Justice in Taiwan. 6 November, 2008.

6 See 'Taiwan: 'The Long Wait'' *ANNI 2008 Report on the Performance and Establishment of National Human Rights Institutions in Asia*. Pages 179-485

surprised everyone by ratifying the International Covenant on Civil and Political Rights (ICCPR), as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) in early 2009. It has also promised to establish an NHRC: a promise that civil society hopes will be converted into actions.

Recognizing that setting up an independent and effective National Human Rights Commission remains a vital mission, Taiwanese civil society restarted the campaign in early 2008. The Alliance for the Promotion of a National Human Rights Commission (NGO Alliance), originally formed in 1999, reexamined the old NGO bill and made partial changes on the number of Commissioners, election process and other details with reference to other countries' NHRC bills and local situations. We plan to reorganize a new alliance composed of old NGO Alliance members as well as new ones, proposing the new bill and engaging in lobbying activities.

The following report is based on the new bill drafted by the NGO Alliance. We are at the stage of gathering further ideas and opinions from NGOs before submitting the new NGO bill in 2009.

II. Independence

1. Relationship with the Executive, Judiciary, and Parliament

During the last campaign, the NGO Alliance wanted the proposed National Human Rights Commission to be independent from the five major yuan (branches) of government: the executive, legislative, judicial, control and examination branches. However, achieving this would require constitutional amendments that would accord the NHRC constitutional status: a difficult task at that time given the state of Taiwan's party politics. The old NGO bill therefore placed the NHRC under the President's Office. The Government bill also adopted the idea, which was then challenged by society for giving the president unprecedented power, especially when the power to investigate was involved. To defend its powers

of investigation, the Control Yuan[7] also stood against the Government bill and considered it against the constitution.

Given the new political conditions (the KMT now holds a majority in the Legislative Yuan) and to resolve past debates, most NGO Alliance members still favor constitutional amendments. Discussions also raised a new proposal to place the NHRC under the Control Yuan. However, although the Control Yuan was actively engaged in setting up a human rights body as a forerunner to the NHRC, the mandate of this body only allowed it to deal with violations in the public sector. It would require total reconstruction to bring it in line with the Paris Principles. The NGO Alliance eventually proposed to place the Commission under the President's Office as the most realistic strategy to make it an independent and effective institution.

To ensure the Commission's independence, the new bill includes four key points. First, the Executive Yuan will have no power to reduce the Commission's annual budget (Article 12). Second, no Commissioner can be removed from office unless he or she is found guilty of a criminal offence or has been indicted. Third, Commissioners cannot be prosecuted on the basis of what they say or how they vote during meetings (Article 13). Fourth, the Commission will have the power to enact rules for its meetings and procedures (Articles 18-19).

Also, adopting ideas from the old NGO bill, the Commission would have the power to request relevant government agencies to consider whether their promulgated regulations, policies or administrative measures infringe upon human rights, and to proffer remedial plans. They also propose independent powers of enquiry and the right to obtain documents from the government, further extending this to assistance from the police, army and relevant agencies (Article 9).

7 As one of the five branches of the government, the Control Yuan has the powers of impeachment, censure and audit. It may also take corrective measures against government organizations. Members of the Control Yuan may accept people's petitions, inspect central and local governments, make investigations, and supervise examinations.

The bill would require the Commission to review Taiwan's constitution, laws and regulations, and to propose amendments to these and legislative bills in accordance with international human rights standards. The Commission would send its reports to the Legislative Yuan. To prevent overlapping jurisdiction with the judicial branch, the bill states that the Commission would not be able to accept complaints that are under judicial review or the subject to litigation.

2. Selection Process of Members

The old NGO bill proposed 15 Commissioners, with the president to appoint eight and the Legislative Yuan to elect seven. In the new NGO bill, there would be 11 Commissioners, with the president to appoint six and the Legislative Yuan to select five. The Commissioners themselves will elect the chairperson and one deputy, so as to avoid direct administrative appointments. The chairperson's role is to lead meetings and represent the Commission (Article 3).

The NGO Alliance suggests that the Commissioners are appointed from three groups: (a) those who have participated in NGO activities and made a special effort for, or contributions to, protection and promotion of human rights or minority rights in particular; (b) those who have demonstrated expertise on human rights, or who have made special contributions to related research or education; and (c) those who have served as a judge, prosecutor, lawyer or have participated in other judicial works, contributing significantly to human rights protection. Among the Commissioners selected by the president and the Legislative Yuan, the numbers of Commissioners from (a) cannot be less than three of the total numbers. It is also explicitly required that the appointment of Commissioners must give consideration to diversity in society. To ensure adequate numbers of female Commissioners, the new draft bill adds that 'the numbers of Commissioners of any gender cannot be less than one-third of the numbers of all Commissioners' (Article 4).

The new bill defines the chairperson as an officer of 'special appointment rank,' not classified as a general civil servant, while the other Commissioners are defined as officers of the highest civil servant rank. Their term is for six years. However, at the first appointment, the president and the Legislative Yuan shall respectively appoint three Commissioners for a three-year term to avoid political influence and to maintain continuity as much as possible. Commissioners may be re-elected or re-appointed once. They may not serve in other governmental bodies or engage in professional practices. Commissioners can be re-appointed.

The new bill requires that Commissioners exercise their powers independently and that they refrain from participating in the activities of political parties. The Commission may appoint consultative advisors, on the strength of powers to make such provisions (Article 15). Also, the administration will be divided into five departments for operational effectiveness and efficiency (Article 16).

3. Resourcing of the NHRI

To ensure the Commission's financial independence, the bill states that the Executive Yuan will have no power to reduce its annual budget (Article 12). This means that the Legislative Yuan is the only branch that deals with the Commission's finances.

III. Effectiveness

1. Protection

The NGO Alliance proposes that the Commission extends its mandate beyond human rights violations to any form of discrimination. The Commission needs to write reports on complaints taken up and investigated, and ask the relevant institution to deal with it. Moreover, it can help the provide remedies to victims of violations (Article 2).

In the course of investigation, the Commission can ask people involved to make statements. It can also ask institutions, groups, businesses, or individuals to submit documents and other required information and evidence. If the parties investigated refuse to comply without a legitimate reason, the Commission will have the power to impose fines ranging from around 588 USD to 7,353 USD for the first time. If these parties should continue to be uncooperative, the Commission will have the power to impose fines ranging from around 1,471 USD to 14,706 USD each time, until they are investigated or submit the evidence required (Article 10).

In the new NGO bill, the Commission can review existing laws, regulations and measures, suggesting changes where appropriate. The NHRC should also be provided with copies of any legislation on human rights and related opinions (Article 2).

2. Promotion

As in the old draft bill, under Article 2, the Commission's functions include proposing national human rights policies; undertaking and promoting research and education in the field of human rights; and preparing national human rights reports, both annual and thematic. There is currently a Human Rights Advisory and Resources Center under the Ministry of Education. After the National Human Rights Commission is set up, the two units can work together on human rights promotion.

IV. Potential Cooperation/Engagement between the NHRI and the NGO

The new bill expressly stipulates that the Commission must cooperate with civil society, international organizations, other national human rights institutions (NHRIs) and NGOs in promoting and protecting human rights (Article 2).

V. Recommendations

1. To the government

Until now, the Control Yuan still sees itself as the only human rights protection institution even though it only deals with human rights violations in public sector. However effective its constitutional powers of investigation and ability to impeach, the Control Yuan nevertheless cannot fulfill the Paris Principles – for the simple reason that it is unable to protect human rights in both the public and private sectors. It also does not have the mandate of promoting human rights through education, public awareness activities, and influencing policy.

After President Ma Ying Jeou ratified the ICCPR and the ICESCR, he promised the implementation of the two international covenants and the establishment of a National Human Rights Commission. Civil society calls on the government to set a timetable for the process of setting up the Commission as the monitoring mechanism of human rights affairs. Civil society has been working toward establishing an NHRC for almost ten years, but a positive response to this advocacy has yet to be heard from government.

If the government is committed to establishing an NHRC, it should also seek to consult experts in the field of human rights, including NGO representatives. Regionally and internationally, the government should try to initiate or participate in discussions regarding current trends and challenges to NHRIs in order to learn from good examples and avoid repeating mistakes.

2. Involve NGOs in process

Since the NGO Alliance formed in 1999, it has continued to advocate for the establishment of an NHRC in Taiwan, including working to produce the NGO bill in 2000. The former government only invited human rights NGOs to provide their views at the initial stages of the project for setting up an NHRI. Both the Executive Yuan's bill and the President Hall's version lacked the participation of NGOs

and were not passed in the Legislative Yuan. With the new NGO bill, twenty-two NGOs will restart the campaign in 2009. We urge the government to involve NGOs during the process of setting up a NHRC in accordance with Paris Principles.

3. International co-operation and pressure

Taiwan Association for Human Rights (TAHR) is a member of the Asian NGOs Network on National Institutions (ANNI). As a representative organization of Taiwanese civil society, TAHR has been actively participating in ANNI activities, keeping abreast of the latest developments regarding national human rights institutions and sharing our campaigns with ANNI members. Taiwanese civil society is looking forward to ANNI having even greater impacts on Taiwan. In the future, by visiting Taiwan or conducting educational workshops here, ANNI could help to hasten the establishment of an NHRI in Taiwan.

The Asia Pacific Forum (APF) annual meeting has rejected the official representatives from Taiwan since 2006.[8] There were no public statements or rules to explain the forced absence of Taiwanese officials. We therefore urge the Asia Pacific Forum (APF) to welcome representatives from Taiwan to the forum. At the level of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), we also hope that Taiwan's disputed international status will not prevent us participating in the international meetings and workshops.

8 Taiwanese officials participated in Asia Pacific Forum annual meeting from 2004-2006. Please check the participant list on the website: http://www.asiapacificforum.net/about/annual-meetings

Thailand in a period of polarization

Prepared by Working Group on Justice for Peace[1]

General Overview

During 2008, Thailand's National Human Rights Commission (NHRC) continued to face issues relating both to its own status following the 2006 military coup, and the persistent and occasionally violent polarization of Thai society.

Uncertain Status

Thailand's NHRC was established under Part 8 of the 1997 Constitution, which contains provisions regarding the number of Commissioners, necessary qualifications for Commissioners, and the selection process. The Constitution also details the financing, powers and responsibilities of the Commission. The abrogation of this Constitution as a result of the September 2006 coup therefore raised questions about the continuing existence of the Commission.

The new military junta quickly ruled that the NHRC should continue to exist, operating in accordance with legislation specific to the NHRC, pending the promulgation of a new Constitution. Significantly, the original Commissioners appointed under the previous Constitution were to continue

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in their positions beyond the expiry of their 6-year terms in July 2007, until new Commissioners could be appointed under procedures set out in a new Constitution.

Since the Commission completed its Five Year Plan in close consultation with civil society in 2007, and the Commissioners[2] did not know when they would be replaced, the Commission's work had to continue without a long-term planning framework.

The 2007 Constitution, approved by plebiscite in August 2007, contains three significant changes with respect to the NHRC.[3]

First, the number of Commissioners was reduced from 11 to 7. The effect of this will be to make the qualifications, impartiality and commitment of each Commissioner more important, while aggravating the workload problems experienced by the first set of Commissioners.

Second, changes in the process for selecting Commissioners removed broad participation from the courts, the legal profession, civil society organizations working in human rights, political parties, and the media. Instead, there will now be a Selection Committee comprising the President of the Supreme Court of Justice, the President of the Constitutional Court, the President of the Supreme Administrative Court, the President of the House of Representatives, Leader of the Opposition in the House of Representatives[4], one person elected by the general assembly of the Supreme Court of Justice and one person elected by the general assembly of judges of the Supreme Administrative Court.[5] The changes are summarised in the following table:

2 Commissioner Khunying Janthanee Santaburt resigned on 20 November 2006. Commissioner Jaran Ditha-apichai resigned after being impeached on 26 September 2007 by the military-appointed National Legislative Assembly for involvement in anti-coup activities. Commissioner Wasant Panich resigned on 12 March 2008. None were replaced.

3 Among the minor changes was the introduction of a compulsory retirement age of 70. A number of previous Commissioners would have had to retire had this provision been in place during their tenure.

4 This is an official position under Thai law selected by all parties not represented in the Cabinet. The position was vacant when the Selection Committee was in operation.

1997 Constution	2007 Constitution
The Selection Committee is comprised of 27 persons: – President of the Supreme Court – President of the Supreme Administrative Court – Attorney General – President of the Lawyer's Council of Thailand – Five representatives from higher educational institutions – Ten representatives from human rights NGOs – Five representatives from all political parties that have at least 1 MP – Three media representatives (1 from radio, 1 from newspapers, 1 from TV)	The Selection Committee is comprised of 7 persons: – President of the Supreme Court of Justice – President of the Constitutional Court – President of the Supreme Administrative Court – President of the House of Representatives – Leader of the Opposition in the House of Representatives – One person elected by the general assembly of the Supreme Court of Justice – One person elected by the general assembly of judges of the Supreme Administrative Court

This new, much smaller committee, drawn narrowly from the judicial and political spheres[6], appears more likely to favour applicants from within the establishment – or at least acceptable to the establishment – than independent representatives from civil society.

Further, whereas the earlier Selection Committee was tasked to submit 22 names for the Senate (at the time a wholly elected body) from which the 11 Commissioners would then be selected, the new Selection Committee selects only 7 names and the Senate (now a half-elected, half-appointed body) merely accepts (with a majority of votes) or rejects the slate presented.

At the time of writing, the Senate had voted to accept the 7 names submitted by the Selection Committee after a process that lacked

5 Section 243, Constitution of the Kingdom of Thailand 2007. The members of the Selection Committee elected by the two general assemblies of judges are both former judges themselves.

6 In fact, five members were active or former members of the judiciary, while one is a former politician.

transparency and afforded minimal opportunity for public input. In particular, the majority of the persons selected failed to meet the qualifications prescribed in Section 256 of the Constitution: namely, 'persons having apparent knowledge and experiences in the protection of rights and liberties of the people, having regard also to the participation of representatives from private organizations in the field of human rights.' Many organizations both within and outside Thailand have criticized the make-up and selection process of the new Commission.[7] However, the appointment of the prospective Commissioners still awaits the signature of the King and a petition has been presented to the King's Principal Private Secretary requesting a review of the nomination of one Commissioner.[8]

Third, the NHRC was given additional powers to propose to the Constitutional and Administrative Courts complaints received and assessments of laws, regulations, orders, and so on, that 'affect human rights and are inconsistent with the provisions of the Constitution.' It may also file lawsuits with the Court of Justice on behalf of victims of human rights abuses.[9] This represents a significant and welcome increase in the ability of the Commission to protect human rights.

Polarization

The activities and reputation of the NHRC in 2008 were coloured by the political polarization that has developed in Thailand since 2006, centred on tension between the legality and legitimacy of successive governments.

Widespread opposition to the administration of Prime Minister Thaksin Shinawatra crystallized in mass anti-government

7 See, for example, a critique by a respected senior human rights defender and Magsaysay Award winner: 'NHRC selection is deeply flawed', Thongbai Thongpao, Bangkok Post, 26 April 2009.

8 'Sulak Sivaraksa petitions King's Principal Private Secretary to examine complaints against nominated Human Rights Commissioner', available at http://www.prachatai.com/english/node/1254).

9 Section 257, Constitution of the Kingdom of Thailand 2007.

demonstrations in 2006. These drew support from groups with a diverse set of grievances. One comprised human rights organizations opposed to widespread human rights abuses (counter-insurgency activities in the Muslim-majority south, the 2003 war on drugs, and so on). Other concerns included the personal enrichment of the Prime Minister, his family, and others in the government through corrupt or improper practices; the pursuit of free trade agreements, privatization and other neoliberal policies; alleged anti-royalist sentiments; and state-community conflicts over natural resources. Protestors clad in yellow, the King's colour, argued that these transgressions were serious enough to make the government illegitimate.

Supporters of the government pointed to three sweeping victories in general elections by Thaksin and his Thai Rak Thai party with unprecedented overall majorities, allowing the first ever single-party administration in Thailand and the first administration to stay in power for an entire four-year term. By the 'rules of the game', this meant that the government held office legally.

The coup of September 2006 removed Thaksin from office, a move which some, including NHRC President Dr Saneh Chamarik, saw as a justifiable though unconstitutional solution to the conflict. Others, including Commissioner Jaran Ditha-apichai, viewed the coup and the appointed government that followed as illegitimate. Wearing red, this group held rallies against the coup and the agencies seen to have supported it, including the Privy Council. Commissioner Jaran was later forced to resign for his anti-coup activities.

In general, Thaksin supporters began to feel that the rules were being stacked against them. There was strong military pressure to ensure a 'yes' vote in the referendum on the constitution drafted by a military-appointed committee, in addition to the hurried passing of legislation restricting human rights, such as the Internal Security Act, and several other factors. This was intensified when the Constitutional Court ordered the dissolution of the Thai Rak Thai party for electoral fraud and retroactively applied a provision of the new constitution to ban all party executives from politics for five years.

The December 2007 elections saw the return to power of pro-Thaksin forces under Samak Sundaravej as head of the People Power Party, the re-branded remnants of the Thai Rak Thai party. This administration was in turn called illegitimate for being a proxy for Thaksin, because it came to power as a result of alleged vote-buying and the ignorance of rural voters, and because of allegations of corruption and lack of patriotism. The anti-government protests coalesced under the yellow People's Alliance for Democracy (PAD), opposed by the red Democratic Alliance Against Dictatorship (DAAD)[10].

The PAD occupied major intersections for weeks from May 2008 onward and then Government House[11] from August. When the courts had dismissed Samak from the premiership for appearing in a TV cooking programme, the PAD organized a rally outside parliament on 7 October when his successor (and Thaksin's brother-in-law) Somchai Wongsawat attempted to present his administration's policies as required by the constitution. The rally was forcibly suppressed by police resulting in the deaths of two PAD protestors: a young woman killed by a police teargas canister containing explosives, and a former military officer apparently killed by explosives he was carrying in his car. Many more were injured, including police officers. In November, the PAD occupied both of Bangkok's international airports for 10 days. All PAD protests ended when the courts dissolved the governing People Power Party and two coalition parties on 2 December 2008, automatically banning the Prime Minister and most of the cabinet from political office for five years. This paved the way for the Democrat Party to form a government which has since been attacked by 'the reds'.

While the DAAD consistently expressed support for former Prime Minister Thaksin, who often addressed their rallies from abroad, there were also informal links between the PAD and the Democrat Party. One of the five leaders of the PAD, Somkiat

10 Also known as the National United Front of Democracy Against Dictatorship (UDD).

11 Government House includes the Office of the Prime Minister, the Cabinet Office, the National Security Council and other important organs of state. During the occupation, all had to find alternative places from which to work. A court injunction to vacate the compound was ignored by the PAD.

Pongpaibul, is a Democrat party-list MP. The future Prime Minister Abhisit Vejjajiva and Finance Minister Korn Chatikavanij paid friendly visits to the illegal PAD occupation of Government House. Vocal PAD supporter Kasit Piromya was named Foreign Minister in the Democrat government.

In this polarization of the country each side is convinced of the righteousness of their cause and demonizes and vilifies their opponents – and Commissioners are no exception. Commissioner Khunying Ambhorn Meesuk co-signed a public statement on 4 November 2008 that referred to DAAD supporters as 'hooligans and hired herd', though the statement also deplores inflammatory language by the PAD. It also claimed that 'many violent incidents… were all unilateral attacks against unarmed PAD demonstrators.'[12] There has been virtually no dialogue between the two sides and no apparent desire for any. Both sides make claims of non-violence but both have been seen using weapons and been responsible for deaths and injuries. The split goes beyond the political to affect other spheres of life, including the media, the security forces, and notably the human rights community.[13]

Largely because of their opposition to human rights abuses under the Thaksin government and personal connections with PAD supporters, many human rights defenders have sacrificed impartiality and identified with the PAD. They have condemned alleged human rights violations by anti-PAD forces, including the government, while remaining silent on alleged violations by the PAD, or even proclaiming their innocence.

The NHRC was similarly perceived to take sides, best illustrated by the following examples. In one incident, the NHRC issued an immediate statement on 8 October 2008 condemning 'the use of violence by the authority' the previous day,[14] and the NHRC President visited wounded PAD protestors in hospital while ignoring injured police officers.

12 Available at http://www.nationmultimedia.com/option/print.php?newsid=30087504.

13 Among many commentaries see Pravit Rojanaphruk 'Human rights defenders split into yellow and red camps' The Nation, January 28, 2009, available at http://www.nationmultimedia.com/option/print.php?newsid=30094336.

14 http://www.nhrc.or.th/news.php?news_id=4176

In another incident, the NHRC issued a report in December declaring that Prime Minister Somchai Wongsawat and Deputy Prime Minister Gen Chavalit Yongchaiyudh, among others, were responsible for the violence. The report based this claim on the grounds that they had ordered police to clear protestors who were blocking MPs from entering parliament, although no evidence was produced that this included an order for violence to be used. The report also charges that the Prime Minister failed to halt police actions when a death and injuries had occurred. To counter the Prime Minister's testimony to the Commission that he was not aware of these incidents, the report argues that he should have known. Overall, the strength of argument is not strong and was described in press commentary as based on 'conjecture rather than evidence'.[15]

The second example is an issue in the PAD campaign against the Samak government concerning the government's joint communiqué with Cambodia in a request to add Preah Vihear temple to the UNESCO World Heritage List. The temple had been subject to competing claims of sovereignty by Cambodia and Thailand and the International Court of Justice had ruled in favour of Cambodia in 1962.

The PAD, using a nationalist discourse that favoured confrontation with Cambodia, charged the government with betraying the nation. Using a law that had been developed to cover free trade agreements, it won a court ruling that invalidated the communiqué. As a result, the Foreign Minister was forced to resign.

On 6 July 2008, the NHRC issued an open letter addressed to the Secretary-General of the United Nations citing 'strong passion and a sense of injustice in Thailand' and accusing the World Heritage Committee under UNESCO of 'the blatant violation of human rights' because its actions 'endangered the lives of those who live along the Thai-Cambodian border'.[16]

15 Avudh Panananda, 'NHRC report omits role of politicians in Oct 7 bloodshed', The Nation, December 23, 2008, available at http://www.nationmultimedia.com/option/print.php?newsid=30091641. The Nation generally takes an anti-Thaksin, pro-PAD line.

16 Available at http://www.prachatai.com/05web/upload/HilightNews/document/Praviharn%20Letter-final%20(26%20Jul%2008).pdf

The NHRC letter, described by one human rights organization as 'strident' and 'shrill',[17] states: 'The acts committed by the World Heritage Committee and UNESCO have shown their insensitivity and total disregard to human rights especially of the peoples of Thailand and Cambodia.'

It is not at all clear that any 'blatant violation of human rights' had occurred, nor that any such violation could be traced to the decision of the World Heritage Committee rather than to the actions of the Cambodian and Thai governments, egged on by inflammatory nationalist rhetoric on both sides. The NHRC was thus perceived to have developed a convoluted human rights argument to bolster the campaign in support of the PAD.

The perceived partiality of some Commissioners lost the Commission the respect of the red side and some neutrals. Some on the yellow side, however, have been very supportive of the Commission's stance.

Since the new set of Commissioners have been selected by a committee dominated by establishment figures and approved by a senate – half of whose members were appointed by the military – with virtually no participation from a broad spectrum of society, it is widely believed that the new Commission will struggle to retrieve or maintain impartiality and may contribute to, rather than solve, the polarization of society.

Other ongoing major human rights issues

The unrest in the three southern Muslim-majority provinces has continued. Security forces are now operating under martial law, enjoying immunity from prosecution for any acts, including violations of human rights, committed in the course of their duties.[18] Violations have included arbitrary detention, torture and

17 See http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=243

18 Section 17 of the Emergency Decree on Government Administration in States of Emergencies states: 'A competent official and a person having identical powers and duties as a competent official under the Emergency Decree shall not be

extra-judicial killings. Involuntary or enforced disappearances are also a problem. From 2003 until now there have been almost 20 reported cases of enforced disappearance from the southern border provinces.[19] This is very high compared to the other parts of the country.

Migrant workers, especially an estimated 1-2 million from Burma, are reported to suffer discrimination, ill-treatment and lack of protection under Thai law. A number of migrant workers filed complaints to the NHRC.

Toward the end of the year 2008, the media reported the refoulement (expulsion of persons with the right to be recognised as refugees) of male Rohingya who had fled Burma by boat and landed on islands off the Andaman coast of Southern Thailand. Media reports based on testimony of refugees claimed that Thai forces had towed boatloads of Rohingya into international waters and set them adrift with no engines and insufficient food and water.[20] This was refuted by the Thai government, which claimed that an internal inquiry uncovered no abuses. It raised the issue with ASEAN partners to seek a multilateral solution.

Effectiveness

Complaints mechanism

Several channels are available to submit complaints to the NHRC: email, fax, letter, call centre, or personal visit. However, most complaints are submitted with the direct or indirect assistance of NGOs. Once the complaint is received, the complaint office considers the type of right that has been violated and submits the case to the relevant sub-committee. The sub-committee then considers if the case is admissible.

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subject to civil, criminal or disciplinary liabilities arising from the performance of functions for the termination or prevention of an illegal act provided that such act is performed in good faith, is nondiscriminatory, and is not unreasonable in the circumstance of exceeding the extent of the necessity.'

19 Case data gathered by the Working Group on Justice for Peace and communicated to the UN Working Group on Enforced or Involuntary Disappearances.

20 For details see 'Perilous Plight', Human Rights Watch, May 2009

If so, investigation will be undertaken by the Commissioners. This involves taking testimony from the complainant and the alleged violator of human rights and investigation of the relevant facts, often through fieldwork. The sub-committee will then attempt conciliation.[21]

The report of a sub-committee has to be approved by the NHRC board. It is like a court verdict, containing the facts of the case, the relevant laws and International Conventions, and the recommendations of the sub-committee. If there is no action from the violator, the Commissioners report the case to the Prime Minister and parliament accordingly.[22] In most cases the Commissioners make recommendations, but implementation by the violator remains an issue. If reports are ignored, there is little the Commission can do. However, information contained in reports is often useful to the public and can be used to file cases with the Court of Justice.

The total number of the complaints in 2008 was 613.[23] Most were submitted by letter (70 per cent), followed by direct personal contact with the office of the NHRC or a Commissioner (15 per cent). Most complaints came from the victims themselves (85 per cent), some through other persons (8 per cent) and NGOs (6 per cent). Below are tables summarizing the complaints on human rights violations received by the NHRC in 2008:

21 Sub-Committee on Water, Coastal, Mining and Environmental Resources, where the alleged violator is typically a government agency, reports that in 5-10 per cent of cases the alleged violator agrees to halt, delay or mitigate the problem. (Personal communication from Ms S Rattanamanee Polkla, Sub-Committee member)

22 See chart for more detail.

23 Data in this paragraph was kindly provided by the NHRC Secretariat and is excerpted from the forthcoming 2008 NHRC report.

Summary Report on Complaints of Human Rights Violations
(According to Areas Where Complaints Were Filed)
Between Jan 1 – Dec 31, 2008
Collected by The National Human Rights Commission, Thailand

No.	Regional	Number of Provinces	Number of cases
	Bangkok	1	152
	Centre	9	50
	Eastern	8	36
	Northeastern - upper	10	58
	Northeastern - lower	9	54
	Northern - upper	9	60
	Northern - lower	8	32
	Western	8	52
	Southern - upper	7	58
	Southern - lower	7	42
	Total	76	594

Note:
1. Complaint in the country (from 76 provinces) Total number 594
2. Complaint in the country that effect in general Total number 18
3. Complaint from foreign countries Total number 1
Total 613

Complaints of Human Rights Violations
(According to Types of Rights Violated)
Between Jan 1 – Dec 31, 2008
Collected by The National Human Rights Commission, Thailand

No.	Type of Rights	Num of case	Percentage
	Rights in Judiciary system	140	24.43
	Rights of life and body	74	12.91
	Rights in personal privacy	17	2.97
	Community rights	62	10.82
	Rights to housing	17	2.97
	Rights to property	43	7.5
	Consumer rights	20	3.49
	Rights to education	5	0.87
	Rights to access to political process	10	1.75
	Right to health	21	3.66
	Labour rights	52	9.08
	Freedom of religion, belief and opinion	1	0.17
	Freedom of communication	3	0.52
	Political rights	6	1.05
	Discrimination	67	11.69
	Freedom of trade, occupation and profession	1	0.17
	Right to land	58	10.12
	Other (unidentified)	16	2.79
	Total	613	100.00

Victims of Human Rights Violations
Between Jan 1 – Dec 31, 2008
Collected by The National Human Rights Commission, Thailand

No.	Status	Num of case	Percentage
1.	Disabled	3	0.52
2.	Outlander	11	1.92
3.	Patient	12	2.09
4.	Public consumer	45	7.85
5.	Consumer	24	4.19
6.	Agriculturist	4	0.7
7.	Accused/ Prisoner	111	19.37
8.	Government officer/ Employee	44	7.68
9.	Owner (of the property)	96	16.75
10.	Victim of crime	72	12.57
11.	Family	15	2.62
12.	Ethnic group	10	1.75
13.	Community	83	14.49
14.	Labour and employer	43	7.5
15.	Other (unidentified)	40	6.98
	Total	613	100.00

Victims of Human Rights Violations
Between Jan 1 – Dec 31, 2008
Collected by The National Human Rights Commission, Thailand

No.	Status	Num of case	Percentage
1.	Children/ Youth	15	2.45
2.	Male	199	32.52
3.	Female	103	16.83
4.	Senile	18	2.94
5.	Group	277	45.26
6.	Others (unidentified)	1	0.16
	Total	613	

Obstacles to Effectiveness

The effectiveness of the NHRC has been limited by a number of factors.

Under previous legislation, Commissioners did not have any authority to take legal action against violators. Many cases remained unsolved even after recommendations were submitted to parliament. It is hoped that the added powers allowing the NHRC to file court cases on behalf of victims of human rights violations may help to overcome this obstacle.

In most cases, investigations take a long time. Delays can be caused by an obstructive bureaucracy, but also by the fact that sub-committee members volunteer their time and this is a limited resource. Many cases accepted for investigation have not yet reached the report stage. Approval of reports by the NHRC Board can also delay submission to the relevant agencies and publications.

Some cases are taken to court, especially when the violation concerns labour laws, where access to the Labour Courts has been made especially easy. Once a case has been taken up by

the courts, any investigation by the NHRC must cease. In some cases, reports are completed so late that the recommendations are overtaken by events.

The structure of thematically based sub-committees, each managed by a specific Commissioner, has yielded uneven results. This system does have the advantage of enlisting support and resources from knowledgeable and experienced outside parties to assist with the workload, and of exploiting the expertise and experience of Commissioners in those areas of greatest interest to them. It has, however, led to some confusion of roles and objectives and to uneven levels of achievement among subcommittees. Some sub-committees have been very active with the support and encouragement of the Commissioner involved. Others have been dormant, or lapsed into dormancy after an initial burst of activity.[24] As a result, members of civil society who have volunteered to serve on these committees have sometimes felt that their offer of cooperation has been spurned.

Very occasionally there has been a lack of coordination of the activities of different sub-committees. One serious case concerns 'voluntary' participation at army-run vocational training camps set up for insurgency suspects as an alternative to detention under the Emergency Decree. A member of one sub-committee was involved in cooperating with the military in setting up these camps and in the effective coercion of suspects into joining the training. A second sub-committee, however, under a different Commissioner, investigated the same vocational training programme as an illegal form of detention. The courts eventually ruled that the programme had violated the rights of trainees and ordered that they be released.[25] The NHRC investigated the performance of the sub-committee members involved and impeached the sub-committee member who had collaborated with the military.

A human rights activist from a southern border province[26] who

24 With the resignations of three Commissioners (see footnote 1), the sub-committees under their responsibility were re-distributed among the remaining Commissioners, thereby exacerbating workload problems.

25 For details see http://www.prachatai.com/english/node/346. Information on the roles of the NHRC from personal communication with detainees.

26 Personal communication, May 2009. For reasons of personal security, the informant

assists local victims to access the NHRC complaints mechanism believes that in general, people in the south welcome the existence of the NHRC. At the same time, however, they are not sure how much the NHRC can really help, possibly because the NHRC lacks the authority to take judicial action and is therefore perceived to have insufficient power to redress the violation. There are violations taking place everywhere in Thailand, but the NHRC does not have the power to deal with them effectively. The NHRC seems to be the sole remaining channel for victims to seek justice, but cannot really solve their problems.

Independence

With the exception of the changes effected by the new 2007 Constitution outlined and discussed in the overview, the legal status of the NHRC remains as reported in the 2008 ANNI Report.

Although the current Constitution was approved by a national referendum in August 2007, and changes to the composition and powers of the Commission are realized in that Constitution, it would not be reasonable to assume that these changes were a significant factor in the vote to approve the Constitution as a whole.

The drafting of the Constitution was not an inclusive process and an offer from the NHRC to make suggestions and recommendations to the Constitution Drafting Committee was rebuffed.[27] The motivation for the changes to the structure, role and functions of the Commission is therefore unclear.

The NHRC is required to present an Annual Report to the Prime Minister. These reports were routinely ignored by then Prime Minister Thaksin Shinawatra. The military-appointed government of Prime Minister Gen Surayud Chulanont ignored the NHRC report presented to it in 2007. As far as can be determined, no report was presented in 2008 (which was beyond the term of service of the original set of Commissioners).

has requested anonymity.

27 'No time to listen to everyone', The Nation, 28 February 2007, available at http://nationmultimedia.com/2007/02/14/national/national_30026821.php.

The NHRC has been trusted by many civil society organizations since its inception, partly because more than half of the first group of Commissioners came from an NGO background, to the point where government officers expect the NHRC to act as an NGO or play an NGO role itself. Some civilians, on the other hand, assume that the NHRC is a government agency, instead of an independent agency receiving budget allocated from the government.

Institutional relationships in Thailand are often mediated through personal relationships. With a new set of Commissioners, it is not clear how the relationship between the Commission and other branches of government will develop. However, the next set of Commissioners will have been selected under a new process dominated by the judiciary and with minimal opportunity for civil society input. Many experienced human rights defenders from civil society applied for selection but were, with no reasons given, rejected. Moreover, most prospective Commissioners do not have a strong background in human rights. Future cooperation with civil society is likely therefore to be weak, both because it is unlikely to be sought, and if sought, unlikely to be given.

The NHRC budget for the latest financial year (2008) was 147,634,300 baht (US$4.524 million), compared with 120 million baht (US$3.75 million) in the previous year. The Commission is generally thought to be adequately resourced, the main problem being civil service regulations on budget disbursement.

Relationship with international agencies

NHRC has sought very limited cooperation with international human rights mechanisms. It has the mandate to seek assistance, in the form of either funding or expertise, from international agencies. In practice, however, it has not made much use of these opportunities. One exception is the sub-committee working on torture, which has sought cooperation from international NGOs such as the Association for the Prevention of Torture (APT) and the International Commission of Jurists (ICJ) to support its activities toward ratification of the United Nations Convention against

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2007.

International human rights NGOs do, however, communicate regularly with the NHRC when they receive complaints concerning alleged violations of human rights in Thailand. The Asian Human Rights Commission, for example, sends inquiries directly to the NHRC, a process which sometimes helps to hasten a response from the NHRC.

Recommendations

The selection process required by the 2007 Constitution of the Kingdom of Thailand is in contravention of the Paris Principles and requires amendment. This procedure has resulted in a prospective set of Commissioners, the majority of whom are not qualified for their positions. Reversion to the procedures set out in the 1997 Constitution would be an adequate remedy.

The NHRC should take more advantage of opportunities for cooperation and assistance from international and regional agencies.[28]

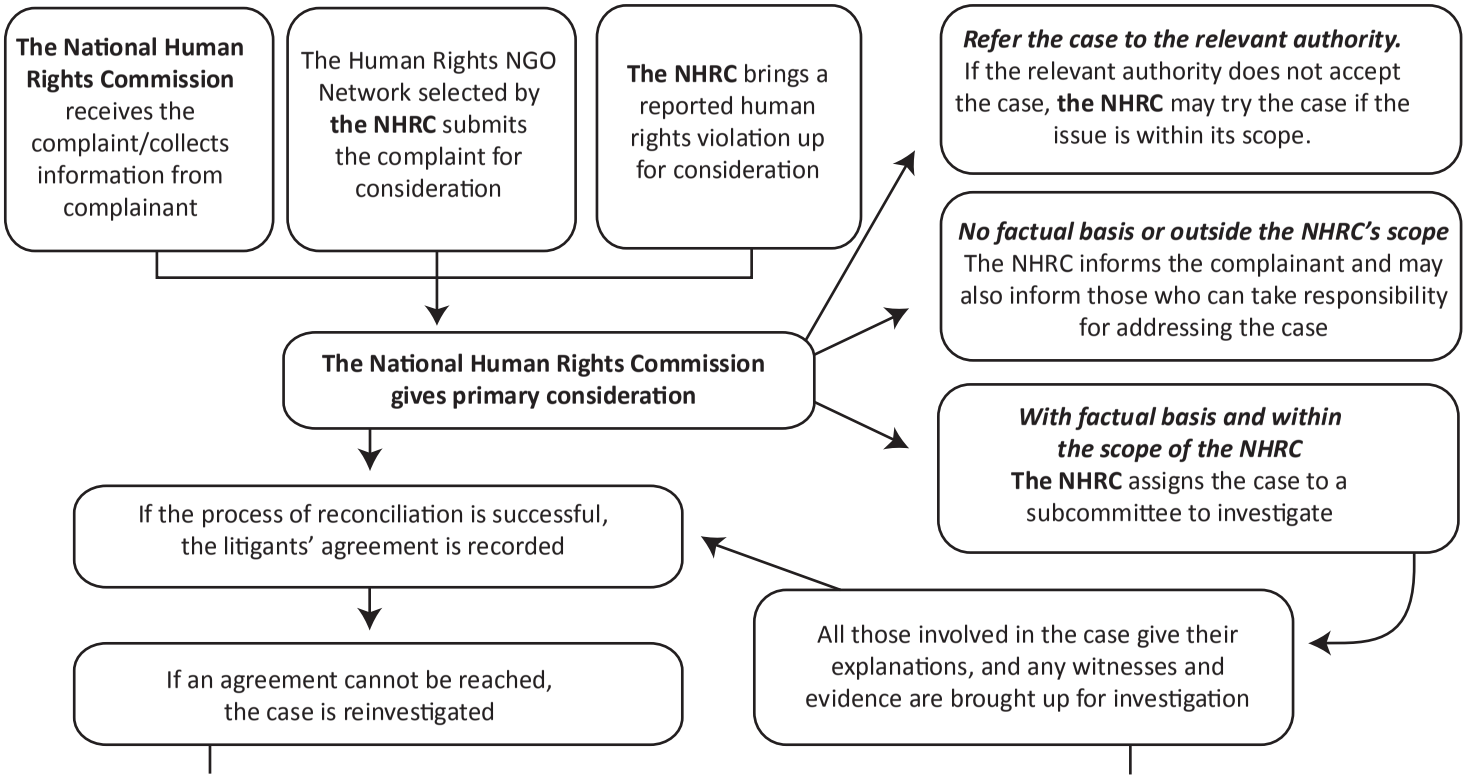
Some thought should be given to the possibility of restructuring sub-committee responsibilities along procedural or functional rather than thematic lines (this is more feasible now that the Commission has powers to bring cases to court) and to making sub-committees accountable to the Commission as a whole, rather than individual Commissioners.

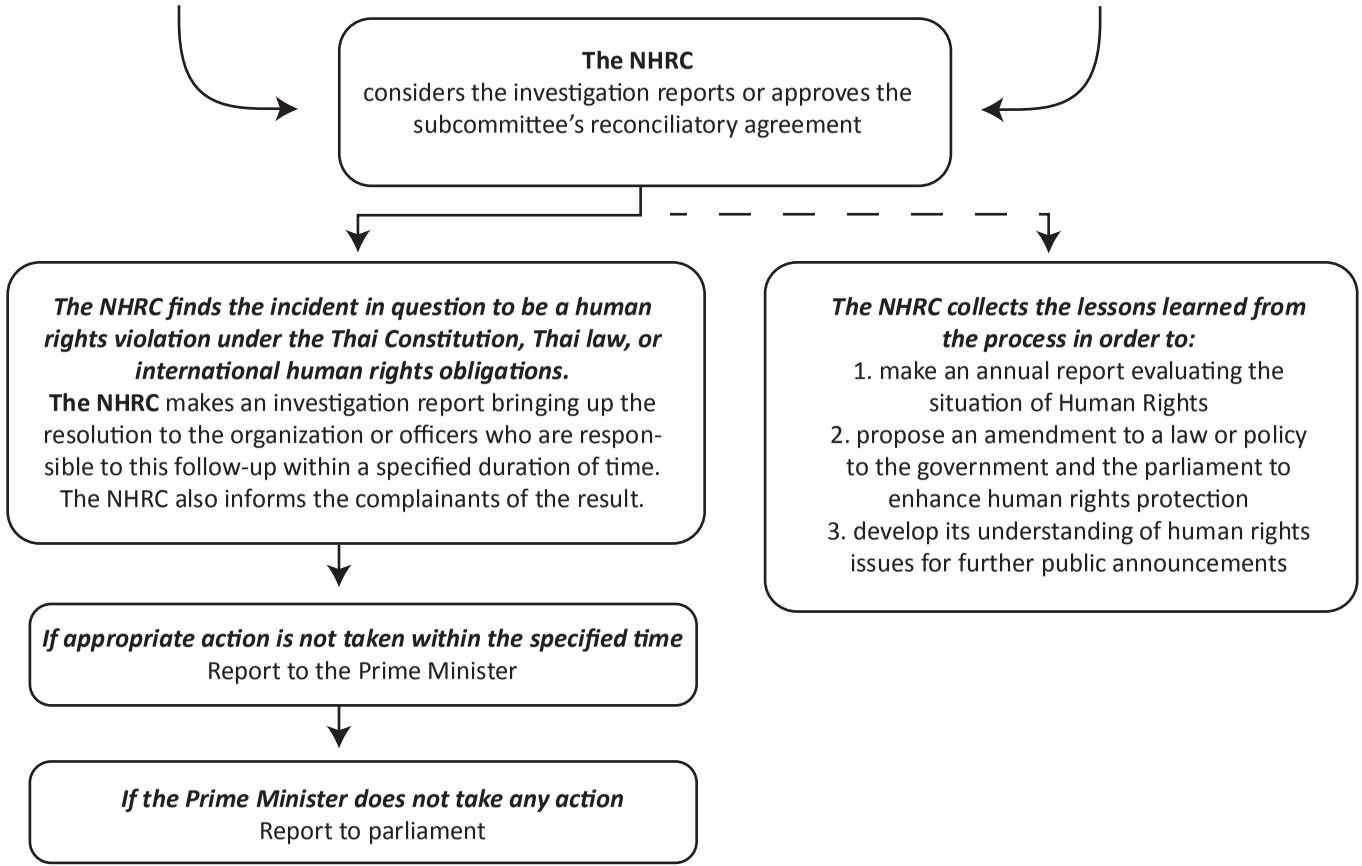
More user-friendly access to the Commissioner may resolve the apparent reluctance of complainants who are afraid to speak to Commissioners about violations because they are intimidated by security measures.[29]

28 Press reports (http://www.nationmultimedia.com/2009/05/14/national/national_30102674.php) say that during his in camera selection interview before the Senate, prospective Commissioner Parinya Sirisarakarn said that he would not welcome intervention by foreign human rights organizations in Thai human rights cases since this would constitute interference in the country's internal affairs. It seems unlikely that this recommendation will be considered.

29 This was unavoidable while the NHRC was leasing office space in the building occupied by the Anti-Money Laundering Organization, from which they have since moved.

Investigation Process for Complaints
(National Human Rights Commission of Thailand)




The NHRC
considers the investigation reports or approves the subcommittee's reconciliatory agreement
The NHRC finds the incident in question to be a human rights violation under the Thai Constitution, Thai law, or international human rights obligations.
The NHRC makes an investigation report bringing up the resolution to the organization or officers who are responsible to this follow-up within a specified duration of time. The NHRC also informs the complainants of the result.
If appropriate action is not taken within the specified time
Report to the Prime Minister
If the Prime Minister does not take any action
Report to parliament
The NHRC collects the lessons learned from the process in order to:
1. make an annual report evaluating the situation of Human Rights
2. propose an amendment to a law or policy to the government and the parliament to enhance human rights protection
3. develop its understanding of human rights issues for further public announcements