

2011 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia

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

Compiled and Printed by
Asian Forum for Human Rights and Development (FORUM-ASIA)

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ISBN: 978-616-90352-6-8

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Foreword

FORUM-ASIA, as secretariat of the Asian NGO Network on National Human Rights Institutions (ANNI), humbly presents this *2011 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*. Our sincere appreciation goes to all ANNI member organizations—its 28 organizations in 17 countries—especially those who have prepared assessment reports on the national human rights institutions (NHRIs) in their respective countries that are now compiled in this annual report. Their substantial contributions are the result of their continuous engagement of the NHRIs in their countries, and which make ANNI a vibrant regional network. Similarly, we would also like to extend our sincere thanks to the NHRIs that contributed valuable inputs to the country reports concerned.

Reports from 16 Asian countries comprise the 2011 ANNI Report on developments from January to December 2010, as well as some urgent additional information of developments in 2011. As in previous years, country reports were prepared following guidelines agreed upon by ANNI members, based on the original set of indicators developed and adopted by the network in December 2008. In addition to the original guidelines, the country reports of this year focus their assessment on several thematic issues, including *the work of NHRIs in protecting and promoting human rights defenders and women human rights defenders; NHRI interaction with international human rights mechanisms; and their work to follow-up or implement references by on torture, death penalty, trafficking, and child pornography by the Advisory Council of Jurists (ACJ) of the Asia Pacific Forum of National Human Rights Institutions (APF)*. We believe that a common framework to assess these thematic issues will further develop the work of ANNI in effectively monitoring and engaging with national institutions in the region, as well as with the APF, as the regional network of NHRIs.

We would also like to express our deep appreciation to the Steering Committee members of the ANNI, Mr Balasingham Skanthakumar of Law Society Trust (LST), Ms Sylvia Angelique Umbac of LIBERTAS and Ms Keira Yeh Ting Chung of Taiwan Association for Human Rights (TAHR), sub-regional representatives and Professor Ahn Kyong-Whan and Professor Vitit Muntarbhorn, advisors who have strongly supported and guided the work of ANNI. Finally, the FORUM-ASIA also wishes to acknowledge and express gratitude to its donors, the Swedish International Development Cooperation Agency (SIDA), Ford Foundation and HIVOS for their support of the ANNI and its work. This publication would not be possible without their generous support.

Our thanks are also due to all the people involved in the publication of the report; especially Mr Toru Hisada of the Human Rights Defenders Department who serves as FORUM-ASIA's focal point for ANNI and who put together the regional overview with inputs from other colleagues, Mr Edgardo Legaspi of the Information, Communication and Publication (ICP) Department who edited the report, and Mr Cody Skinner, for the cover and book design what we have continued to use in this publication, and all other colleagues in FORUM-ASIA who provided inputs and comments on this publication.

As in every year, we wish that this publication will be useful to the readers, and will contribute to the work of both NHRIs and civil society.



Yap Swee Seng
Executive Director
FORUM-ASIA

A Regional Overview: Growing Recognition of the Role of NHRIs

Asian Forum for Human Rights and Development (FORUM-ASIA), ANNI Secretariat¹

1. The Year 2010 in Context

There has been a growing recognition of the role of national human rights institutions (NHRIs) in Asia as potent tools for protecting and promoting human rights at the national level. Also, more and more human rights defenders (HRDs) from all over Asia recognize the importance of ensuring the independence and effectiveness of NHRIs, if NHRIs are to support and protect them in their work of promoting and protecting human rights. It is believed that the wider engagement with the NHRIs by non-governmental organizations (NGOs) in the region comes after the several years of forceful and active advocacy from civil society organizations (CSOs) on the issue of NHRIs.

There have been several events in 2010 regarding the establishment and performance of the NHRIs in the region that proved to be significant to the work of the ANNI.

In Japan, for example, in the August 2009 election, the Democratic Party of Japan (DPJ) captured a majority in the Lower House (House of Representatives), ending the half-century dominance of the Liberal Democratic Party (LDP). The DPJ election manifesto included the establishment of an NHRI. In March 2010, the ANNI, together with its member the Citizens' Council for Human Rights Japan (CCHRJ), organized its third regional consultation in Tokyo. The consultation was attended by key MPs, academics and CSOs, and the importance

1 Prepared by Mr Toru Hisada, FORUM-ASIA focal point for ANNI

of establishing a NHRI in Japan that is in compliance with the Paris Principles was highlighted. Also, in April 2010, an MP's union within the DPJ was established to specifically discuss the establishment of an NHRI in Japan. Also, Professor Yozo Yokota, a veteran human rights advocate, was appointed as the special advisor to the Ministry of Justice. Finally, on 22 June 2010, the Minister of Justice, the Senior Vice Minister and the parliamentary Secretary of the Ministry of Justice in Japan released the interim report, *Establishment of a new Human Rights Remedy Agency*. The interim report describes the bare bones of an NHRI in Japan, the picture envisioned by Ministry of Justice. After years of stagnation under the LDP, the establishment of an NHRI in Japan might be fast-tracked, due to the commitment of the DPJ administration together with the continuous pressure from the UN Human Rights mechanisms including Universal Periodic Review (UPR) and Committee on Elimination of Racial Discrimination (CERD). Nevertheless, there are also strong voices against an establishment of the NHRI among the MPs as well as civil society. Human rights organizations in Japan are skeptical about the Diet's passage of the NHRI bill in the near future.

In Taiwan, the ANNI, together with its member the Taiwan Association for Human Rights (TAHR) organized its First National Workshop on 27-29 March 2010 in Taipei. The workshop was attended by representatives of the Control Yuan (the government branch responsible for audit or accountability in Taiwan), academics and CSOs. The workshop helped key stakeholders in Taiwan to better understand the significant role of NHRIs in the promotion and protection of human rights at the national level. ANNI was also able to build strong relationships with members and partners and various networks in Taiwan on this issue. Then in May 2010, President Ma Ying-Jeou announced the establishment of a consultative commission on human rights. As a result, the Human Rights Committee was re-established under the President's Office on 10 December 2010, the International Human Rights Day. The mandate of Commission is to advise the President on human rights policies, and supervise the State departments to produce the first national state report on the International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR). With these developments, it is hoped the establishment of a full NHRI in Taiwan can be expected in the near future.

With regards to advocating changes at the national level on issues pertaining to NHRIs, the ANNI has encouraged fellow HRDs on the ground to establish a network to engage in the establishment and development of independent and effective NHRIs for the promotion and protection of human rights. As a result, the All India Network of NGOs and Individuals working with NHRIs (AiNNI) was established in April 2010. People's Watch (PW), the ANNI member in India initiated the formation of AiNNI by referring to the experience of the ANNI. The AiNNI has now more than 300 member organizations and individuals and it has since become a forum to monitor, engage and pressure national and state human rights commissions in India to function according to their respective mandates.

Meanwhile, the independence and effectiveness of some NHRIs in the region have been a source of serious concern to the ANNI. For example, the National Human Rights Commission (NHRC) of Bangladesh was reconstituted on 22 June 2010 under the National Human Rights Commission Act of 2009. However, the NHRC Bangladesh falls behind the standards set forth in the Paris Principles and General Observation of the Sub-Committee of Accreditation (SCA) of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC-NHRI). According to the NHRC Act of 2009, the President of Bangladesh appoints the Chairman and Members of the Commission, upon the recommendation of high-ranked seven member selection committee, under the chairmanship of the Speaker of the Parliament. Also, during the selection and appointment of the present members of the commission, no such process to call for application or listing and publicizing potential nominees and take public input was followed. The organizational infrastructure of the NHRC Bangladesh is also a problem. The NHRC Bangladesh does not have its own office building yet and has rented a space in the 12th floor of a high-rise building in which physical access is a problem as the building seriously lacks in elevator facility and suffers from a deficient power supply. Finally, the NHRC Bangladesh faces a shortage in human resource since it does not have its own secretariat, and has not framed any rule of its own on this matter. Staff appointments are still being determined by the government.

Also, the independence and effectiveness of the National Human Rights Commission of Korea (NHRCK) has been increasingly

questioned under the current leadership of Mr Hyun Byung-Chun who was appointed following Professor Ahn Kyong-Whan's resignation as chairperson on 5 July 2009 in protest of government policies which undermined the competence of the NHRCK. In December 2010, ANNI sent an open letter to South Korea President Lee Myung-Bak expressing deep concern regarding the current crisis within the NHRCK. The negative developments in the NHRCK have left a void amongst Asian NHRIs in terms of the capable and exemplary direction that the commission once set for the region.

2. Continuing Attempt by Some Governments to Cripple the Independence of the NHRIs.

The independence of some NHRIs continues to be concern in the region. In Nepal for example, many aspects of the draft NHRC Bill 2009 are inconsistent with the Paris Principles and will seriously hinder the commission's independence and autonomy from the government. The ICC-SCA, as well as NHRC Nepal and CSOs expressed grave concern on the bill. If the bill is passed as it is, it will be major challenge for the NHRC, as well as CSOs in Nepal.

In Thailand, the selection and appointment process of the NHRCT Commissioners had long been held as a good model in the region. Yet, when the 1997 Constitution was replaced by the 2007 Constitution, stipulating a different composition, selection procedure and powers for the commission, the 1999 NHRC Act needed amendment. NHRCT as well as CSOs in Thailand have expressed concerns regarding certain provisions of the draft bill. Of major concern is a gag clause that will prevent reporting on what the NHRCT is doing, thus reducing the opportunity for the public oversight of its performance. The draft bill has been approved by the Cabinet and is awaiting submission to Parliament for enactment. If enacted, the bill will be a major challenge for the NHRCT, as well as CSOs in Thailand.

With regards to the selection and appointment processes, commissioners of the NHRIs including the chairperson in most of the countries in the region are selected either only by the President or Prime Minister, or by parliament, or by a group created by the government. Missing from these selection processes is the CSOs participation, so that appointments would often be based on the interests

of the government and would at times result in commissioners lacking in knowledge and experience in the human rights field.

In the Philippines, for example, transparency of the selection and appointment processes of the Commission on Human Rights of the Philippines (CHRP), including the chairperson, has been a source of concern since this power is vested only in the President. On 1 September 2010, Ms Loretta Ann P. Rosales was appointed as the new Chairperson of the CHRP by Philippines President. However, no other stakeholders including CSOs in Philippines were consulted over her selection and appointment, which was done behind closed doors. ANNI, in July 2010, sent an open letter to the President of the Philippines expressing deep concern over the non-participatory and non-transparent selection process of the CHRP chairperson arguing that the process runs against the Paris Principles.

Also in Malaysia, a new batch of SUHAKAM commissioners was appointed in 7 June 2010, after the end of the term of the previous batch on 23 April. However, there was also no participatory and transparent selection and appointment processes of new commissioners. For instance, the members of the selection committee appointed by the Prime Minister in 2010 were kept confidential until it was exposed by an anonymous source to the media on 1 April 2010. Earlier in February 2010, CSOs in Malaysia addressed a letter to Chief Secretary urging him to ensure that the SUHAKAM Commissioners be selected from a pool of qualified candidates via a participatory and transparent processes guided by the Paris Principles. They also asked the selection committee to publicize all names and profiles of candidates received and to conduct public interviews. Yet, neither the Prime Minister nor the Chief Secretary to the government acted upon these requests by CSOs in Malaysia. To make the matter worse, Deputy Minister Liew Vui Keong said in Parliament that there is no article in the enabling law of SUHAKAM which stipulates that the Prime Minister has an obligation to consult with CSOs before making any such appointments.

Continuous attempts by governments to cripple the independence of the NHRIs exemplified above clearly shows their lack of political will in promoting and protecting human rights in the country by maintaining independent, effective, transparent and accountable NHRIs.

3. Disregard by Governments in Implementing the Recommendations Made by NHRIs.

Issues concerning the governments' non-implementation of the NHRI recommendations made by NHRIs continued to be of concern in the region, resulting in the ineffectiveness of the NHRIs. In Nepal, for example, only a few recommendations made by the NHRC of Nepal have been implemented by the government. To make the matter worse, counter to the recommendations made by the NHRC of Nepal, the government has withdrawn a number of significant cases of human rights violations from the Courts. The NHRC of Nepal claims that its ineffectiveness is attributed to the failure of the government in adequately implementing its recommendations, fostering the culture of impunity in the Nepal by not penalizing those accused of serious human rights abuses.

Also in Malaysia, despite being perceived as a toothless tiger, the new set of SUHAKAM commissioners has called the government to recognize the fundamental human rights of the people, such as the freedom of assembly as declared in the Malaysian Constitution and the Universal Declaration on Human Rights (UDHR). SUHAKAM has also repeatedly called for the abolition of draconian laws such as the Internal Security Act (ISA) and Emergency Ordinance (EO). Yet, the government has continued to ignore recommendations made by SUHAKAM. In addition, even though its enabling Act requires SUHAKAM to prepare an annual report, and make recommendations regarding its findings, the parliament has never debated any annual report of the commission since its inception in 2001, let alone act on major recommendations. On 21 March 2011, SUHAKAM submitted its 10th annual report to the Malaysian Parliament and, during a press conference held on 26 April 2011, Tan Sri Hasmy Agam, Chairperson of SUHAKAM expressed his hope that 2010 annual report of SUHAKAM would be discussed in the Malaysian Parliament. ANNI also supported the initiative by SUHAKAM by sending an open letter to Datuk Seri Nazri Aziz, Minister in charge of parliamentary affairs, urging the Malaysian Parliament to debate the said report. However, there has not been any indication from the Malaysian Parliament of any debate on the report.

4. Role of NHRIs in the Promotion and Protection of HRDs and WHRDs

The role of NHRIs in the promotion and protection of HRDs and WHRDs has been crucial as defenders in the region have faced continuous challenges. Ongoing armed conflicts in some parts of the region have made the already limited working space of HRDs and WHRDs to be more constricted as they become more susceptible to threats, repression and persecution. In other parts of the region where there is no raging conflict, HRDs and WHRDs have combated human rights abuses while dealing with various other challenges like suppression, persecution, constant threat of prosecution and threats to their lives and that of their families. WHRDs have also faced additional challenges of violations from traditional or customary practices, cultural prejudice and religious fundamentalism.

Currently, only six NHRIs in the region—India, South Korea, Malaysia, Mongolia, Philippines, and Sri Lanka—have a designated desk or focal person for HRDs and WHRDs. In Sri Lanka, for example, Human Rights Commission of Sri Lanka (HRCSL) identified its Director of Inquiries and Investigations as the focal person for HRDs and WHRDs, in response to a suggestion from the HRDs working on the ground. In Malaysia, SUHAKAM set up the HRD desk in 2009 as a result of advocacy by CSOs in Malaysia who have witnessed the HRDs and WHRDs facing the risks of harassment and arrest at demonstrations and public assemblies. Also, in India, the NHRC of India appointed a focal person for HRDs in 2010. Consequently, the NHRC of India has been providing public information on its website regarding the status of complaints submitted to the commission by HRDs in India. Nevertheless, these desks or focal persons for HRDs and WHRDs within NHRIs in many countries are still new and need to be strengthened in order for them to effectively address the broader problem of the promotion and protection of the rights of HRDs and WHRDs.

Meanwhile, NHRIs and CSOs have pushed for the creation of a desk or appointment of focal person for HRDs and WHRDs for institutions yet to create one. For example, the Indonesian Human Rights Commission (Komnas HAM) in 2010 advocated the establishment of an HRD desk within the Commission by conducting a series of discussions with HRDs and government agencies, namely the Ministry of Law and Human Rights, the Attorney General's Of-

fice and the Victim and Witness Protection Institution. Also both in Maldives and in Nepal, CSOs have advocated for the establishment of a dedicated desk for HRDs.

As the primary mechanism for the promotion and protection of HRDs and WHRDs at the national level, it is crucial for NHRIs to effectively address issues concerning the work of human rights defenders in their countries.

5. NHRIs and International Human Rights Mechanisms

NHRIs have played a bridging role between their countries and international human rights mechanisms. The General Observation of the ICC-SCA (1.4) emphasizes the importance of the NHRIs to interact with the international human rights system. Also, at the close of its 16th session, the UN Human Rights Council (HRC) adopted the outcome document from the review of its work and functioning by an open-ended intergovernmental working group.² The outcome document sets out a range of new opportunities for 'A' status NHRIs to share their independent expertise in the work of the global human rights body, including:

- Taking the floor right after their country during the plenary discussions of the UN HRC, and adoption of the Universal Periodic Review (UPR) report on that country;
- Taking the floor right after their country, following the deliberation of a mission report on that country by Special Procedures mandate holders; and
- Proposing candidates for appointment as Special Procedures mandate holders.
- NHRIs with A status at ICC-NHRI will also be allocated a separate section in the UPR summaries of stakeholders' information.

Several NHRIs in the region are said to have engaged with international human rights mechanisms especially in the UPR process. The NHRC of Nepal for example, submitted with two other

² . *Review of the work and functioning of the Human Rights Council*, UN Human Rights Council 16th Session, Agenda Item 1, UN Doc: A/HRC/RES/16/21 12 April 2011.

national institutions a joint stakeholder report to the UPR Working Group on major human rights issues in Nepal. Members of the NHRC of Nepal also participated in the plenary session of UPR on their country in January 2011, which came up with several recommendations to the government for reinforcing NHRC, implementing recommendations by NHRC, and providing sufficient resources, independence and autonomy.

Also in Malaysia, SUHAKAM participated in the UPR of Malaysia in 2009 and submitted its stakeholder report to the UPR Working Group. SUHAKAM has also followed up the UPR outcomes with relevant stakeholders through a number of meetings, and also monitored the implementation of the UPR recommendations by the government agencies with the assistance of an Inter-Working Group Committee.

Finally in the Maldives, HRCM played a positive role in the UPR of the Maldives in 2010. It submitted not only the stakeholder report to the UPR Working Group which was comprehensive and balanced, but also took initiative to bring together CSOs from across the country to help organize the CSOs effort to submit a stakeholder report.

As NHRIs, participating in more opportunities in international human rights mechanisms will further reinforce their work in their respective countries, particularly to assist implementation of the decisions and recommendations on the ground.

6. Interaction and Cooperation Between NHRIs and CSOs

NHRIs and CSOs in principle should be important partners, with shared mandates to promote and protect human rights. Yet, the interaction and cooperation between NHRIs and CSOs in many countries in the region has been determined by the degree of independence and autonomy of NHRIs from the governments. NHRIs which are considered by CSOs as lacking independence from the government would not be able to establish strong and constructive relationships.

For example, the NHRCK under the leadership of former chairperson, Professor Ahn Kyong-Whan, was trusted by CSOs as op-

erating in accordance with the Paris Principles. The NHRCK and CSOs had cooperated with each other well by undertaking a partnership project and annual consultation. However, since Mr Hyun Byung-Chul, the current chairperson, was appointed, the relationship with civil society has collapsed. The South Korean government's attempts to cripple the independence of the NHRCK, together with the mismanagement of the NHRCK, and failure of NHRCK to take up important human rights issues are contribute to the current distrust and adversarial relationship between NHRCK and South Korean CSOs.

In Thailand, NHRCT has recognized the value of the support and cooperation from the CSOs in further developing its work. However, the composition of the present NHRCT has led several Thai CSOs to withdraw cooperation from the NHRCT.

Finally, in Malaysia, SUHAKAM has been open in its engagement with CSOs. However, CSOs in Malaysia hesitate to engage with SUHAKAM due to the past relationship of the previous commission, that includes a boycott by CSOs, and most notably when 42 organizations boycotted the commission's 10th anniversary on 8 September 2009. However, the situation has improved since the new batch of commissioners was appointed in June 2010. In its first 'National Inquiry into the Land Rights of the Indigenous People in Malaysia', which was held in 10 May 2011, SUHAKAM has actively engaged with indigenous peoples (IPs), CSOs and media, which is crucial in guaranteeing full participation and inclusiveness of the process. Also, a number of consultations including CSOs were organized by SUHAKAM through the Economic, Social and Cultural Rights Working Group (ECOSOCWG) to talk about issues pertaining to business and human rights. With this development, cooperation between SUHAKAM and CSOs in Malaysia is expected to be reinforced for the promotion and protection of human rights in Malaysia.

7. Conclusion

On 16 June 2011, the UN HRC adopted a resolution on 'National Institutions for the Promotion and Protection of Human Rights,'³ it

3 . *National Institutions for the Promotion and Protection of Human Rights*, UN Human Rights Council 17th Session, Agenda Item 8, UN Doc. A/HRC/17/L.18, 10 June 2011

is the first-ever Council resolution to focus specifically on the work of NHRIs. The resolution, acknowledging their significant role in the promotion and protection of human rights at national level, encourages NHRIs to play a vibrant role in preventing and tackling human rights abuses, and also calls for further cooperation with regional coordinating bodies of NHRIs including the APF. It also acknowledges the significant role that NHRIs play in the functioning of the Council, including its Special Procedures and UPR mechanism.

With NHRIs gaining more and more recognition by regional and international bodies, the significance of establishing and ensuring effective and independent NHRIs cannot be emphasized enough. As NHRIs with “A” status will have an enhanced role and increased space at the UN Human Rights Council, it is paramount for these NHRIs to be an independent voice from the government, and make positive contributions to the deliberation at the UN Human Rights Council. In particular, the lack of transparency and pluralism, whether it lies in the selection and appointment of the commissioners or in the institution’s operating processes, is often an obvious indication that the institution does not stand independent and autonomously from the government. At the national level, an NHRI considered by CSOs as lacking independence would not be able to establish positive cooperation with HRDs on the ground, resulting in the institution’s difficulties in addressing human rights abuses effectively.

The ANNI remains committed to work on the development and establishment of independent, effective, transparent and accountable NHRIs for the promotion and protection of human rights in the region, and to foster the culture which human rights are respected.

Bangladesh: A Reconstituted Commission Yet to Prove Its Effectiveness

Ain O Salish Kendra (ASK) ¹

I. General Overview of the Country's Human Rights Issues in 2010

The year 2010 was the second year of the Grand Alliance, led by the Bangladesh Awami League. The alliance formed the government in 2009 winning a landslide victory in the general election after almost two years rule of an unelected military-backed caretaker government. The electoral promise of the Grand Alliance was to 'bring the change.' Thus people were vigorously waiting for the changes to be realized in the second year of their governance. Though the year has seen some positive initiatives taken by the government to protect and promote the human rights, including reconstituting the National Human Rights Commission, the year largely came as a year of losing peoples' hope in the government as the 'agent for change'.

The overall human rights situation of Bangladesh in 2010 gives mixed impressions. While there has been some progress, the drawbacks are no less alarming. The present government pledged in its electoral manifesto that once in power extrajudicial killings will be brought to an end. But it has not been stopped. Rather it is continuing under different names such as 'gun-fight', 'encounter,' etc. The government continuously insists that there are no 'cross fire' deaths, but persons are killed as law enforcing authorities have to fire in 'self defense'. Such explanations are resorted to justify extra-judicial killings. Even in the investigation conducted by the Ministry of Home Affairs, such evidence has been found against the Rapid Action Battalion (RAB), which supports the allegations

¹ Prepared by Sultana Kamal (ASK Executive Director) and Eeshita Dey (Senior Media Relations Organizer). The writers sincerely acknowledge the substantive inputs from the NHRC Chairman, and the steering committee members of the UPR-HR Forum.

of extra-judicial killings. In addition, the new trend of 'disappearance' or 'secret killing' has emerged, which is more alarming. In many cases, after the disappearance or recovery of the a body killed by shooting, the families of the victims constantly allege that victims had been earlier nabbed by the RAB or members of law enforcing agencies in civilian clothes.

The trial of the 2009 mutiny of the Border Guard Bangladesh (BGB, formerly known as the Bangladesh Rifles or BDR) commenced in 2010. Although, this is a positive sign, custodial deaths of BDR members in detention did not stop. Continuing the previous year's trend, 22 more BDR members died in custody in 2010.

The law and order situation had been precarious throughout the year. Evidence of the breakdown in law and order include violence in different universities resulting in the death of a number of meritorious students, killings by muggers including a journalist, and the increasing trend of mob justice which has killed 127 persons in 2010.

Incidents of stalking have also drastically risen in 2010, despite visible preventive efforts of government. In 2010, 31 women committed suicide after being harassed by stalkers. In addition, the father of a victim was also reported to have committed suicide in humiliation, while the mother of a perpetrator also committed suicide in extreme disappointment with her unruly son. But the stalkers did not give up. As a result of such incidents, mass protests against stalking have been observed, in which protestors became victims of their rage with 20 persons being killed while protesting such occurrences.

Many corruption cases have been withdrawn due to administrative and political consideration showing utter disregard to the rule

3 The Bangabondu killing refers to the murder of the architect of the liberation movement of Bangladesh and the first President of the country Bangabondu Shekh Mujibur Rahaman, seven of his family members and three security personnel. They brutally killed by a gang of army officers on 15 August 1975. Soon after the killing, their accomplice Khandaker Moshtaque took over power as president and framed an indemnity ordinance to protect the killers. In 1996 the indemnity ordinance was repealed and on 2 October 1996 Sheikh Mujibur Rahman's personal assistant Mohitul Islam filed a murder case. The 13-year legal battle ended on 19 November 2009 with the order of the appellate division of the Supreme court dismissing the appeal petitions of five convicts against the third judgment of the High Court that handed them and seven others the death penalty.

of law. It is worth mentioning that almost all the cases withdrawn due to political considerations involved ruling party activists. However, there have also been cases of withdrawals where none of the accused or victim belonged to any political party. For example, the statement of the police commissioner defending an MP suspected of killing a person in his private car has created doubts regarding the fair investigation of the case.

Local journalists in different places were threatened and tortured by the influential local leaders of the ruling party. A journalist named Masum from the *New Age* daily was tortured by the RAB. In 2010, 298 journalists have been tortured in different incidents. In addition, other key incidents which have raised the question of the government's commitment to freedom of expression, including the closure of Channel 1 and attempt to shut down the *Amar Desh*, and the temporary banning of Facebook.

The killing of Bangladeshi citizens by the Indian Border Security Force (BSF) was also an increasing concern last year. According to different sources, some 100 Bangladeshis were killed by the BSF in the border areas in 2010.

Although some praiseworthy initiatives have been taken to implement the *Chittagong Hill Tract Accord*, there had been no progress in resolving land disputes in the area. The current controversy that has arisen is whether land survey or the settlement of a land dispute should be undertaken first. At its 26 December meeting, the treaty implementation committee decided to postpone the activities of the land dispute commission until the amendment of the law was done. Violence has not yet stopped in that region. Questions have been raised at different times regarding the role and affordability of the army and the government with the people.

In 2010, the garments industry was rocked by workers' unrest. While the unrest began with the issue of the minimum wage of workers and the period of their entitlement, the situation worsened when employers declared an indefinite shutdown of factories. The new wage structure declared in November 2010 was yet to be completely implemented. Workers were also disappointed with the anomalies of the new wage structure. On the other hand, many labor leaders including Montu Ghosh and Moshrefa Mishu had been arrested and taken to remand, which seriously affected labour's freedom of association.

The incidents relating to land purchase at Rupgonj for an army residential project led to a conflict between the villagers and the law enforcing agencies. One died and several others remained disappeared. In another case, people again assembled against the open pit coal mining at Phulbari, demanding compensation for the people affected by the Boropukuria coal mine.

The student movement in public universities also staged protests against increased academic fees, movement of local people against land acquisition by RAJUK in Gazipur, and against the proposed airport at Munshigonj. These protests were symbols of people's constant struggle to protect their resources.

Amidst these issues, it must be noted that the present NHRC was reconstituted only on 23 June 2010. Until then, only the previous Chairman represented the Commission. The present NHRC has made very strong positions against incidents of human rights violations especially on extra-judicial killings, torture by law enforcing agencies, rights of the indigenous peoples, fair trial of the accused BGB men, against BSF killings, etc. The high presence and strong words of the new Chairman made the existence of the NHRC highly visible in public. However, the high profile of the new Chairman still does not overcome the need for establishing an independent and effective institutional mechanism in compliance with the Paris Principles.

II. Independence

According to the Paris Principles, for a national human rights institution to be truly independent, it must be: (1) established by a distinct law or legislation; (2) financially solvent, and able to act independently with respect to budget and expenditures; (3) autonomous of any State agency or entity in carrying out its administrative functions.

A. Founding Law and Rules

On 9 July, 2009 the parliament passed the *National Human Rights Commission Act of 2009 (Founding Act)* giving it a retrospective effect to legalize the acts done the commission established in

2008. Except for the Chairman, two other members of the previous commission resigned on April 2010. The Chairman alone ran the commission until he resigned on 22 June 2010 upon reaching the maximum age limit for government service. On the same date, the present Chairman and six new commissioners were appointed. Of the seven commissioners, it may be noted that the Chairman and only one member are full time, the other five are appointed on honorary basis and do not serve full time.

The *Founding Act* ensures the independence of the Commission in several ways. According to Section 6 of the Act, the Chairman and Members of the Commission shall hold office for a term of three years from the date on which he enters his office. The Chairman or any Member of the Commission may resign before completion of his or her term by submitting a written resign letter submitted to the president. In case any vacancy occurs in the office of the Chairman or if the Chairman is unable to discharge the function of his office on account of absence, illness or any other reason, the full-time Member shall act as Chairman until a newly appointed Chairman holds office or until the Chairman resumes the function of his office, as the case may be.

According to Section 8 of the Act, (1), The Chairman or any Member of the Commission shall not be removed from his office except in like manner and on the like grounds as Judge of the Supreme Court.

The President may also remove the Chairman or any other Member from his office, if he:

- (a) Is declared insolvent by any competent court; or
- (b) Engages himself in any post extraneous to his own duties during his term of office for remuneration; or
- (c) Is declared by a competent court to be of unsound mind; or
- (d) Is convicted of any offence involving moral turpitude.

The previous Commission did prepare its organizational structure and draft rules for staff recruitment, which was later sent for the approval of the President through the ministries, as required by the law. The rules were sent back to the Commission seeking several amendments from the ministries. On 22 December 2009

the Commission further made request to approve an organogram of 62 personnel to which after more than one year, the government gave approval for appointing only 28 mostly support staff members. Hiring of these staff members could only start in July 2011 because of the delay in approving the procedural issues by the Government. Thus as a matter of fact, as of July 15, 2011 the NHRC has no staff of its own, except the secondees from other government offices.

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

Contrary to news reports, alleged tension between the NHRC and the Legislative branch cannot be validated by evidence. From the documents of the NHRC it may be seen that the local level executive have shown better response and cooperation than the central level executive bodies. For example, the NHRC has received very few responses from the Ministry of Home Affairs.

The NHRC has so far received highest standard of recognition from the Higher Judiciary. Two notable examples can be highlighted in this regard.

A High Court bench on 27 July 2010 directed the NHRC to set up a committee comprising lawyers, journalists and social workers to oversee the cases of illegal detention of the victims in jail in the name of safe custody and to report back to the court.

Another High Court bench requested the NHRC Chairman to be present and to express opinion on a case of arbitrary arrest and torture by the police of a Dhaka University student named Abdul Kadar. The NHRC chairman gave his opinion before the court on 28 July 2011; and the court directed to form separate investigation committees to investigate the matter and also to suspend the involved police officials immediately.

C. Membership and Selection

Following to the selection process set forth in the NHRC Act 2009, The seven members of the present commission were appointed in June 2010 (for the Chairman and Full Time Member), and July 2010 (for Honorary Members) for a three-year term (2010-13) . Un-

der the Act, Commission members will be appointed by the President, upon the recommendation of high-ranked Selection Committee, consisting of seven members: the Speaker of the Parliament as chairman, two ministers, one Secretary of the Government, two parliamentarians (one from the Treasury Bench and another from the opposition), and the Chairman of the Law Commission. From this list, it can be seen that the selection committee is dominated by the Executive and no representation from civil society is ensured.

Regarding the selection of the members, the *General Observation* of the ICC-SCA clearly emphasizes that the selection process has to be transparent, the vacancies should be advertised broadly, and broad consultations should take place throughout the selection and appointment process. During the selection and appointment of the present commission, there were no public calls for input on applications, or for reviewing nominees. The Selection Committee merely assessed and selected from the candidates proposed by the Law Ministry, which according to the NHRC Act, provides necessary secretarial assistance to the Selection Committee.

Unfortunately, controversy arose about one of the members right after the selection. Several media reports came out of a previous allegation of sexual harassment against him. The said Commissioner was later replaced by a woman, but by that time the selection process had already been discredited.

D. Resources

The NHRC is still facing huge problem in regard to its organizational infrastructure. Although the Paris Principles state that “the national institution shall have an infrastructure which is suited to the smooth conduct of its activities,” it must be noted that the NHRC does not have its own office building. The Commission rents office space in the 12th floor of a high-rise building that serious inadequacies in terms of power supply, elevator facilities, etc.

The United Nations Development Programme (UNDP) Bangladesh office is supporting the Commission both in terms of logistics and human resources. UNDP funding has to be channeled through the External Relations Department (ERD) of the Government.

III. Effectiveness

The effectiveness of the reconstituted commission has yet to be demonstrated as the commission is still relatively new. Among the initiatives taken to increase the effectiveness of the institution include the signing of an agreement between the government and development partners on 6 May 2010 to assist the NHRC in developing a strong and effective institutional framework under the “Bangladesh National Human Rights Commission Capacity Development Project” (BNHRC-CDP). Under this project the NHRC has drafted its five-year strategic plan, which lays out the vision and mission of the Commission as follows:

Vision: to establish “a human rights culture throughout Bangladesh”

Mission: to ensure “the rule of law, social justice, freedom and human dignity through promoting and protecting human rights.”

The Commission also established four long-term goals for itself and the country, which it will vigorously pursue during the current terms of the Commissioners and beyond:

- A human rights culture throughout Bangladesh where people’s human dignity is respected;
- A just society where violence by state is an episode of the past and officials know, and are held accountable for, their responsibilities;
- A nation that is respected internationally for: (1) its human rights compliance; (2) ratification of all human rights instruments; (3) up-to-date reporting to treaty bodies; (4) open cooperation with UN special mechanisms;
- An NHRC that is credible, apolitical, objective and effective and respected for leading human rights protection throughout the country.

The commission has finalized its strategic plan, after a series of consultations with different stakeholders within and outside the capital. The next step is to develop a detailed plan of action. In the future, these documents will be important tools in evaluating the effectiveness of the commission.

Complaint handling

The *NHRC Act of 2009* mandates the commission to look, not only at violations of human rights but also at any abetment thereof by a person, State or government agency or organization or public servants. The Commission can receive complaints from the person affected or any person acting on the victim's behalf. It can also act *suo-moto* on cases of human rights violation (S 12.1).

The Commission can receive complaints by post, email and direct submission. Like ASK, several NGOs also refer complains to the NHRC. A Director and a Deputy Director for complaints and investigation deals with the cases under the guidance of the Chairman and the Full Time Member. Although the founding act allows the commission to set up its offices outside the capital, the commission is yet to do so.

As per S. 14 (1), if any human rights violation is revealed from the enquiry of the Commission, the Commission may take steps to resolve it through mediation. S. 15 (2) states that the procedure of appointment and power of the mediator shall be determined by rules. The Commission has drafted rules on mediation which is awaiting approval.

Under such circumstances, while the commission's complaint handling is yet limited to send letters or asking for reports to the Executive, the Commission is receiving an increasing number of complains. It received 23 complaints during the year 2008, while in 2009 and 2010 it received 72 and 205 complaints, respectively. Though the numbers may suggest an increase in the number of incidents of human rights violations, these figures may also be interpreted as an indicator of rising level of people's awareness of the Commission's existence, and confidence in its activities. The following are summaries of some of the noteworthy complaints of human rights violations addressed by the Commission during 2010:

Apprehended and disappeared by the RAB

A national daily reported that one Md Tushar Islam Titu was arrested by RAB-3 elements under the leadership of a Deputy Director from Dhukuria Berabazar of Belkuchi Upazilla of Sirajgonj

District. After that Titu went missing, as the RAB-3 denied making any such arrest. When the allegation was published in the newspapers, the Commission *suo moto* took the matter into its cognizance. A high-level investigation committee was requested by the Commission to look into the case. After recurrent requests, a report was sent to the Commission, which is self-contradictory and incomplete. The Commission again requested the Home Ministry to initiate a full-fledged investigation committee under a Joint Secretary. Though the Commission continues to put pressure on the Home Ministry, it is yet to receive any further report.

Mistaken arrest and custodial death

The attention of the NHRC was drawn to a news item published by in different dailies that one Kaiser Mahmud Bappy was captured and shot dead by the RAB, after being mistaken as a certain Kamrul Islam Bappy. The Commission *suo moto* took notice of the complaint, and urged the Home Ministry to form a high-level inquiry committee and report to the NHRC.

In addition, the Hong Kong-based Asian Human Rights Commission (AHRC) wrote a letter informing the NHRC that a white-clad RAB officer captured one young Mohiuddin Arif from his residence. The next day, Arif's family was informed by RAB that Arif had been handed over to a police station, after which he was sent to court but was not produced before the judge. Arif's relatives discovered that Arif received serious injuries to his legs and eyes, and was unable to walk. Arif told them was the result of severe beating by the police. Police however claimed that Arif had those injuries when they received him from the RAB, even submitting a certificate to that effect. The AHRC also mentioned in their letter that the court ordered the accused into police custody without personally examining him and without giving him a hearing. Some days later Arif succumbed to death.

The NHRC requested the Home Ministry to conduct an inquiry into the matter and send a report to the Commission. Following numerous requests, the Home Ministry formed an inquiry committee for both the incidents. The time limit for submitting the report was extended several times, but on 25 August 2010 the committee sent a letter to the NHRC indicating that the report had been submitted, although no copy of the report was attached. To date,

the NHRC has not received any report on the matter, so it remains uninformed about the outcome of investigations.

On 26 December 2010, the daily *Prothom Alo* reported that the committee formed by Home Ministry termed Arif's death as a 'homicide'. On the same day the newspaper also revealed that the committee formed at the request of the NHRC to investigate the death of Bappy determined that the RAB had relied on incorrect sources and weak corroboration of information.

The outcome of these two incidents is a positive reflection of the NHRC's efforts irrespective of its limitations. However, the Commission can only take further steps once it receives the inquiry reports.

Arbitrary detention

On 1 August 2010 the NHRC received a complaint that some white-clad persons described as members of DB Police captured Md Al Jubaer Mahmud Sumon, 25, from his home in the late evening. The next morning Sumon's relatives reported the incident at the nearest police station, but the police claimed to know nothing about the incident. Afterwards, the complainant and other relatives of Sumon communicated with the DB police headquarters and learned that Suman had been kept in custody by the DB police office at Minto Road in the capital. The complainant alleged that the DB police failed to present Sumon before the court within 24 hours of the capture, in violation of the law.

The NHRC asked the Narayanganj district administration to conduct an inquiry and submit a report on the matter. The District Administration wrote a letter on the matter to the Police Department of Narayanganj. The Commission is yet to learn the response of the District Administration and the Police Department, even after a followup on 29 November 2010.

Children in custody

Two reports titled, *Niom nei tobu 165 shishu karagare* ('Law does not support: Yet 165 children is in jail') and *Niom nei, thana hajote rakha hocche shishuder* ('In violation of laws, children are kept in thana custody') were published in the national daily *Prothom Alo*. The editorial of the same daily on 9 March 2010 expressed concerns about

the indifference of the law enforcing agencies to comply with child rights laws, including seven 2003 directives of a High Court division to protect the rights of the children under custody.

The NHRC took notice of the reports and wrote a letter to the Inspector General of Police to take steps to comply with the apex court's directives, in particular to arrange separate rooms for child prisoners. The Home Ministry was also asked to take the same initiatives and to inform NHRC about the steps taken. In addition, the Social Welfare Department was asked to take necessary measures to transfer the children as soon as possible to juvenile correction centers.

On 29 November 2010 the Home Ministry submitted a summary report of the Prison Department (not its own) in which it was claimed that the report of the *Prothom Alo* was not completely true. Nevertheless, the Commission regards its action as a success because its efforts raised awareness of the concerned departments about this matter.

Death in police custody

ASK lodged a complaint with the NHRC that a person under police custody in Barishal was killed by 'crossfire'. The allegation was made on the basis of findings by ASK's own investigation. According to ASK's allegation some white-clad police arrested Mr Alauddin Hawlader and after some hours was shot dead. The ASK investigation team did not find any specific allegation from the police station against the victim. As per ASK's statement, Hawlader's death was not a consequence of chance encounter, but rather he was murdered.

The NHRC requested the Inspector General of Police (IGP) to inquire into the matter. The IGP was requested again to send the follow up but there was no response. Then, the NHRC requested the Home Ministry to do the same. The first letter to the IGP was sent on 5 August 2009 and afterwards the series of requests were made both to the IGP and the Home Ministry. Nearly one year later, on 14 June 2010, the Commission was informed that the matter was under trial (*sub-judice*). Section 12 (2) (a) of the Human Rights Commission Act 2009 excludes the Commission's jurisdiction on a *sub-judice* matter, so that the only recourse for the Commission is to enlist it accordingly.

Alleged abduction and killing by RAB

ASK requested the NHRC to inquire into and take action on the complaint of a 'bulleted dead body of Suman recovered after being abducted by the RAB'. According to the complaint, Shahidullah, alias Suman, and his wife Rani Akter were held by white-clad RAB personnel from the Amin Bazar area of Savar on the night of 14 April 2010. They were detained in the custody of a temporary RAB-4 Camp located at Nabi Nagar. Around midnight on 15 April 2010 a RAB team set Rani Akter free at a bus stand in the Mohammadpur area. Returning home, Rani described the incident and went to RAB-4 Camp at Nabi Nagra in search of her husband Suman. Any allegation of detention of Shahidullah, alias Suman, was denied by the RAB.

The next morning, Suman's elder brother Manik received a phone call from the Pallabi Thana police station, and recovered his brother Suman's dead body from Dhaka Medical College Mortuary. Suman's wife Rani claimed that RAB shot her husband dead after incarcerating him for 12 hours. The company commander of RAB-4, Squadron Leader Shah Nizamul Haque, denied the matter and said that he had no information about any arrest of Shahidullah Suman, and on 14 April 2010 no RAB officer was in duty in their white uniform. The Commission requested an investigation by the Home Ministry, but has not been informed about any follow up.

Pension rights for freedom fighter

Ila Rany Roy was a veteran who fought in the Liberation War of 1971. The private TV Channel NTV aired a program called *Agrozo*, highlighting the contribution of Ms Roy in the Liberation War, and her present uncertainty of getting a pension for her service. The case caught the attention of the Commission, treating it as a threat to the human rights of Ms Roy. The Commission thought it just and proper to inquire into the matter *suo moto*.

The District Commissioner was urged to file a report about the matter with the NHRC. The content of the complaint was that the Matriculation Certificate of Ms Roy wrongly mentioned her birth date as 18 October 1936, which was corrected by an affidavit to list 1942 as her actual year of birth. As per the regulations of the Family Planning Board, she was appointed to the service with 18

October 1942 as her date of birth. An official already attested this date and secured entry into the service book accordingly. But even after serving 31 years, 8 months and 22 days, she remained in a precarious position about her pension money.

Under these circumstances, on the basis of the information received, the Commission has been assured that the complexities of obtaining the pension by Ms Roy are about to be resolved. The NHRC has witnessed progress in this matter and is satisfied that its initiative will bring some solace to the veteran woman freedom fighter.

Disposal of complaints by alternative dispute resolution mechanisms

a. **Dismissal without cause.** On 14 October 2009, Md Kamrul Islam brought to the NHRC's attention an alleged violation of human rights by the Bangladesh Development Partnership Center (BDPC). The complaint alleged that during the probation period of the complainant, he was terminated from service without any notice. He claimed at least 15 days to join another service or be compensated in the amount equivalent to 15 days' salary. The BDPC Director or his authorized agent and the complainant were requested to appear in person before the Commission on a stipulated date. The BDPC Chairman explained the matter in detail to the NHRC Chairman and submitted the necessary papers on the basis of which another date was fixed for a hearing. On the stipulated date, both parties appeared at the NHRC and after hearing them the Commission resolved the issue through arbitration. The Commission convinced the BDPC to award the complainant compensation in the amount equivalent to one month's salary. The complainant later informed the Commission that he received the money, and no other allegations against him remained. The matter stands resolved.

b. **Recommendation of arbitration.** Ranu Ara Begum lodged a complaint against Md Razu Miah and Md Wazuddin. Given the importance of the issue, the NHRC referred the matter to the District Magistrate and requested that the necessary steps be taken to resolve the matter after proper investigation. Afterwards, the Commission was informed by the District Magistrate that the issue had been resolved through arbitration. The Commission expressed

satisfaction after examining the papers and confirming that the parties had consented to the result of the arbitration.

IV. Thematic Focus

A. Activities conducted on the promotion and protection of HRDs and WHRDs

Regional Seminar on National Human Rights Commissions: Experiences and Challenges

The NHRC, with the support of UNDP's National Human Rights Commission Capacity Development Project, organized a two-day regional seminar titled "National Human Rights Commissions: Experiences and Challenges" on 13-14 November in Dhaka. Seminar participants included delegates from 19 countries and representatives from 7 national human rights institutions in the Asia Pacific region, including India, Indonesia, Malaysia, Maldives, Nepal, New Zealand and Sri Lanka. In a series of plenary and parallel sessions, seminar participants shared their experiences and knowledge on key human rights issues affecting particular groups in the country, including women, children, indigenous peoples, migrant workers and other minority groups.

At the end of the two-day program, the *Dhaka Declaration on Human Rights and National Human Rights Institutions* was adopted by seminar participants. The *Dhaka Declaration* emphasized the importance of independent, transparent, accountable and effective national human rights institutions. The Declaration also focused on the need for funding and cooperation to ensure that human rights institutions can function strongly and independently. In addition, the Declaration highlights the need for greater regional cooperation in the fight for human rights, particularly regarding human trafficking and migrant labor. It was noted that creative and novel approaches were necessary to address the rights of the downtrodden in the current political and economic environment.

Observance of International Human Rights Day 2010

The NHRC observed International Human Rights Day on 10 December 2010. The theme of the day reflected the year's UN message, "Speak Up, Stop Discrimination". As a part of the program,

law students from different universities participated in an awareness campaign by distributing educational materials and promotional stickers on human rights to the public in various areas of Dhaka. In the afternoon, a discussion meeting was held among representatives from various government ministries, civil society members, NGO representatives, news media personalities, and students attended the occasion.

B. Interaction of NHRIs with the international human rights mechanism

Since the commission is still in its early days, it is yet to establish any interaction with the international human rights mechanisms.

C. Follow-up or implementation of references by the ACJ

The commission has not taken any specific activity in relation with the follow-up or implementation of the ACJ references, but it made recommendations to the Government in the process of drafting new *Trafficking Act* and the amendment of the *Children Act*.

D. Consultation & Cooperation with Civil Society

In general, the relationship between the NHRC and civil society is friendly and complementary. The NHRC invites civil society organizations without any selectivity in its programs; while the NHRC is also invited by the leading civil society actors. Moreover, according to the NHRC, they are planning to develop specific issue-based cooperation modalities with the civil society organizations.

V. Conclusion and Recommendations:

In order to achieve international recognition, the Commission applied for accreditation to ICC-NHRI. The Sub-Committee on Accreditation meeting held in May 2011 recommended a 'B' status for the Bangladesh NHRC. The SCA has made following observations and recommendations:

- The SCA recognized and welcomed the significant public advocacy undertaken by the new Chairman. They also wel-

comed the information that the commission is working in co-operation with development partners including UNDP.

- But the SCA noted that ‘the selection committee established by section 7 of the founding Act is primarily comprised of government appointees and the quorum requirements would appear to allow nominations solely by those members.’
- Regarding the secondment, the SCA noted that, ‘secondment of the secretary and senior staff members may or may be seen to compromise the independence of a national human rights institution’

In line with the SCA recommendations, ASK makes the following recommendations:

For the NHRC

- Immediately complete the recruitment of the approved manpower with competent human resources.
- Take steps to gradually eliminate the practice of secondment.
- Immediately adopt a comprehensive operational guideline and bring it in practice.
- Set priorities and set examples of good practices.

For the Government of Bangladesh

- Immediately amend the NHRC Act to remove the flaws of the act.
- Take immediate steps to approve the proposed organogram of the NHRC.
- Take effective steps to ensure the early and effective response of the executive to the recommendations made by the NHRC.

For the International Community

- Keep continuous dialogue with the Government of Bangladesh to ensure the independence and effectiveness of the NHRC of Bangladesh.
- Continue engagement with the NHRC of Bangladesh to keep it active and vibrant.

Hong Kong: Overview of the Human Rights Situation and Existing NHRIs

Hong Kong Human Rights Monitor¹

I. Key Human Rights issues in 2010 and 2011

Although the *Basic Law* promises a high degree of autonomy under the principle of ‘one country, two systems’, the interference by the Chinese Central Authority in Hong Kong² affairs has been increasing and has been undermining human rights protection in the territory. Particularly the freedoms of expression and assembly are being threatened this year.

A. Hard line approach on protests and assemblies

As describes in the *ANNI Report 2010*, the Hong Kong Government has been taking a hard line approach in handling protests and assemblies particularly those on politically sensitive issues³ by way of selective prosecutions motivated by political considerations and an abuse of law and procedures. Civil society has been

1 Key Author: Ms Debbie TSUI Ka-wing (Project & Education Officer). Acknowledgement to Mr CHONG Yiu-kwong (Chairperson), Mr CHAN Chi-shing (First Deputy Chair), Ms Belinda Winterbourne (Executive committee member) and Mr LAW Yuk-kai (Director) of Hong Kong Human Rights Monitor who commented on the draft of this report.

2 The full name of this agency is the “Liaison Office of the Central People’s Government in the Hong Kong Special Administrative Region”. The Liaison Office is regarded as the political symbol of Chinese Central Authority in Hong Kong. As discussed in the *ANNI Report 2010*, the Chinese Liaison Office interferes in spite of the promise of autonomy in Hong Kong affairs such as in the incidents of the 10-point agreement and the Diaoyu Island in 2009.

3 Political sensitive issues to the Chinese or Hong Kong authorities are mainly those activities or movements criticizing the Central Government or voicing different political opinions from it. Examples include the awarding of Nobel peace prize to Liu Xiaobo, the attempts to replicate the Jasmine revolution in China and the resisting against the suppression of Falun Gong.

questioning the law enforcers particularly the Hong Kong Police as a state security apparatus, and suspects the government is being pressured by the Chinese Central Authority to suppress 'social instability' to quell the emergence of the Jasmine Revolution in China.

As mentioned in *ANNI Report 2010* there were actual or attempts to block a protest ship to defend the Chinese sovereignty over the Diaoyu ("Fishing") Islands by the police and Marine Department under the pretext of the lack of a license, safety gears, and rat inspection for the first time since 1996.⁴ There were also repeated seizures by the police of replicas of the statue of the 'Goddess of democracy', the symbol of 1989 Tiananmen Massacre, displayed in public area as part of memorial events.⁵ In May 2011, the Food and Environmental Hygiene Department and the police stopped the 7th International Day against Homophobia and Transphobia (IDAHO) during the dance session for lack of license for 'public entertainment'.⁶ In these incidents, the law enforcers 'creatively' interpreted the law and abused the procedures to infringe the citizens' freedom of expression and assembly for the State's political interests, which might have been extended from political sensitive protests and assembly to social ones.

Protests and assemblies outside the Chinese Liaison Office in Hong Kong have been particularly affected since 1 October 2008. Despite the civil society's criticisms on the abuses of police power, the suppression of protests is generally getting more serious.⁷ The

4 For more information on the Diaoyu Islands Incident in May 2009, please refer to the session titled the Chinese Central Authority's interference in HK affairs in 'Hong Kong 2009 and the first quarter of 2010' in *ANNI Report 2010*, at 42-44. See also "'Protesters' ship stopped on its way to Diaoyu Islands for second time in two days", *South China Morning Post*, 4 May 2009 and 'Diaoyu protest ship halted for its own safety', *South China Morning Post*, 15 May 2009.

5 The seizure of 'Goddess of democracy' in May and June 2010: Please refer to the section Hard line approach on protestors which threatened the freedom of expression and assembly in 'Hong Kong 2009 and the first quarter of 2010' in *ANNI Report 2010* at 44. See also 'Tiananmen art show in piazza shut down', *South China Morning Post*, 30 May 2010 and 'Statues released and placed in Victoria Park', 2 June 2010.

6 The Places of Public Entertainment Ordinance (Laws of Hong Kong Chapter 172) regulates public entertainment only but the police creatively interpret the law and abuse it to regulate the public assembly. 'You can gather but you can't dance, police tells gay', *South China Morning Post*, 16 May 2011.

7 For instance, while the Chinese Liaison Office always refuses to receive petition letters from protestors, the police even prohibited protestors from affixing petition letter outside the Office or stopped the protestors from throwing petition letters into the Office or even snatched such letters in due course. Despite protestors had been able

Champagne Arrest in October 2010 highlighted the absurdity of the abuses of police powers. While a group of protesters celebrated outside the Chinese Liaison Office the awarding of the Nobel Peace Prize to Liu Xiao-bo, one of the protestors was arrested for common assault as she opened a bottle of champagne and accidentally splashed a security guard.⁸ Another example is the police's suppression of a series of protests supporting the Chinese Jasmine Revolution outside the Chinese Liaison Office, including the snatching the protestors' banners under the excuse of blocking the sight of police even though the police could actually monitor the protest from different angles.⁹ The arbitrary and ridiculous arrests and restrictions on protests clearly show the police acting as a political tool and extension of the state apparatus of the Chinese Central Authorities.

The government has been criticized for tightening the control on protests and public assemblies particularly those involving young activists. During the anti-budget protest on 6 March 2011, protestors blocked the main road in Central. The police then arrested all 113 protestors, including boys aged 12 and 13, for unlawful assembly, and not just the key activists initiating the blockade.¹⁰ It is the largest mass arrest in Hong Kong since the arrest of Korean protestors during the World Trade Organization (WTO) conference in 2005. The change in prosecution policy and practice is regarded as a way to threaten juvenile social activists.¹¹

The civil society criticized the police for using excessive force including suddenly charging at the protestors (who were at a standstill waiting to be carried away peacefully by the police), and police throwing punches on protestors. Police also used pepper spray without warning, accidentally spraying on a 8-year-old boy, and deliberately spraying the eyes of a protestor who was already

to carry and present pulp coffins to the Chinese Liaison Office in order to show their opposition to the Chinese Central authority before in their processions, the police have blocked the passage of any pulp coffins since 1 Oct 2009.

8 'Celebrating Nobel, woman arrested for splashing champagne', CNN, 11 Oct 2010. <http://edition.cnn.com/2010/WORLD/asiapcf/10/11/hong.kong.champagne.arrest/>

9 It happened on 27 Feb 2011.

10 Budget activists vow to maintain protests in city. Budget activities promise protests are not over yet' and 'Mother of boy injured at protest decries security minister's comments', *South China Morning Post*, 8 March 2011.

11 For instance, four protestors were arrested and charged as they were sitting in the road to oppose the constitutional reforms in 25 June 2010. Two of them were juveniles under the age of 20.

in a submissive state being held by a few policemen.¹² In response to the pepper spraying on the boy, the Police chief said 'It's really an Arabian Nights if maintaining law and discipline requires an apology'.¹³ The Security Bureau Chief asserted that the police aimed the pepper spray into the air, despite television footage and newspaper photos clearly showing the police aiming the spray directly at protesters.¹⁴ Police were challenged for violating international norms on the use of force, and the Security Bureau's failure to monitor the police's mishandling of protests and assembly. When it came to the budget debate in April 2011, there was strong police presence even though there were few protests outside Legislative Council (LegCo).¹⁵

To sum up, the police are taking a hard line approach and threaten freedom of expression through political prosecution and abuse of law and procedures: (1) to suppress the politically sensitive protests particularly those outside the Liaison Office of the Central Authority, with the police acting as a political tool of the Mainland Chinese authorities; (2) to suppress the progressive social movement involving lots of youth and echoing the call for a Chinese Jasmine Revolution; (3) the tendency to tighten freedom of expression including even mild protests and assemblies.

B. Entry Ban on Chinese dissidents forgoing HK's autonomy

The Hong Kong Government surrendered Hong Kong's autonomy in immigration control when it denied exiled June 4 dissidents Wang Dan and Wuer Kaixi's entry in January 2011 in an attempt to comply with the Mainland's order or to please the Mainland authorities.¹⁶

Exiled June 4 activists including Wang Dan and Wuer Kaixi, who were on the wanted list of the Chinese Central authorities after the crackdown, applied for entry to attend the funeral of Szeto

12 'Police banners blamed for mayhem at rallies', *South China Morning Post*, 10 March 2011 and 'Youtube clip of anti-budget protest sparks controversy', *South China Morning Post*, 11 March 2011.

13 'Youtube clip of anti-budget protest sparks controversy', *South China Morning Post*, 11 March 2011.

14 'Lawmakers to quiz security chief over life', *South China Morning Post*, 25 March 2011.

15 'Controversial budget approved without any fireworks', *South China Morning Post*, 15 April 2011.

16 'Entry ban makes one country two systems a lie, Wang Dan says', *South China Morning Post*, 27 Jan 2011.

Wah, a democracy icon and Hong Kong political leader who had helped the activists escape from China after the June 4 crackdown.¹⁷ They were denied entry even though both of them promised to keep a low profile if they were allowed to come. Particularly, Wang Dan was refused to enter Hong Kong though he voluntarily promised to restrict his activities, such as not making any public speech, not talking to journalists, and even not staying overnight.¹⁸ Wuer Kaixi was previously granted entry in 2004 to attend the funeral of a Cantonese pop singer who was a strong supporter of the 1989 pro democracy movement.¹⁹

Despite the implied refusal of the application by the Security Bureau Chief in saying ‘mourning does not have to take place in Hong Kong’,²⁰ the entry application was believed given a green light when the director of the Hong Kong and Macao Affairs Office, Wang Guang-ya told the Hong Kong media that ‘it rests with the SAR government to handle HK affairs. I am sure it will satisfactorily handle the matter’.²¹ It was also believed that the high hopes for Wang Dan to visit ‘is legitimate’ a few days before the funeral.²²

Eventually, the Hong Kong Government rejected the dissidents’ entry application. Civil society criticized the Hong Kong Government for forgoing its autonomy in immigration control guaranteed by the Basic Law, the mini-constitution for Hong Kong, and undermining the “One country, Two systems” principle. Civil society also criticized the government for a continuous violations of the rights to freedom of expression, freedom of thought and freedom of movement enshrined by the International Covenant on Civil and Political Rights (ICCPR), which is applicable in Hong Kong according to the Basic Law.

C. Re-igniting the Article 23 debate by potential chief executive candidate

Rita Fan, a potential candidate for Chief Executive in the 2012 elec-

17 ‘Activists beg to attend funeral of “Uncle Wah”’, *South China Morning Post*, 4 Jan 2011.

18 ‘Dissident vows not to stay on after funeral’, *South China Morning Post*, 8 Jan 2011.

19 ‘Szeto funeral door still open for dissidents’, *South China Morning Post*, 5 Jan 2011.

20 ‘Pressure mounts to allow exiles HK entry’, *Hong Kong Standard*, 4 Jan 2011.

21 ‘Wang Dan’s entry for Szeto funeral in HK’s hands, Beijing official says’, *South China Morning Post*, 11 Jan 2011.

22 ‘High hope for Wang Dan visit is legitimate’, *South China Morning Post*, 26 Jan 2011.

tion and a member of the Chinese National People's Congress Standing Committee, reignited the debate on enacting national security legislation as required by Article 23 of the Basic Law. The attempt to enact a package of the law had once triggered more than half a million Hong Kong people to take to the streets on 1 July 2003 to protest the legislation for undermining human rights, and resulting in the shelving and then withdrawal of the legislative proposals. She described the withdrawn legislation as 'not a monster as imagined by many' and as an unavoidable responsibility for the next government to enact Article 23.²³ Rita Fan's speech may serve to test the waters for public acceptance of the Article 23 legislation, and to pressurize other potential candidates to commit the responsibility of legislation.

D. National Education made compulsory for schools

Echoing China President Hu Jintao's comments in 2007 and various calls of different Chinese officials on 'enhancing' the Hong Kong children's understanding of China's development and national identity, Chief Executive Donald Tsang proposed to make 'moral and national education' a compulsory subject for schools in his Policy Address 2010-2011. The consultation on the new curriculum started in early May 2011 and will end at the end of August 2011. The new curriculum will be introduced in primary schools in 2012, and secondary schools in 2013.

Civil society criticized the new curriculum as a form of 'brain-washing' as the curriculum and teaching guidelines lacked the critical approach; avoided universal human rights values whenever mentioning China issues; emphasized only the positive sides of China; provided the students with incomprehensive pictures of China; and boosted nationalism only in an emotional manner. It is an attempt by the government to nurture abjectly obedient nationals, to create an atmosphere discouraging any criticisms on Chinese government, and to curtail freedom of expression in school campuses. Civil society also criticizes the introduction of national education as a rollback, displacing civic education which concerns universal human rights values, and the Hong Kong government for its persistent neglect on human rights education.

23 'Rita Fan reignites Article 23 debate', *South China Morning Post*, 26 May 2011.

E. Action Plan for the Bay Area of the Pearl River Delta

In January 2011, the Hong Kong Government released the controversial consultation document for the action plan for the bay area of the Pearl River Delta, of which the cross border plan was jointly discussed by Hong Kong, Macao and Guangdong governments. The regional plan claimed to improve the quality of life by building advanced public transport network, infrastructure, facilities, and housing, and transforming the countryside and wetlands into tourist attractions. It was also regarded as an attempt at better integrating Hong Kong, Macao and the Mainland after the resumption of sovereignty from the British and Portuguese.²⁴

Civil society criticized the action plan for undermining freedom of information as the consultation was conducted in a low key manner—only lasted for 18 working days—and the consultation document did not include details of the plan but only empty words.²⁵ Civil society also criticized the government for excluding public participation during the stage of formulating concepts, visions and planning, although the future development of Hong Kong including what to develop and how to develop should be discussed and decided by citizens. The public were only marginally involved in the last stage by which time the concepts and substantial planning were almost decided. Civil society also feared that the Hong Kong government would be forced to integrate with Mainland China, and lose its autonomy in determining the way of development in the regional planning. This would undermine the “One country, Two systems” principles, with serious implications on the preservation of human rights and rule of law in Hong Kong and Macau. Concerns on diminishing local cultural identity and local culture were also sparked.

For the time being there is no further information about the regional plan. Civil society will keep an eye on the issue.

24 ‘Public and lawmakers demand details of mystery regional plan’, *South China Morning Post*, 8 Feb 2011.

25 Ibid. See also ‘Delta master plan calls for more transparency’, *South China Morning Post*, 10 Feb 2011.

F. Developments on the efforts establishing NHRI & obstacles

1. Government's unwillingness to set up an NHRI, and to enhance the power of existing human rights protection bodies

Despite various United Nations treaty bodies and the local civil society having repeatedly urged the Hong Kong Government to establish a human rights commission,²⁶ the government reiterated it had no intention of setting up such an institution as the existing human rights protection mechanisms were operating well and setting up such an institution would supersede or duplicate the existing human rights protection mechanisms²⁷ However, it has not provided any substantial studies and researches on the effectiveness or weakness of the current mechanisms

The year 2011 witnesses the 20th anniversary of the Hong Kong Bill of Rights Ordinance (Cap 383) (HKBORO), which incorporated ICCPR provisions into the laws of Hong Kong. LegCo Members seized the opportunity to raise questions on the implementation of HKBORO and to press for the establishment of a human rights commission to promote public education on HKBORO, and to monitor the implementation of the HKBORO and the ICCPR.²⁸ However, the Hong Kong Government has so far maintained its refusal to establish any additional human rights mechanism, including a human rights commission.

The reason the Government rejected the establishment of an NHRI and enhancement the power of human rights protection

26 The Legislative Council has even passed a motion supporting the establishment of human rights commission on 14 July 1993. Please refer to 'Appendix 1: UN recommendations on the setting up of HRI' and 'Appendix 2: Events in the debate on the establishment of a human rights commission and its substitute body', the EOC in the chapter 'Hong Kong mulls its options' in *ANNU Report 2008*, at 50-56.

27 *HK Government's response to LegCo question: Hong Kong Bill of Rights Ordinance*, 18 May 2011. <http://www.info.gov.hk/gia/general/201105/18/P201105180194.htm>. See also in the Hong Kong report for the Universal Periodic Review (UPR) of China, Hong Kong and Macao SAR in February and June 2009.

28 *HK Government's response to LegCo question: Hong Kong Bill of Rights Ordinance*, 18 May 2011. <http://www.info.gov.hk/gia/general/201105/18/P201105180194.htm> ; Annex: list of Statutory Provisions, Policies and Measures Held by the Court to be Inconsistent with the Hong Kong Bill of Rights Ordinance since the Establishment of the Hong Kong Special Administrative Region: http://gia.info.gov.hk/general/201105/18/P201105180194_0194_79011.pdf ; Chong Yiu-kwong, Hong Kong Human Rights Monitor. 'Implementation of International Human Rights Conventions - the Hong Kong Experience', Law, in Asia-Pacific Human Rights Information Center (ed.), *Jurisprudence and Human Rights in Asia*. (HURIGHTS Osaka) 2011.

bodies is probably for ease of governance. It does not want to be monitored by a human rights commission with a wide mandate, which may criticize the Government's policies and measures for human rights violations, and may be regarded as weakening the governing authority.

All these show that the government fails in its obligations under international human rights covenants, and 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.

Examples of government's reluctance to set up effective protection bodies

In the height of public criticism over the failure of Hong Kong authorities to prevent banks and finance companies from selling high risk investment linked products such as 'Lehman Brothers mini-bonds' to small investors especially the inexperienced and elderly, the Government once vowed to study the establishment of an office of Financial Ombudsman to handle complaints by investors against malpractices by the banking and finance sector. The idea of setting up a Financial Ombudsman has been dropped mainly due to strong opposition from banking and finance companies. The Government proposed in early 2010, and decided in late 2010, that seizing a time when public outrages have largely subsided, to set up a Financial Dispute Resolution Centre (FDRC) that would help investors and financial institutions to come to settlements, mediation and then arbitration with deplorably low ceiling on amount of claims. The FDRC is clearly a less proactive body defending the interests of victim investors against banks and finance companies as compared to a Financial Ombudsman with expertise in investments and mandated to protect small investors against malpractices of the banks and finance companies. It is very fair for the press to comment that 'the FDRC might help protect investors' interests, but it is abundantly clear that the policy is on the whole more favorable to financial institutions'.²⁹ The government decision shows clearly that it is more interested in protecting big business than really defending

²⁹ 'Financial dispute mediation', Ming Pao, 12 February 2010. The article cited is an editorial published by the newspaper during the public consultation. But its comments are still valid regarding the Financial Dispute Resolution Centre depicted in the Government's final decision announced in Dec 2010. The article is also available at: <http://edu.sina.com.hk/news/15/4/1/53690/1.html>

small victim investors. This is also indicative of the unholy alliance of the Government and the big business (and the Mainland authorities) which tends to defend interests of each other at the expense of proper protection of various interests and rights. It is not easy to convince or force the Government to establish more effective bodies for the protection of interests of the general public.

The government is also reluctant to enhance the power of the existing human rights protection bodies. For instance, when the sale of clients' personal information to other business by the management company Octopus cards was disclosed, it sparked the public concerns on protection of personal information and lack of power of investigation and prosecution by the office of the privacy commissioner for personal data (PCPD). The Octopus incident has sparked the much needed public interest on the review of the Personal Data (Privacy) Ordinance, Cap 486 (PDPO) initiated by the former PCPD, Roderick Woo, and conducted by the Constitutional and Mainland Affairs Bureau.³⁰ The PCPD proposed to require the data user to obtain the explicit consent of data subject to use the personal data for direct marketing purposes, and set up a Do-not-call ('DNC') register for person-to-person telemarketing calls. Right now the PCPD has limited power to conduct investigations and inspections, and related powers to discharge these investigative functions. The PCPD further proposed to enhance its powers by empowering it to conduct criminal investigation and to be granted powers of prosecution, award compensation to aggrieved data subjects, including the power to impose monetary penalty for serious contravention of Data Protection Principles under the PDPO.

However, in its report on further public discussions on review of the Personal Data (Privacy) Ordinance, the government has rejected most of the powers the PCPD seeking to grant to him and the establishment of DNC register.³¹ Even the call for an opt-in system for the use of personal data for direct marketing has been rejected by the government. The government however has agreed to criminalise unauthorized sales of personal data by the data user and disclosure with a view to gain or cause loss of personal data obtained without the data user's consent.

30 'Legal change after Octopus scandal leaves loophole, says privacy chief', *South China Morning Post*, 19 April 2011.

31 *The Constitutional and Mainland Affairs Bureau. Report on Further Public Discussions on Review of the Personal Data (Privacy) Ordinance*, 17 April 2011. <http://www.legco.gov.hk/yr10-11/english/panels/ca/papers/ca0418cb2-1553-4-e.pdf>

2. Restraints on the partly elected Legislative Council (LegCo)

There is a strict limit for private bills introduced by LegCo Members according to the Basic Law. LegCo Members may introduce private bills only if the bills do not relate to public expenditure, political structure or the operation of the government.³² These restraints drastically limits the type of laws that can be legislated.

For bills relating to government policies, the Chief Executive's written consent is required.³³ Given that the Government has been averse to setting up a human rights commission, even if LegCo Members plan to introduce a private bill on setting up the human rights commission, it may not be approved by the Chief Executive, and may eventually fail to be introduced in LegCo.

Even if a private bill is tabled in LegCo, it requires the majority support of members from both the group on functional constituencies as well as the group on geographical constituencies whose members are returned by geographical elections.³⁴ Given that the functional constituencies elections violate the principle of universal and equal election, and their record of opposition to motions favoring public interests as opposed to industry and government ones, it is very difficult for a private bill on setting up a human rights commission to be passed.

3. Weak cooperation among civil society

Apart from the United Nations' recommendations, the cooperation among non-governmental organizations (NGOs) in Hong Kong for urging the establishment of a human rights commission is also not strong. NGOs focus on a range of different issues, of which advocacy for a human rights commission issue is just one, but not the main issue. The demand for the establishment of a human rights commission in Hong Kong is not unified and focused. Hence, it is important to reconsider the strategy for motivating and networking NGOs with a view to better promote public awareness for a human rights commission for Hong Kong through education and campaigning.

32 Article 74, Basic Law.

33 Article 74, Basic Law.

34 Part 2, Annex 2: Basic Law.

Prologue to Analysis

Although there is no human rights commission in Hong Kong, the human rights protection mechanisms consist of different human rights protection bodies such as the Hong Kong Equal Opportunities Commission (EOC), the Office of the Ombudsman, the Office of the Privacy Commissioner for Personal Data (PCPD), the Independent Police Complaints Council (IPCC) and the Commissioner for Covert Surveillance.

We would like to take the EOC for analysis because the human rights protection bodies share similar shortcomings. The EOC is regarded as a substitute body of human rights commission, and is accredited by the International Coordinating Committee (ICC) with C status due to its non-compliance with the Principles relating to the Status of National Institutions (The Paris Principles).

Brief analyses of other human rights protection bodies may be found in the appendix.

II. Independence of the EOC

A. Relationship with the Executive, Judiciary and Legislature

The EOC is a statutory body set up in 1996 under the Sex Discrimination Ordinance (SDO) in order to implement anti-discrimination legislation. Its implementation is overseen by the Constitutional and Mainland Affairs Bureau (CMAB). It is subject to monitoring by the LegCo and the Audit Commission. Its enabling law expressly states that, '[t]he Commission shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government'.³⁵ However, the EOC Chairperson and members are all appointed by the Chief Executive, who himself appointed by the Central Authority in Mainland China based on a kind of indirect election by an Election Committee whose members are returned by restricted franchise or appointment by certain corporate bodies.

³⁵ Section 63(7), Sex Discrimination Ordinance.

B. Non-transparent Selection Process of Members

No improvement has been made to address the institutional problems of EOC. The composition and selection process of the EOC members does not comply with the principles of independence and pluralism in the Paris Principles. Not only does the Chief Executive appoint the EOC Chairperson and members, he also determines the requirement, remuneration as well as the terms and conditions of the appointments. The whole process is kept under wraps, and is only publicly known when the final appointment is published in the Gazette.³⁶ The selection process has long been criticized for not being open or transparent, and for excluding civil society participation.³⁷

Although non-governmental organizations have proposed for appointment some candidates who are experienced in anti-discrimination work and are independent-minded, the Government has never adopted any of these suggestions and nor has it given the reasons for non-adoption. Instead, members lacking experience in anti-discrimination work were appointed and re-appointed even with low attendance rates in the EOC meetings. The Government has ignored the fact that candidates with experience and commitment on human rights and anti-discrimination work would facilitate the EOC Chairperson to more effectively defend human rights; has made civil society suspect it of deliberately weakening the EOC's mandate as an anti-discrimination watchdog.

C. Resourcing of the EOC

The EOC's operations are publicly funded. The funding of the EOC is proposed by the Chief Executive, and then appropriated by the LegCo. The Secretary for Financial Services and the Treasury may give directions in writing of a general or specific character to the Commission in relation to the amount of money which may be expended by the Commission in any financial year, and which also must be complied with by the Commission. Subject to such constraints and the powers of the Director of Audit to examine its books

³⁶ Section 63(3)(9), Sex Discrimination Ordinance.

³⁷ The appointments were often criticized for some of those appointees did not have track records on human rights and equal opportunities. NGOs fought for involvement and participation in the selection process by nominating candidates for the EOC in 2004 and 2007 but received no responses from the Government.

for proper use of resources, the EOC has the power to direct its own resources. For the constraints on the EOC's strategy due to the control of budget by the Government, please refer to ANNI Report 2009.

III. Effectiveness

A. Protection

1. Limited jurisdiction

The EOC has a narrow mandate as it can only enforce the Sex Discrimination Ordinance (Laws of Hong Kong Chapter 480) (SDO), the Disability Discrimination Ordinance (Cap 487) (DDO), the Family Status Discrimination Ordinance (Cap 527) (FSDO), and the Racial Discrimination Ordinance (Cap 602) (RDO).

2. Inconsistencies among the discrimination laws

As the RDO provides less protection from discrimination than the SDO, DDO and FSDO, this inconsistency causes confusion for the EOC in its enforcement of the 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 excluded a similar provision against racial discrimination from the RDO.

3. Complaints Handling

The EOC can receive complaints on discrimination based on the grounds of sex, disability, family status and race.

The EOC itself does not have adjudication power since according to Article 80 of the Basic Law, only the judiciary has power to adjudicate under the framework of separation of powers.

The EOC handles complaints through mediation. If mediation fails, the matter may be resolved by going to court.

The EOC has been criticized for taking a non-committal approach towards handling complaints.³⁸

³⁸ The civil society criticized the EOC for the slowness in its processing of complaints. For instance, in the case of dress code on female teacher, the complainant filed her

The EOC may grant legal assistance for clients instituting legal proceedings, particularly if the case raises a matter of principle, or it is unreasonable to expect the applicant to deal with the case unaided given the complexity of the case.³⁹

However, the EOC is not that willing to approve legal assistance to the complainants. In 2010, among the 931 complaints received, there were 57 applications for legal assistance, of which 13 applications were granted (22.8%), 32 applications were rejected (56.1%), and 12 applications (21.1%) remained under consideration.⁴⁰ From these numbers, it appears that the EOC is more reluctant to grant legal assistance applications than in 2009.⁴¹

And if an application is rejected, there is no independent body for the complainant to appeal to.

B. Promotion

The EOC has a mandate to conduct research, educational activities and services in order to promote equality of opportunities and principles of anti-discrimination in public education.⁴²

complaint in September 2007 but the school refused to mediate and EOC classified the case as failure to settle in July 2008 and EOC finally agreed to offer legal assistance in July 2009. As late as May 2010, EOC filed the claim at court and the school agreed to settle promptly. It took the complainant nearly 3 years to get compensation and an apology from her former school. The complainant had been required to wear skirt at school. She had been humiliated by the principal for wearing trousers. The EOC has once rejected her complaint. In 2007, she lodged complaint to the EOC on the ground of sex discrimination. The school did not respond to mediation. After a lot of efforts by the victim with assistance of the Hong Kong Human Rights Monitor, the EOC changed its position and granted legal assistance to the complainant in 2009. The school agreed to settle two weeks after the EOC filed a writ in the District Court in May 2010. See 'Payout for teacher forced to wear dress', *South China Morning Post*, 11 Nov 2010 and the press statement of the Association for the Advancement of Feminism dated 10 September 2010.

39 Section 85(2), Sex Discrimination Ordinance.

40 EOC. Statistic on Enquiries, Complaints and Legal Assistance for the period of 1 Jan 2010 to 31 Dec 2010. <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/papers/statisticcontent.aspx?itemid=9243> The latest statistics of the first quarter of 2011 can be found at: <http://www.eoc.org.hk/EOC/GraphicsFolder/InforCenter/Papers/StatisticList.aspx>

41 In 2009, among the 921 complaints, there were sixty-eight applications for legal assistance. Thirty-one of the applications (45.6%) were granted. Thirty applications (44.1%) were rejected and seven of the applications (10.3%) were under consideration. See *ANNI Report 2010*.

42 Section 65, Sex Discrimination Ordinance

The current EOC Chairperson, Mr WK Lam has adopted a relative independent and proactive approach in anti-discrimination work. He seems to have taken a broader interpretation of the mandate of EOC than his predecessor. He has also actively expressed his concern about a broader range of discriminations, including sexual orientation and discrimination against new mainland migrants in relation to the government's HKD 6,000 handout to permanent residents.⁴³

EOC published a formal investigation report and proposed improvement on accessibility of public premises in June 2010.⁴⁴ The Labour and Welfare Bureau set up a working group to follow up the EOC report but only implemented some of the proposals.

In March 2011, the EOC decided to finalise its proposals to be submitted to the government for setting up an equal opportunities tribunal⁴⁵ after consulting the civil society including NGOs, trade unions and legal experts. The EOC had proposed since about 2003 the tribunal in order to deal with the discrimination disputes in a quick, cheap and efficient manner. The proposals have yet to be made formally.

EOC publishes the Code of Practice to explain the anti-discriminations laws, and to provide practical guidance on the compliance with the law and promote equality. Currently there are Codes of Practice on Employment under the SDO, FSDO and RDO. The DDO has a Code of Practice on Employment and Education,

Women's groups have been requesting for a Code of Practice on Education under the SDO, while NGOs have been requesting for a Code of Practice on Education and on provision of goods, facilities or services under RDO. Unfortunately, these requests have yet to be accepted by EOC.

After public consultation in 2010, the revised Code of Practice on Employment under the Disability Discrimination Ordinance by

43 'Police misstepped on lesbian dance', 19 May 2011, 'Hate messages have no place in world-class city', South China Morning Post, 11 March 2011.

44 EOC, 'Formal Investigation Report: Accessibility in Publicly Accessible Premises', June 2010. <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/investigation/list.aspx?itemid=8834&investigationname=4>

45 EOC, 'The EOC Reports on Work Plans and Progress', 17 March 2011. <http://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=9328>

the EOC⁴⁶ was published in the Gazette and tabled in the LegCo in April 2011. However, the revised code has failed to include adequate improvements to embody the principle of equal opportunities. In spite of repeated efforts by NGOs, including the Hong Kong Human Rights Monitor, in identifying various defects and weaknesses in the draft, and in submitting proposals to the EOC and the LegCo for amendments, only limited improvement has taken place on its adoption by LegCo on 1 June 2011.⁴⁷

It is also a year after the RDO began implementation. There were not many racial discrimination complaints made to the EOC due to lack of understanding by the ethnic minority population about the complaint procedures, the RDO and EOC. The limited usefulness of the weak RDO is another reason for its low usage. NGOs have called for LegCo public hearings to enable the EOC to report on its review, and NGOs to comment on its implementation.

Despite the proactive approach adopted by the current EOC Chairperson, Mr Lam, he would only serve for a three-year term which is a shorter term than his predecessor. The civil society worries if the proactive approach can be maintained in the future in the light of the lack of improvements to the institutional problems of the EOC.

Part 4: Potential cooperation/engagement between the NHRI and the NGOs

Although there is still no formal working platform between the EOC and the NGOs, public engagement has improved as the EOC has become relatively more active to meet with NGOs and to participate in anti-discrimination activities.

46 EOC. *Revised code of practice on Employment under the Disability Discrimination Ordinance*. 2011 http://www.legco.gov.hk/yr10-11/english/oth_leg/gn2159-11-e.pdf
The related LegCo Paper can be found at http://www.legco.gov.hk/yr10-11/english/hc/sub_leg/sc58/general/sc58.htm

47 For instance, the Hong Kong Human Rights Monitor alone has made three submissions to the EOC and LegCo since the release in the initial consultation of the first draft of the Code. The latest submission by the Hong Kong Human Rights Monitor is: Further submission from Hong Kong Human Rights Monitor (LegCo Paper No: CB(2)1870/10-11(01)), 23 May 2011 http://www.legco.gov.hk/yr10-11/chinese/hc/sub_leg/sc58/papers/sc580506cb2-1870-1-c.pdf

Annex

Updates on human rights protection bodies other than EOC in 2010 and 2011

(Note: For institutional problems of each body, please refer to ANNI Report 2009)⁴⁸

Privacy Commissioner for Personal Data (PCPD)

1. As mentioned in 4.1 of Part 1, PCPD urged to enhance his power such as to award compensation to aggrieved data subjects. However, in its report on further public discussions on the review of the Personal Data (Privacy) Ordinance in April 2011, the government refused to grant prosecution powers, to enhance investigation powers, and the power to award compensation to aggrieved data subjects.
2. In January 2011, PCPD released the consultation document on the Sharing of Mortgage Data for Credit Assessment. It addresses the proposals made by the government with the support of the financial services industry to share more comprehensive consumer credit data through the use of a central credit database operated by a credit reference agency (CRA). A revised Code of Practice to give effect to the changes above was issued by the PCPD on 1 April 2011. The PCPD has apparently yielded to Government demands by accepting the expansion of the sharing of mortgage data for credit assessment in spite of the opposition by his predecessor, academics and other civil society organizations. He however did not support government and industry proposals for sharing pre-existing mortgage data for positive mortgage data unless prescribed consent is obtained from the consumers. He therefore restricted the sharing of new positive mortgage data to mortgage loan applications and review of existing mortgage

⁴⁸ See the section titled Other Human Rights Protection Mechanism in Hong Kong in : 'An eye on Hong Kong: examining new developments' in ANNI Report 2009, at 41-46. http://www.forum-asia.org/news/in_the_news/pdfs/2009/2009%20ANNI%20Report.pdf

loans only. It is worrying that the expansion of mortgage data sharing may pave the way for further transgressions on privacy rights.

3. Following his predecessor, the current privacy commissioner has also complained that the PCPD has neither sufficient resources, nor the power.⁴⁹
4. The Monitor is expressly concerned about the repeated hiring of public relations firms or university attached bodies in consultancy services. These tasks should normally be taken up by the Office of the PCPD. Such summoning of paid external assistance may not be a proper use of existing human resources and public funds. It is important to clarify if such reliance on outside services was due to the actual overload of existing staff, or just the lack of willingness or expertise to take up the relevant workload by better deployment of its existing human resources.

The Office of the Ombudsman

The Ombudsman criticized the government's malpractice in allowing illegal construction of small houses in the New Territories. This criticism drew the anger of New Territories indigenous inhabitants who called for 'rationalization' of the illegal structures in the area instead. Subsequently, media reported that the Chief Executive and top government officials as well as lawmakers have illegal structures at their apartments. The scandal triggered by the Ombudsman's report has yet to fully unfold.⁵⁰

The Independent Police Complaints Council (IPCC)

Before finalizing its manual on policing of public meetings and processions, the police were only willing to present to the IPCC an overview of the public order manual during a public meeting in 2010. Police reiterated that the manual would be restricted in circulation only to police officers.⁵¹ It showed Police would like to keep the IPCC and the public in the dark. Doing so would make it

49 "Octopus 'serves a lesson'", *South China Morning Post*, 5 August 2010.

50 'More pressure over illegal NT Structures', *South China Morning Post*, 20 April 2011.

51 'New police manual on protest tactics out soon', *South China Morning Post*, 10 Dec 2010.

difficult if not impossible for the IPCC to discharge its functions. In addition to denying public access to the document, the public have also not been consulted during the process of its completion.

The Commissioner on Interception of Communications and Surveillance

Justice Woo Kwok Hing, the Commissioner on Interception of Communications and Surveillance, released his fourth annual report⁵² in November 2010. For the first time, the report disclosed cases of intercepted calls to journalists. The report pointed out that the Code of Practice did not have any provisions requiring legal professionals and law enforcement agencies to report to the commissioner cases where journalistic information may have been obtained through interception or covert surveillance. The issue was first flagged in the 2008 report so that it could be looked into when reviewing the Ordinance or the Code. He proposed to set up a new audit trial system to enable his office to know which part(s) of a call the listener had listened to. He also called for serious consideration and resolution by the Legislature in its review of the provisions of the Ordinance to address the power of Commissioner to listen to, or intercept suspected journalistic materials, similar to those subject to legal professional privilege.⁵³

The Government promised to submit amendment proposals to LegCo in the first half of 2012, and submit the bill for first reading before 1 July 2012, a year behind its original schedule.

52 *Commissioner on Interception of Communications and Surveillance Annual Report 2009*. Available at: http://www.info.gov.hk/info/sciocs/eng/pdf/Annual_Report_2009.pdf

53 'Law enforcers listened to journalists' calls', 23 Nov 2010, 'Spot checks sought on audio recordings', *South China Morning Post*, 30 Nov 2010.

India: NHRC In Search of a New Direction¹

All India Network of Individuals and NGOs working with National and State Human Rights Institutions (AiNNI)²

I. Key Issues on the NHRC of India

During the period covered by this report (2010)–2011, the key issues that the National Human Rights Commission (NHRC) of India had to face from a civil society point of view were [i] the 2010 ANNI Report³ and [ii] the preparations for submitting its own application for re-accreditation to the Sub-Committee on Accreditation (SCA) of the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights (ICC-NHRI).

It is important to recall that soon after the *ANNI Report 2010* was released in Bali on 2 August 2010, the NHRC released for the first time a response to the report, which we gratefully welcome. The NHRC's response was made available later in the same month by its Secretary General, Mr K. S. Money, to AiNNI and the Working Group on Human Rights in India and the UN (WGHR)⁴, a day

1 Context: This report is not a full report on the National Human Rights Commission of India (NHRC), nor meant to be an overview, but a report that addresses a select few concerns according to the guidelines provided by the editorial team of ANNI for the 2011 Report.

2 Prepared by Mr Henri Tiphagne, the Honorary National Working Secretary of AiNNI along with editing input from the National Conveners of AiNNI, Ms Maja Daruwala, and Mr Y. S. R. Murthy, with assistance from Ms Sabitha, AiNNI National Coordinator and Ms Megan Mathews from Wayne State University Law School who interned with People's Watch at the time of writing of this report.

3 <http://peopleswatch.org/AiNNI/>

4 The Working Group on Human Rights in India and the UN (WGHR) was established in January 2009 by a group of civil society organizations and independent experts working in the field of human rights in India. The basis of WGHR's work is national and international human rights law. WGHR works towards the realisation of all civil, cultural,

prior to the release of the Indian ANNI Report 2010 and its Hindi translation in Delhi. The AiNNI and WGHR were appreciative of the participation of the former Secretary General of NHRC on the India launching of the ANNI Report. It must be mentioned that the former Secretary General of NHRC functioned until the last day of his tenure in February 2011 as perhaps the only senior functionary willing to accept and work on the host of issues that the larger Indian civil society was attempting to raise regarding the functioning of the NHRC. It is apparent that his views were not shared by the Chairperson and members of the NHRC, who continued to view every criticism of the Commission with disdain and regarded AiNNI, as “enemy camp”.

In January 2011, coinciding with the conclusion of the visit of the United Nations Special Rapporteur (UN SR) on the situation of the human rights defenders (HRDs), Ms Margaret Sekaggya, AiNNI submitted its report on the functioning of the NHRC to the ICC-NHRI. The report, which was a response to the ICC-NHRI’s call for the same from civil society, was endorsed by over 350 individuals and organizations across the country. In her press release at the end of the mission⁵, Ms Sekaggya noted that despite their strong founding mandate in the *Protection of Human Rights Act* (PHRA), the state and national human rights must do much more to ensure the safety and legitimacy of India’s HRDs, many of whom distrust the functioning of the bodies established to protect them.⁶ Ms Sekaggya made several specific recommendations for strengthening the NHRC, which are discussed later in this report.

The AiNNI Report was formally released in Delhi on 6 April 2011 by the former Chairperson of the NHRC, Justice J.S. Verma, and was followed by state-level releases in at least 10 state capitals across the country. In response, the NHRC stated “The NHRC is pained to notice that a group of NGOs, under the banner of AiNNI, who, due to some vested interests, perhaps, have lowered the prestige of the country in the eyes of the world community by asking the ICC-NHRI to downgrade a national institution like NHRC which has “A” accreditation status for its credibility as a human rights organization. This despite the fact that NHRC-India is the

economic, political and social human rights in the country and towards holding the Indian government accountable to its national and international human rights obligations.

5 UN Press Release from Margaret Sekaggya’s Fact-Finding Mission, complete report available at: <http://www.ohchr.org/EN/NewsEvents/Pages/NewsSearch.aspx>

6 <http://peopleswatch.org/AiNNI/>

most empowered autonomous and independent statutory NHRI in the world and also recognized so.”⁷

Following the 24th General Meeting of the ICC-NHRI in Geneva on 23-27 May 2011, the ICC-SCA took up for consideration NHRC’s application for re-accreditation. The recommendations of the ICC-SCA were forwarded confidentially to the NHRC in order to give the Commission an opportunity to respond. It is still not clear whether these recommendations have been formally challenged by the NHRC India. On 10 June 2011, less than two days after the receipt of the recommendations, the NHRC issued a press release stating that “the ICC-NHRI had recommended that the NHRC of India to be reaccredited with ‘A’ status.”⁸ However, this statement is only partially true. The NHRC conveniently ignored the fact that its reaccreditation is conditional. Thus, there was an attempt to misrepresent facts and mislead public opinion. But the Legal Editor of a leading national daily attributed the whole result to India’s diplomatic clout, exposing the unpleasant facts which NHRC tried to hide in its press release. The SCA expressed a number of concerns, which are discussed later in this report, regarding the current functioning of the Commission, and will review the NHRC’s accreditation again in 2013 and 2016⁹.

Further, the NHRC responded to the AiNNI report, stating that it “is replete with any unsubstantial personal allegations, unfactual repetitions and wild suggestions.” Most disturbingly, it refers to the group “as a motley collection of NGOs with little experience of working at the grassroots level, thus, bringing into question the group’s credibility and competence to make unfounded allegations against NHRC....” It is pertinent to note that the following individuals do not fit into the above description by any stretch of imagination:

- Mr Henri Tiphagne, Honorary National Working Secretary of AiNNI, is serving his second consecutive term on the National Core Group of NGOs of the NHRC.

7 For the complete NHRC press release dated 26 April, 2011, see: <http://www.nhrc.nic.in/disparhive.asp?fno=2253>

8 For the complete 10 June 2011 NHRC press release see: <http://www.nhrc.nic.in/disparhive.asp?fno=2318>

9 Letter from MrVladlenStefanov, Chief, NIRMS, OHCHR to Justice K.G. Balakrishnan, Chair, NHRC on8 June 2011 with the ICC/SCA recommendations of May 2011as attachment.

- Ms Maja Daruwala, [Executive Director of the Commonwealth Human Rights Institute and Member of the National Core Group of NGOs of the NHRC],
- Mr Yambem Laba, [Former Member of the Manipur State Human Rights Commission],
- Dr S.D.J.M. Prasad, [representing the National Campaign on Dalit Human Rights]
- Mr Ashok Mathews (Executive Director of SICHREM, Bangalore]

Most importantly, the AiNNI report was endorsed by the following persons:

- Mr R.V. Pillai, Former Secretary General of the NHRC, India who served in that capacity for 5 years,
- Mr Ashok Chakravarthy, former Senior Superintendent of Police, Investigation Division, NHRC with nearly 10 years of service; and
- Mr Y.S.R. Murthy, [Former Director, Research of the NHRC and worked in the NHRC in different capacities for over 12 years and is presently working as Associate Professor and Executive Director, Centre for Human Rights Studies at the Jindal Global Law School, Delhi and a national convenor of AiNNI].

This resort to name-calling speaks volumes about the capacity of the NHRC rather than addressing the issues, and recognizing the competence and grassroots experience of AiNNI and its functionaries.

II. Independence

The January 2011 *AiNNI NGO Report on the Compliance with the Paris Principles by the NHRC of India*¹⁰ addressed the issue of NHRC's independence in detail. The report¹¹ concluded that the NHRC's in-

¹⁰ Response to the AiNNI report is available on the NHRC's website, http://www.nhrc.nic.in/Documents/NHRC_Comments_on_AiNNI_Report.pdf. The comments regarding NHRC independence begin on page 8 of the report.

¹¹ Please see the AiNNI report for further information: http://peopleswatch.org/dm-documents/HRD/NGO%20Report_Paris%20Principles_NHRC_India.pdf

dependence is compromised by the tight control the Government maintains over many aspects of the Commission's operations. Further, in addition to presenting an impediment to independence, the procedures regarding selection and appointment of its NHRC members present a significant obstacle to achieving plurality and diversity within the commission.

“Unavoidable” Encounter Killings

There continue to be a high number of extrajudicial killings in India, often euphemistically referred to as “encounter killings”. Extrajudicial killings are unlawful murders committed by law enforcement officials or other persons acting in direct or indirect compliance with the State. Because encounter killings are such a frequent occurrence in India, the NHRC developed excellent guidelines for dealing with such cases in 1996 and 2003,¹ which include reporting requirements. However, it has been the experience of many human rights groups that these guidelines have been largely ignored by almost all state governments, and not enforced by the NHRC itself.

On 21 May 2010, the NHRC reported that between 1993 and 2010, 2,956 cases of encounter killings were registered with the NHRC.² Of these cases, 1,590 were complaints from public authorities on encounters involving police. The remaining 1,366 cases were complaints from the public alleging fake encounters with police. Over the

course of the 17 years in which these complaints were received, the NHRC only completed investigations of 62% of the killings, leaving 1,110 encounter deaths unexamined. Of those cases investigated, 1,846 in total, only 27 were found to be intentional murders staged during a fake encounter with police; the rest of the deaths were from genuine police encounters.³

Recently, the NHRC has taken action in several cases involving encounter killings:

➤ In July of 2010, the NHRC recommended that the state government of Uttar Pradesh pay 500,000 Indian rupees (INR) to the family of 12 year old Durgesh, son of Om Shankar Sharma, resident of Data Ganj, who was killed as a result of what the Commission referred to as “police excesses.”⁴

➤ In August 2010, it was again recommended that Uttar Pradesh compensate the family of a victim of torture and encounter killing by law enforcement officers.⁵

1 Revised Guidelines Dealing in Encounter Deaths, NHRC, 1993 and 2003: nhrc.nic.in/.../RevisedGuidelines-DealingInEncounterDeaths.pdf

2 Information received in response to RTI petition regarding the development of jurisprudence in NHRC from 12.10.1993 through 31.8.2009 – 16(1)/PIO/2005(RTI)/2641.

3 Information received in response to RTI petition regarding the development of jurisprudence in NHRC from 12.10.1993 through 31.8.2009 – 16(1)/PIO/2005(RTI)/2641.

4 <http://nhrc.nic.in/disparchive.asp?fno=2070>

5 <http://nhrc.nic.in/disparchive>

III. Effectiveness

Since the release of the AiNNI report 2011 and the visit of the UN SR on HRDs, the NHRC has made some improvements to its system of handling complaints. NHRC is now promptly acknowledging complaints submitted to them, and complainants are receiving more timely responses to their submissions. Further, the mechanisms for addressing the complaints made by HRDs have also greatly improved. There is now a HRD focal point who is accessible at all times [including late at night], and the status of the HRD complaints is now posted in a specially designated area of the NHRC's website. However, despite these limited gains, the NHRC struggles due to the lack of adequate personnel to handle

➤ In January of 2011, despite the claims of the Jammu and Kashmir government that the NHRC does not have jurisdiction over police atrocities, the government paid the NHRC-recommended 500,000 INR to deceased rickshaw puller Mohan Lal.⁶

➤ In March 2011, the Commission took suo moto cognizance of a media report alleging that two criminals were killed in an encounter with police in Fairabad.⁷

Despite these recent actions on encounter killings, it is clear that the NHRC is not able to adequately investigate all of the complaints of encounter killings that it currently receives, which are only a small fraction of the rapidly increasing total complaints. And yet the number of NHRC members continues to be just five. In order to mitigate their workload, the NHRC could enlist the state human rights commissions to monitor and carry out the 2003 guidelines on these pending cases. In addition, the NHRC could

seriously take the police directors general of all states to task to comply its 2003 guidelines, to deter state police forces from carrying out encounter killings. The NHRC's National Core Group on NGOs recommended this particular course of action in 2010 but is yet to be followed.

On the other hand, public comments made in July 2010 by the NHRC Chairperson regarding extrajudicial killings have been most distressing.⁸ He defended the state's use of extrajudicial killings as "unavoidable sometimes" as he permitted police officers to "take control of the situation" arising from increased "law and order problems". This statement, which indicates that India's national guardian of human rights accepts and approves of the killing of criminals without due process of law, demonstrates that there are serious problems regarding the NHRC's treatment of encounter killings.

asp?fno=2103

6 <http://nhrc.nic.in/disparchive>.

asp?fno=2177

7 <http://nhrc.nic.in/disparchive>.

asp?fno=2247

8 A Statement by the Asian Legal Resource Centre, <http://www.humanrights.asia/news/alrc-news/ALRC-STM0042010?country=ebd823451ff9d4304a4510728b30450a&campaign=406554ce74c74252f6faee16a6823c61&issue=&document=>

all the complaints it receives. Nor are they trained in human rights and evaluating complaints against constitutional and international normative standards.

On 5 July 2011, the Supreme Court ordered the State of Chhattisgarh to cease and desist from using Special Police Officers¹² [SPOs]. It categorically prohibited the use of SPOs in any manner including in any activities directly or indirectly aimed at controlling, mitigating, or otherwise eliminating Maoist or Naxalite activities. The state was ordered to immediately recall all firearms issued to these officers, and to take proactive measures to prevent the operation of any group that takes law into their own hands. Prior to the judgement, the Apex Court had asked the NHRC to undertake a fact finding on the Salwa Judum phenomenon and report to it. This offered the NHRC an opportunity to publicly present its own human rights jurisprudence on an issue of seminal importance, and indicate a stronger direction in protection of human rights that is 'victim' rather than state-centred.

The SC and the NHRC have taken divergent views regarding the use to which the SPOs are being put by the state. While the SC sees the use of SPOs as counter insurgency agents and illegitimate, the NHRC has viewed them as ancillary, protective and benign. For example, in its report the NHRC says that the *Salwa Judum* militia existed but has been replaced by the SPOs. Yet at the same time it accepts that the distinction is hard to perceive. This essentially means that the difference between the SPOs and the *Salwa Judum* cadres is an illusory convenience that the State had created in its efforts to use a counter insurgency whereas the SC deplored the violations of human rights. Further, the NHRC report plays down the atrocities by the SPOs and has no mention of the State's responsibility to control the organization. (For a side-by-side comparison of the points of view of the NHRC and the Supreme Court please see to Annex 1)

ICC-SCA Report on Recommendations to the NHRC

As mentioned earlier, the ICC-SCA recently conditionally reaccredited "A" Grade status to the NHRC. The SCA expressed the

12 Petition 250 of 2007, 5 July 2011, Supreme Court of India

following concerns about the NHRC's current functioning and made numerous recommendations to the NHRC: ¹³

- ***Diversity and Pluralism:*** First, with regard to the composition and pluralism of the NHRC, the SCA reported that the PHRA requirement that the NHRC Chairperson be a former Chief Justice of the SC is an impediment to achieving diversity within the NHRC, as the requirement limits the top NHRC leadership position to a very small and homogenous pool of potential candidates. Further, while the deemed members, comprised of representatives from the National Commission for Women [NCW], the National Commission for Scheduled Castes [NCSC], the National Commission for Scheduled Tribes [NCST] and the National Commission for Minorities [NCM], bring diversity to the NHRC, the SCA noted that the deemed members are not substantively involved in NHRC activities.¹⁴
- ***Independence:*** The SCA voicing its objection to the NHRC's practice, included in the PHRA, of requiring that both the Secretary General and the Director General of Investigation be seconded from the Government of India, says "...the NHRCI advocate to amend the PHRA 2006 to remove the requirement that the Secretary General and Director of Investigations be seconded from the Government, and to provide for an open merit based selection process."¹⁵
- ***Effectiveness:*** Regarding the NHRC's handling of complaints, the SCA was unable to definitively determine the veracity of the criticisms raised by AiNNI and others about the NHRC's slow response time. However, the SCA did note that the NHRC is clearly perceived to handle complaints poorly, and this is something that the Commission should address.¹⁶ Nevertheless, AiNNI notes that the NHRC has improved on the time it takes to respond on complaints received by it.
- Lastly, the SCA indicated that the NHRC should release its Annual Reports in a timely manner. The reports should then be discussed with the Government no more than six months

13 ICC SCA Response and Recommendations to the NHRC

14 ICC SCA Response and Recommendations to the NHRC, pages 1-2

15 ICC SCA Response and Recommendations to the NHRC, page 4

16 ICC SCA Response and Recommendations to the NHRC, page 5

after release. Reporting and sharing subsequent recommendations is one of the essential functions as of the Commission, and thus must be made a priority.¹⁷

While the NHRC did retain its “A” Grade status, the SCA has put them on warning. The SCA recommendations categorically stated that the SCA will consider the issues of composition and pluralism, the appointment of the Secretary General and Director General of Investigation, and the relationship of NHRC with civil society at the first session of the ICC-SCA in 2013. The SCA further recommended that the issue of complaint handling function and the annual report will be taken up during NHRC’s 2016 accreditation review.

IV. Thematic Focus

A. Specific activities on the promotion and protection of HRDs and WHRDs:

In 1998, the UN General Assembly adopted the Declaration on human right defenders (HRDs), marking the 50th Anniversary of the Universal Declaration of Human Rights¹⁸. The purpose of the Declaration is to officially recognize and protect individuals and groups that defend fundamental human rights. Because of the controversial nature of their work, HRDs and their families are often at risk of violence and crippling social stigma. The NHRC is a state-funded institutional defender of HRDs. As the national body responsible for protecting and promoting human rights, the NHRC must make the security of HRDs a priority. While the NHRC has made some recent progress on the issue of the HRDs, there is much more the NHRC must do in order to ensure the security of the HRDs. Civil society organisations (CSOs) including those that are members of the NHRC’s National Core Group of NGOs have, from its inception, been calling for the NHRC to prioritize specific measures that signal its commitment to the protection of all those who protect human rights. These include forming a task force to look at, keep under review and report on situation of HRDs, and to respond to any threats to them with rapidity.

¹⁷ ICC SCA Response and Recommendations to the NHRC, page 7

¹⁸ Declaration on Human Rights Defenders, available at: <http://www2.ohchr.org/english/issues/defenders/declaration.htm>

While the request for a task force still stands, the NHRC has taken the matter partially on board by appointing in May 2009 a 'focal point' to deal with any issues related to HRDs. The focal point is accessible to HRDs at any time by telephone, fax, and email. As a result, HRD complaints are addressed sooner. In addition, the NHRC has also dedicated a section of their website exclusively to HRDs. This space is used to post information about the status of complaints submitted to the NHRC by the HRDs.

While these steps at the NHRC are a welcome development it is clear from the statements of the UN SR on HRDs that much remains to be done. In her comments to the media at the completion of her official mission to India in January 2011, Margaret Sekaggya commended the Government of India for their openness in allowing the mission, but expressed many concerns regarding the condition of the HRDs. The visit revealed that the state and NHRIs are not meeting the needs of the HRDs. "All of the defenders I met with expressed disappointment and mistrust in the current functioning of these institutions," Sekaggya said. In her view, the national and state HRCs should do much more to ensure a safe and conducive environment for HRDs throughout the country and should to strengthen the function of the NHRC. Of primary concern were the reports of violence, threats, and intimidation perpetrated against HRDs and their families. "Throughout my mission, I heard numerous testimonies of both male and female HRDs, and their families, threatened, arbitrarily arrested and detained, falsely charged, under surveillance, forcibly displaced, or their offices raided and files stolen, because of their legitimate work upholding human rights and fundamental freedoms,"¹⁹ she commented. Further, she highlighted the fact that some HRDs are more vulnerable to attack than others, particularly women and those protecting the rights of socially controversial groups. "I am particularly concerned at the plight of HRDs working for the rights of marginalized people, i.e. Dalits, Adavasis (tribals), religious minorities and sexual minorities, who face particular risks and ostracism because of their activities²⁰." As Ms Sekaggya identified, certain HRDs are at greater risk, a fact that the NHRC has not publicly recognized. During the last year, for example, at least ten RTI activists were killed, and the NHRC has remained silent in response to these atrocities. In order to adequately protect these HRDs, the NHRC must display a

19 UN Press Release from Margaret Sekaggya's Fact-Finding Mission

20 UN Press Release from Margaret Sekaggya's Fact-Finding Mission

greater sensitivity toward the dangers they face.

It is clear that present arrangements in relation to HRDs are insufficient. The present report recommends that the NHRC to:

- Appoint and adequately provision its own Special Rapporteur to intervene and assist HRDs; keep their situation under review; periodically report on them state wise, and be mandated to create awareness of the special status of HRDs amongst other state human rights commissions encourage them to create similar mandates at state level.
- Take local and immediate action on behalf of HRDs. It is not enough to announce policy or issue orders from Delhi. NHRC members must instead visit HRDs where they work, in the field, and when necessary, in prison and in court. This type of action signifies solidarity with HRDs, and it also demonstrates the NHRC's independence of action from the State.

In the Veeravanallur Case,²¹ five HRDs in Tirunelveli District in Tamil Nadu, including three women, were wrongfully arrested while participating in a training hosted by the Dalit Foundation. ²² NHRC field representatives performed a thorough grassroots investigation within 15 days, and submitted their report to the NHRC headquarters within a month of the incident. However, the NHRC took nine months to issue its order. In the meantime, People's Watch was forced to spend an enormous amount of money fighting for the release of the HRDs in court.²³ HRDs should not

The case of Ms Irom Chanu Sharmila is representative of the lack of NHRC action in regard to HRDs. Ms Irom is a WHRD from Manipur She has been held in judicial custody during her 10-year fast protesting the Armed Forces Special Powers Act. She has publicly lamented the fact that the NHRC has never visited her while she was in custody. ¹

¹ <http://www.manipur.org/news/2011/04/23/rights-activist-de-means-nhrc/>

²¹ File Number 901/22/37/2010. Please see the Annex 2 for more information about the petitions filed in this case.

²² As part of the training program, the trainees approached the Veeravanallur police station to request information about a case of alleged torture of a Dalit. They were arrested after making this request.

²³ People's Watch filed a total of 15 petitions, seven before the district magistrate and eight before the Madurai Bench of the Madras High Court. The details of the petitions are attached to this report.

be forced to spend their own money doing the work of the NHRC. The NHRC has the capacity to act quickly on the ground, but this effectiveness is blunted by the higher levels of the institution.

The NHRC has been reluctant to intervene through court in matters where it could act as *amicus curia* or as an advocate of human rights or even as trial observer where there are valid concerns of possible miscarriage of justice or victimization. Trial observations concerning HRDs are another crucial area of NHRC involvement. Section 12(b) of the NHRC's founding legislation, the PHRA, gives the institution the ability to "intervene in any allegation or violation of human rights pending before a court with the approval of such court²⁴."

In 2010, the Binayak Sen²⁵ trial which became an international *cause celebre* offered a particularly important moment for the NHRC to put its mandate to good use. However in the face of widespread public concern and despite several requests for the NHRC to observe the trial, it was left to delegates of the European Union to do so.

A creative interpretation of Section 12 (b) of the PHRA would provide the NHRC the opportunity to take action in circumstances where an HRD is at risk for injustice. The mere presence of the NHRC can ensure more fair court proceedings. There are hundreds of opportunities throughout the country for the NHRC to support HRDs facing trial, and the Binayak Sen trial provided a disappointing example of the NHRC's lack of oversight. The majority of the country disagreed with the verdict. The EU's Delegation in India sent its representatives to monitor the trial at all stages, first in Raipur, then in Bilaspur, and finally, in the SC in Delhi. However, the NHRC did not observe even a single day of the trial or later court hearings. If the EU Delegation in India could undertake the job of a trial observer, then why couldn't the NHRC do the same? Not only does this omission raise questions as to the NHRC's respect for the HRDs of India, it also calls into question their independence from the government.

HRDs do the difficult groundwork necessary to promote and

²⁴ *Protection of Human Rights Act*, Section 12(b)

²⁵ Binayak Sen is a renowned doctor and human rights defender. He was accused of, and later sentenced to, sedition for allegedly supporting the Maoist Naxalite insurgency movement.

protect human rights in India. This means that the NHRC must provide timely and effective support and protection where the HRDs work. The NHRC has the ability to do this effectively, as they demonstrated in the Veeravanallur Case.

The NHRC must not only act as a defender of human rights, but it is also the NHRC's responsibility to provide legal protection, security, and legitimacy for these important individuals and organizations working at the grassroots level. The work of the HRDs is essential to the fulfillment of the NHRC's mandate, and the NHRC must therefore recognize the HRDs as valuable and equal partners and treat them accordingly. The NHRC's work with the HRDs must go beyond symbolic engagement. While it is difficult for the members as former judges of the Supreme Court, or former police officials or former diplomats to descend to the grassroots, this is a challenge that the NHRC must address.

Recommendations: In addition to the fact that this country now possesses over 170 human rights institutions at the State level, it is pertinent to note that the NHRC has the moral duty as the lone member of the ICC-NHRI from India to encourage the other national and state human rights institutions in India to also establish special procedures for protection of HRDs and WHRDs. Deemed members of the NHRC from other thematic NHRIs working with women, minorities, Scheduled Castes and Scheduled Tribes should also be encouraged to establish special task forces to focus on specialized HRDs working under their respective themes.

B. Interaction with international human rights mechanisms

The ICC-SCA holds that NHRI engagement with international institutions is absolutely essential to effective functioning of the commissions. The SCA evaluates the interaction of NHRIs with international human rights mechanisms by evaluating the extent to which the NHRI: 1) cooperates with special mandate holders; 2) interacts with the UN Human Rights Council (HRC) through the submission of written statements, etc.; 3) participates in the Universal Periodic Review (UPR) and implements its recommendations; 4) engages with the UN human rights treaty bodies and ensures the implementation of their recommendations; 5) actively engages with the ICC-NHRI and its SCA and ensures the implementation of their recommenda-

tions²⁶. There is currently tremendous scope for NHRC's improvement in all of the areas enumerated by the SCA.

Effectiveness: NHRC's international standing is nothing like it once was. India continues to participate in the UN HRC, but since its inception such participation has always been limited to the chairperson, members, or senior bureaucrats of the commission. The 'deemed members' of the full Commission, which include the chairpersons from the NCW, the NCSC, the NCST, and the NCM, have never participated in any international meetings as representatives of the NHRC, even though they are touted as part of the Commission when its pluralism is questioned. In addition to being excluded from formal proceedings, the deemed members are never selected to participate in international training programs. As recently reminded to the NHRC by the ICC-SCA in its 2011 recommendations, international involvement is not to be reserved only for the appointed members as the 'deemed members' can also benefit from this enrichment.

The NHRC's mandate requires it to urge and remind the government to accept requests for country visits from UN human rights Special Procedures. The Indian Government has repeatedly ignored such requests, particularly when they involve more difficult issues such as extra-judicial killings and torture.²⁷ However, the NHRC has never publicly demanded that the government address requests for such visits through its annual reports or newsletters or web site. It is important not only that the NHRC encourages governmental action, but that the NHRC does so publicly. Secret official communications do nothing to build the people's opinion of the NHRC.

Further, every UN Special Rapporteur submits an annual thematic report in their area of focus, which includes contributions from NHRIs. However the Indian NHRC has not offered any single addition so far. The vast human rights experience in this country from extensive civil society work could have been collected and submitted to the SRs by NHRC's research division. Contributing to these SR annual reports is an opportunity to direct the international conversation on topics with particular relevance to India. This would not only enrich international understanding, but

26 SCA General Observations 1.4

27 UN Website Record of Visit Requests: idsn.org/fileadmin/user_folder/pdf/New_files/UN/.../SP_countryvisits.pdf

would also bring much needed international attention to India's most important issues. In addition, such contribution is an important demonstration of the NHRC's independence.

Universal Periodic Review (UPR): The 2012 round of the UPR is approaching, and this is an excellent opportunity for the NHRC to step up and set the agenda for the government. NHRC should make early recommendations for the UPR based on the assessment of their SRs and experts from civil society.

Civil Society: AiNNI has received information that the NHRC has commenced regional consultations on the UPR with civil society in Chandigarh (for the north zone) and Jaipur (for the West Zone), and plans to conduct similar activities in other regions. Such consultations must be welcomed, and be truly open and genuinely include critical voices of society and represent the different thematic concerns in the field of human rights, involving all HRDs.

Treaty Obligations: The NHRC is mandated to function as a government watchdog, and should therefore openly remind the government to fulfill its international treaty obligations. The government is required to submit its periodic reports to the UN treaty bodies describing the human rights situation in the country, but they have not done so consistently. In order to fulfill its mandate, the NHRC should be constantly monitoring the government's actions, and should have submitted shadow reports to the TBs, when necessary to expose governmental shortcomings. Monitoring and shadow reporting are essential parts of the NHRC's mandate to promoting and protecting human rights, and will also definitively demonstrate that the NHRC is independent from the government. Thus far, the NHRC has repeatedly allowed this opportunity to pass.

In the past, India's NHRC was a leader in the international human rights community, and it took bold and independent action to protect and promote human rights. The NHRC played an important part in the ICC-NHRI, having served as its Chair in the initial years and also as a member of the Committee in 2002, 2006, and 2007. The commission continues to be part of the ICC Bureau, comprised of 16 voting members to, among others, assess applications for membership of the ICC. India was also a founding member of the Asia Pacific Forum of National Human Rights Institutions (APF), a coordinating body established in 1996. A particular

high point of NHRC's international action came in 2001 when the NHRC contradicted the Government of India at the World Conference Against Racism on the inclusion of caste discrimination. These momentous human rights achievements clearly indicate that the NHRC has incredible capacity to not only protect and promote human rights in India, but also internationally.

It is also equally pertinent that the NHRC provides public feedback on government's implementation pledges made in campaigning for membership at the UN Human Rights Council. So far, there is no public document that this has been carried out by the NHRC, including in May 2011, when the Government of India placed its pledges again before its election to the HRC.

Lastly, in order to make these much needed changes, the NHRC must also look closely at its members. The leadership of the NHRC is a significant feature in its ability to respond to violations as well as to complaints, how it is perceived in the public and its overall status and credibility. Allegations of colourable conduct at the leadership level significantly erode public confidence and consequently also erode the body's effectiveness. Unfortunately the reputation of the NHRC has been damaged by the controversies that have arisen in relation to the choice of chairperson, which is made all the more unsettling because of the call for the Chairperson's resignation from both citizens and prominent jurists, including former Supreme Court Justice V.R. Krishna Iyer.²⁸ The refusal to appoint women commissioners and to choose commissioners solely from former high government officials has created deep skepticism about the Commission. Questionable appointments include persons who headed police departments and other government offices that have little demonstrable track record for being champions of human rights. In the absence of any known track record in the defence of human rights, it is not surprising to find ambivalent NHRC stances on several issues including as demonstrated in the *Salwa Judum*, court observation matters, its belated intervention in relation to the proposed torture bill, as well as the death penalty.

The NHRC has retained its A status at the ICC-NHRI but has been given benchmarks against which to show improvement if it is

28 One of the many articles describing the Chairperson's alleged corruption: http://articles.timesofindia.indiatimes.com/2011-06-26/india/29705794_1_balakrishnan-nhrc-national-human-rights-commission

to retain its position. The time, between now and the next review, should be an opportunity for self-reflection and determination for the commission to improve its performance significantly.

A. Follow-up or implementation of NHRIs of references by the ACJ on torture, the death penalty, and human trafficking

Death Penalty

India continues to impose the death penalty, although it is supposedly reserved as a punishment for only the most heinous crimes. As of 2008, there were 345 people on death row, with more than 105 individuals sentenced to death in 2010.²⁹ However, only one execution has occurred since 1995, and approximately 50 executions since India's independence in 1947.³⁰

Shortly after assuming the office of Chairperson of the NHRC in 2010, Justice K.G. Balakrishnan made statements supporting the death penalty in India, citing the uncertain premise of its effectiveness in deterring crime. Justice Balakrishnan further said that it was his personal opinion that Indian society is not yet ready to abandon capital punishment. With regard to the official position of the Commission, he inexplicably commented "that it is not proper for the NHRC to give an opinion on the death sentence."³¹

This declaration, however, contradicts Section 12(f) of the PHRA, which includes a mandate that the NHRC promote international standards by making recommendations consistent with international instruments.³² In 1999, the UN Commission on Human Rights passed a resolution calling on all States "to establish a moratorium on executions, with a view to completely abolish the death penalty."³³ States were encouraged to "not to impose the death penalty for any but the most serious crimes" and "progressively to restrict the number of offences for which the death penalty may be imposed."³⁴ This call was endorsed later on by the

29 <http://www.thehindu.com/news/national/article1578013.ece>

30 <http://newsfeed.time.com/2011/06/14/calling-all-hangmen-india-cant-find-an-executioner-for-its-death-penalty/>

31 <http://www.deccanherald.com/content/85315/nhrc-chief-favour-death-penalty.html>

32 *Protection of Human Rights Act*, 1993, <http://nhrc.nic.in/hract.htm>

33 UN Commission on Human Rights Resolution, 1999; <http://www.un.org/terrorism/pdfs/2/G9914457.pdf>

34 UN Commission on Human Rights 1999 resolution on the death penalty

UNGA and the APF's Advisory Council of Jurists (ACJ) reference. Despite this, the death penalty has not been taken up seriously by the NHRC even after 18 years of its existence.

Torture

While India signed the UN Convention Against Torture in 1997,³⁵ it is one of the few democracies which have not yet ratified the convention. Doing so would signify India's commitment to prevent torture of all forms, and would provide legislation for the prosecution of incidents of encounter killings and other forms of torture. The Government of India has introduced a *Prevention of Torture Bill* in both Houses of Parliament. In 2010, civil society groups made extensive interventions and have ensured a better draft to be introduced in the Upper House of the bill, which was finally referred to a select committee.

However it is to be mentioned that the *Minimum Interrogation Standards* [MIS] that have been insisted upon in the ACJ reference on torture had not been cited by the NHRC in its confidential communication to the government when it was called upon to provide comments. Neither did the NHRC reference these points before the Select Committee of the country's Upper House of Parliament when it considered the Prevention of Torture Bill.

It is therefore important that the NHRC seriously consider the following:

- [i] Placing all ACJ past and future references on its web site;
- [ii] Discussing the ACJ references before the full commission National Core Group on NGOs and other relevant core groups, and evolving of its own policies in that regard that it has constituted;
- [iii] Including these ACJ references in the annual report, and, more importantly, action the NHRC has carried out to implement these ;

Such steps will contribute to a lot of debate and changes will gradually and systematically follow.

35 UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1987: <http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html>.

National Action Plan on Human Rights:

Despite the OHCHR's repeated urgings, the preparation of a National Action Plan on Human Rights has remained in limbo at the NHRC for many years, even after a series of consultations were held with civil society members in 2007. The Commission also did not bother to inform the members of the civil society about the action taken in this regard.

Final Note

The ANNI guidelines for 2011 suggested that the country report be sent to the concerned NHRC for its comments before release. In fact this is a proposal that was placed at the Goa ANNI conference this year by People's Watch. Pursuant to this guideline, a letter was sent to the NHRC on asking them for details to which unfortunately there was no reply. An interview was thereafter sought for as well. The reply was that the information made available in the annual report of 2010 – 2011 will be sent to us is under preparation and as and when the report will be ready the same will be shared with our organization. In view of the refusal of the NHRC to part with any official information or provide an appointment for an interview, this report has not been sent to them for comments at the end. Copies of relevant communication in this regard have also been forwarded to the ANNI secretariat.

Annex 1: Clear contradictions between the NHRC report³⁶ and the Court's decision

Nandini Sundar and Others vs. SOC and Others	
Supreme Court	NHRC's Chhattisgarh Enquiry report1
<p>¶ 74. "Both the Union of India, and the SOC, have sought to rationalize the use of SPOs in Chhattisgarh.... [T]he adverse effects on society, both current and prospective, are horrific. Such policies by the State violate both Article 14 and Article 21, of those being employed as SPOs in Chattisgarh and used in counter-insurgency measures against Maoists/Naxalites, as well as of citizenry living in those areas.... Even if we were to grant, for the sake of argument, that indeed the SPOs were effective against Maoists/Naxalites, the doubtful gains are accruing only by the incurrence of a massive loss of fealty to the Constitution, and damage to the social order."</p>	<p>§ 1.53 "Besides providing security to the camps, these SPOs also proved to be a very valuable asset to the local police and security forces in the offensive against the Naxalites. They are familiar with the terrain and recognize Naxalites by face (many SPOs are former 'sangham' and 'dalam' members). In addition, since many of them are victims or NOK of victims of Naxalite violence in the past, they are a highly motivated lot in the fight against the Naxalites. They are the frontline fighters in the security operations against the Naxalites."</p>
<p>¶ 40. "Some of the features of these new [Chhattisgarh] rules are summarized as follows. The circumstances specified for appointment of SPOs include the occurrence of "terrorist/extremist" incidents or apprehension that they may occur. ...[T]he rules specify that the SPO should be "capable of assisting the police in prevention and control of the particular problem of the area." In as much as "terrorist/extremist" incidents and activities are included in the circumstances, i.e., the particular problem of the area, it is clear that SPOs are intended to be appointed with the responsibilities of engaging in counter-insurgency activities."</p>	<p>§ 1.52 "The petitioners have been highly critical of the SPOs and have, in fact, tried to project SPOs and Salwa Judum as one and same. As pointed out in one of the preceding paragraphs, during the enquiry it was found that the need to appoint SPOs arose after the establishment of the temporary relief camps, as the security of camps was of prime importance and the police force available was grossly insufficient. Being centres of activities against the Naxalites, these camps were the prime targets of Naxalites. Thus, the able bodied from amongst the villagers were recruited as SPOs and they were tasked to help the local police and security forces to provide security to the relief camps."</p>

³⁶ Available at <http://nhrc.nic.in/Chattisgarh.pdf>

<p>¶ 59. “Given the number of civil society groups, and human rights activists, who have repeatedly been claiming that the appointment of tribal youths as SPOs, sometimes called Koya Commandos, or the SalwaJudum, has led to increasing human rights violations, and further given that NHRC itself has found that many instances of looting, arson, and violence can be attributed to the SPOs and the security forces, we cannot but apprehend that such incidents are on account of the lack of control, and in fact the lack of ability and moral authority to control, the activities of the SPOs.”</p>	<p>§ 1.54 “Some of the SPOs have, however, also been found to be responsible for certain incidents of atrocities against the tribals. There are some instances where action under law has been taken against them in this regard. As reported by the State Government, 1579 SPOs have even been dismissed on disciplinary grounds in the past three years or so. However, the atrocities committed by SPOs during security operations against Naxalites cannot be blamed on Salwa Judum.”</p>
<p>¶ 56. “The State of Chhattisgarh has also revealed that 1200 of SPOs appointed so far have been dismissed for indiscipline or dereliction of duties. That is an extraordinarily high number, given that the total SPOs appointed in the State of Chhattisgarh until last year were only 3000, and the number now stands at 6500. The fact that such indiscipline, or dereliction of duties, has been the cause for dismissal from service of anywhere from 20% to 40; of the recruits... [shows] that the entire selection policies, practices, and in fact the criteria for selection are themselves wrong. The consequence of continuation of such policies would be that an inordinate number of such tribal youth, after becoming marked for death by Maoists/ Naxalites the very instant they are appointed as SPOs, would be left out in the lurch, with their lives endangered, after their temporary appointment as SPOs is over.”</p>	<p>The NHRC argues that the Salwa Judum effectively no longer exists, having been supplanted by the SPO, and uses this argument as the springboard to somehow leap to their conclusion that the Petitioner has no case. Yet, the NHRC admits that, “even many of the tribals in the interior areas refer the SPOs as Judum,” essentially admitting that neat lines cannot be drawn regarding the perceived identity of counter-insurgent forces. (§ 1.62) In addition, the NHRC stubbornly refuses to even acknowledge the possibility that the Salwa Judum and the SPOs are connected.</p>

Annex 1: Case of Illegal arrest of the HRDs by the Police of Veeravanallur police station on 15.08.2010

Petitions filed before DM cum JM Court, Cheranmahadevi

S.No	Date	Description of petitions filed before court
1	16.08.2010	Bail petition filed before the DM-cum-JM Court, Cheranmahadevi for our HRDs/accused
2	16.08.2010	Copy Application No. 139/2010 filed before DM-cum-JM Court, Cheranmahadevi for copies of FIR, Remand Report, arrest memo and arrest card
3	25.08.2010	Petition in CrMP No. 5739/2010 condition modification petition filed before DM-cum-JM Court, Cheranmahadevi
4	30.08.2010	Copy Application No. 148/2010 filed before DM-cum-JM Court Cheranmahadevi for bail order and FIR copy
5	03.09.2010	Copy application No. 155/2010 filed before DM-cum-JM Court, Cheranmahadevi for condition, modification petition and order
6	04.09.2010	Condition Relaxation petition filed before DM-cum-JM Court, Cheranmahadevi
7	15.09.2010	Copy Application No. No. 159/2010 filed before DM cum JM Court, Cheranmahadevi for Charge Sheet and 161 (3) statements

Petition filed before Madurai Bench of Madras High Court

8	18.08.2010	Anticipatory Bail petition in CrI.OP No. 9606/2010 filed for Mr Henri Tiphagne.
9	30.08.2010	Writ Petition No. 11348/2010 for CBCID enquiry
10	30.08.2010	WPMP 1/2010 in WP 11348/2010 to stay all further investigation in Cr.No 161/2010 of Veeravanallur PS
11	30.08.2010	Petition No CrI.OP (MD) No. 10130/2010 to quash the FIR
12	30.08.2010	Misc. Petition in CrI.OP MP No.1/2010 for stay of further proceedings in Crime No. 161/2010 of Veeravanallur PS
13	06.09.2010	Misc. Petition No. 1/2010 in CrI. OP No. 9606/2010 for extension of time for production of sureties
14	20.09.2010	Petition in CrI. OP No. 11303/2010 to quash the charge sheet filed in Crime No. 161/2010 of Veeravanallur PS
15	20.09.2010	Misc. Petition in CrI. OP MP No. 2/2010 to dispense with the personal appearance before Court in Criminal Case C.C.No.191/2010 on the file of DM-cum-JM Court, Cheranmahadevi

Indonesia: Weak Leadership and Coordination

Imparsial, the Indonesian Human Rights Monitor

Human Rights Working Group (HRWG)

The Commission for the Disappeared and Victims of the
Violence (KontraS)¹

Introduction

In the period of January 2010 until June 2011, the Indonesian Human Rights Commission (Komnas HAM) faced substantial challenges in fulfilling its mandates. During this period, there are some problems in maintaining cases and reports which indicate weak leadership and coordination among the commissioners. In the case of persecution of Ahmadiyah sect in several places in Indonesia, and the torture video of a Papuan, some views expressed by the commissioners challenged their supposed understanding of universal human rights.

Besides this, divergent comments of the commissioners on these cases has left a bad impression of the commission among Human Rights Defenders (HRDs) in Indonesia. This also raised another problem of Komnas HAM in its relations with human rights NGOs in Indonesia.

Still, protection for HRDs from security forces and radical groups has become the main problem, especially regarding free-

¹ Prepared by Ms Poengky Indarti (Executive Director, Imparsial), Mr Bhatara Ibnu Reza (Human Rights Research Coordinator, Imparsial), Mr Rafendi Djamin (Executive Director, HRWG), Mr Choirul Annam (Deputy Executive Director, HRWG), Papang Hidayat (KontraS)

dom of religion and belief. The State, through its apparatus, has also supported the radical groups in their actions against religious minorities. For example, in February 2011, in the Cikeusik tragedy in Banten, the police sent only a handful of officers who consequently failed to protect an Ahmadiyah congregation from being attacked by a radical group. With regards to law enforcement, the Indonesian police do not carry out their duty to implement the law. A clear example was demonstrated in the case of Taman Yasmin Church in Bogor, where the police stubbornly carried out the Bogor mayor's decree to revoke the church building permit even though a Supreme Court judgment already overturned the decree on 1 July 2011. Instead of carrying out the judgment, the Indonesian police prevented the congregation from doing their activities which were well within their rights.

During Indonesia's re-election bid for membership at the Human Rights Council on May 2011, the Government of Indonesia received a letter from Ms Navanethem Pillay, United Nation High Commissioner for Human Rights. She urged Indonesia to review its laws restricting religious expression and practice.² Ms Pillay said that according to reports, "further acts of harassment and violence have taken place" since new regulations were issued. She pointed out that Indonesia ratified the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to freedom of religion.³

Independence and Effectiveness

The main problem of the independence and effectiveness of the Komnas HAM concerns several commissioners' opinions which are against the principle of universal human rights regarding freedom of religion and beliefs. One statement, regarding freedom of religion and the Ahmadiyah sect, by a Komnas HAM commissioner went:

"In fact, the Ahmadiyah teaching really-really destroys and disgraces Islamic teaching. This is not included as part of the idea of freedom of religion and belief in human rights and the Constitution. The Muslim has a right

2 *The Jakarta Post*, "UN tells RI to review laws restricting religious freedom," 18 May 2011

3 *Ibid*

to defend and protect the sacredness of the teaching and their conscience from this blasphemy".⁴

This statement has two indications: first is a biased interpretation of the principle of freedom of religion and belief that reflects a lack of understanding of the principle.⁵ Second is an inconsistency on the value, perspective and attitude of the commissioner's views on freedom of religion which also influences the functioning of Komnas HAM.

After the Cikeusik tragedy, Komnas HAM and the Governor of West Java made an agreement for strengthening the protection, promotion and respect for human rights.⁶ Despite this, the number of human rights abuses on freedom of religion has continued to occur in West Java, showing the absence of control by both actors, and also an evidence of inconsistency on the value, perspective and attitude of the commissioners in viewing the freedom of religion.

Furthermore, human rights violations concerning religious issues, especially on the Ahmadiyah case in Indonesia should be seriously handled by Komnas HAM in an independent and impartial manner consistent with respect for the universality of human rights. The position expressed by Komnas HAM commissioners indirectly gives legitimacy for intolerant groups to continue their activities.

Thematic Issues

Protection on Human Rights Defenders

Human rights defenders (HRDs) in Indonesia continue to face risks of attacks from state and non-state actors. The increasing number of violations against HRDs shows the Indonesian state's denial of recognition to defenders, and its failure to provide protection to their

4 *Hidayatullah, Saharuddin Daming, anggota Komnas HAM: Membubarkan Ahmadiyah Bukan Pelanggaran HAM, 29 June 2010, <http://majalah.hidayatullah.com/?p=1173> Accessed 21 August 2011.*

5 This perspective is further demonstrated in the example of several commissioners in response to the Cikeusik tragedy. During a formal meeting of the Komnas HAM, they called tragedy a "clash" and not an attack, denying the fact that the incident was in accordance with a campaign by the perpetrators. This information was given by trusted source who requested anonymity (2011).

6 See Komnas HAM, *Laporan Tahunan 2010: Konsistensi Mewujudkan Kemanusiaan Yang Adil dan Beradab*, (Jakarta: Komnas HAM, 2011), p. 237.

human rights activities. Most of the HRD victims are students, peasants, labor unionists and, increasingly, journalists.

While in the past years freedom of press has improved in Indonesia, the practice of journalism remains to be one of the risky professions in the country. In 2010, there were 26 cases of violations against journalists, mostly in the eastern part of Indonesia. Most of them were targeted due to their work of reporting on environmental impact of mining or palm oil ventures, and on corruption.

Mr Banjir Ambarita, a journalist based in Jayapura, Papua was stabbed in March 2011 because of his news report on a sexual abuse scandal in the Jayapura's police detention center. After being urged by the Alliance of Independent Journalists (AJI) and several NGOs, Komnas HAM promised to monitor this case. The Commission through its Papua representative will open an investigation and will ask for the results of the Indonesian police headquarter's investigation of this incident in Papua.

Similarly, the case of the attack of anti-corruption activist, Mr Tama Langkun of Indonesia Corruption Watch (ICW) has not been concluded yet. Despite the Jakarta Metropolitan Police promise to immediately find the culprit, and the order of President Susilo Bambang Yudhoyono to investigate this case after visiting Tama in the hospital, there is no official announcement by Jakarta Metropolitan police regarding the results of their investigation.

Komnas HAM has been slow in monitoring and responding to this case even though it has a monitoring department. Even in July 2010, ICW and the Coalition of Anti-Violence sent a letter to Komnas HAM Chairperson Ifdhal Kasim requesting to commission to monitor the case of Tama Langkun.⁷ Komnas HAM in their statement promised to respond to the case immediately by using their mandate according to the law.⁸ However, there has not been any report released by Komnas HAM on the case until now.

International Cooperation

In this sub-section will focus on Komnas HAM's cooperation or participation in existing regional and International human rights bodies namely the UN Human Rights Council (HRC) and its re-

7 See <http://m.antikorupsi.org/?q=content/17854/surat-ke-komnas-ham-tentang-permintaan-monitoring-penanganan-kasus-penganiayaan-terhad>

8 See <http://nasional.inilah.com/read/detail/652081/URLTEENAGE>

lated mechanism , Asia-Pacific Forum of National Human Rights Institutions (APF) and International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC-NHRI). In general, between January 2010 and July 2011, Komnas HAM has been actively participating in these forums. The questions which need to be raised are: First, what is the impact of their participation to the advocacy in addressing human rights issues in Indonesia? How effective was the level of participation during UN HRC? With regard to participation to ICC-NHRI and APF, the main question would be whether or not Komnas HAM has made significant contributions to the work of both APF and ICC-NHRI.

During that period, Komnas HAM participated in the following major activities:

- the 15th OHCHR Workshop on Asia-Pacific Regional Arrangements in February 2010, in Bangkok
- the 15th Annual APF meeting in August 2010 in Bali
- Annual meetings of the ICC-NHRI in March 2010 and May 2011
- UN Human Rights Council Regular Sessions in Geneva in the first half of the year 2011.

It must be noted that during this period, there were no processes on Indonesia under the UN Universal Periodic Review (UPR), and in any UN treaty body. Thus Komnas HAM's performance in their engagement with treaty body mechanism will be focused in the follow up of the recommendations (This is elaborated under different section of this report.)

It was regrettable that Komnas HAM failed to participate in the OHCHR Workshop on Regional Arrangements in Asia-Pacific simply because of wrong information on a travel ban in Thailand. This meeting was part of a UN HRC resolution to encourage the establishment of regional human rights mechanisms in Asia-Pacific Region. The workshop was attended by a delegation from the Indonesian Foreign Ministry from Jakarta and Geneva, together with the Indonesian Representative to the ASEAN Intergovernmental Commission on Human Rights (AICHR). Were it able to

attend the meeting, Komnas HAM's role as an important pillar on the implementation of four pillars of cooperation the so called "Teheran Framework of human rights Cooperation" could have been presented, as well as its significant role in the South East Asia Forum of National Human Rights Institutions role during the establishment process for AICHR establishment.⁹

In contrast, Komnas HAM's engagement in the UN HRC 16th Regular Session in March-April 2011 was more positive. The commission worked in close consultation with representatives of Indonesian NGOs attending the same session to respond to the brutal killing against Ahmadiyah followers by a violent religious group. A strong oral statement was delivered with great impact during the deliberation on agenda item on religious freedom. This statement was combined with Komnas HAM's presentation during a briefing focusing on religious freedoms issues hosted by the EU Delegation in the UN HRC. Both activities strengthened the direct interaction with the UN Special Rapporteur on freedom of religion or belief, Mr Heiner Bielefeldt. Moreover the full exercise of advocacy in the UN HRC was then completed with a meaningful dialog with the Indonesian Permanent Mission in Geneva.

During 15th Annual Meeting of the APF in Bali, Komnas HAM as co-organizer of the event was not able to push for the formation of an APF working group on migration. The advocacy was in the light of migration particularly migrant workers rights being one of the main human rights challenges in Indonesia. On the other hand, their contribution to the ICC-NHRI related activity particularly on the issue of Business and Human Rights, discussed at the 10th ICC-NHRI Conference held in Edinburg, Scotland in October 2010, was quite significant¹⁰ This was reflected in a well prepared paper presentation and active participation during the debate. Komnas HAM concretely contributed to the drafting of the Edinburgh Declaration on Corporate accountability on Human Rights. It was expected that their activity on this issue will be translated at the national level as the leading actor in stimulating dialog between government, corporations and civil society organizations (CSOs) in creating new norms in regulating corporate accountability on human rights.

9 The APF Secretariat together with NHRIs from Afghanistan, India, Jordan, Mongolia, Philippines, Thailand and Timor-Leste participated in the workshop.

10 The conference was co-hosted by Scottish Human Rights Commission and attended by representatives from NHRIs, the business sector, governments and UN and from more than 80 countries.

Torture Video in Tingginambut, Papua¹¹

A torture video in Tingginambut, Puncak Jaya appeared in the website of Hong Kong-based Asia Human Rights Commission (AHRC) on 17 October 2010.¹² This 11-minute video showed two incidents of torture being conducted by Indonesian military (TNI) against the local people. The first footage showed a number of persons from Gurage village being kicked and hit with helmets during an operation on 16 March 2010.¹³ The second incident showed a person's genitalia being burnt with cigarettes while under interrogation. The latter incident happened on 30 May 30, with the torture committed by a military officer in search for information regarding the whereabouts of members of Free Papua Movement (OPM), Goliat Tabuni and Marongen Wenda¹⁴

Later it was revealed that the perpetrators were from the Infantry Battalion/753 Arvita Pam Rawan (AVT) Nabire and one of the victims of torture was Anggepugu Kiwo¹⁵ The military investigated seven personnel from this battalion and submitted their case to the Military High Court III-19 of Military Area Command XVII/Cendrawasi. Five defendants were charged with Article 103 (1) Military Penal Code for deliberate avoidance of service or non-excusable neglect, punishable with a two-year prison term. This court martial was criticised for the use of Article 103 of Military Penal Code, and for failure of the military prosecutor to include torture as among the offences. Moreover, the victims never attended the court proceeding to deliver their statements. Military Court III-19 Jayapura decided that these five defendants faced different jail terms

The deputy head of National Commission of Human Rights in Papua, Matius Murib, stated that there were no human rights violations to be brought to the human rights court in relation to these incidents. The existing cases were always reported to the head of the Regional Police or the Military Area Command and recommended to the Attorney General. Yet, without international pressure, such as

11 All information in this section was taken from Al Araf, et.al, *Securitization Papua; The Implication of Security Approach towards Human Rights in Papua*, (Jakarta: Imparsial, 2011).

12 See <http://nasional.vivanews.com/news/read/183850-video-kekerasan-tentara-indonesia>, "Video Penyiksaan di Papua Beredar di Youtube", Accessed 22 March 2010.

13 See Komnas HAM, "Laporan Tim Pemantauan dan Penyelidikan Kekerasan di Puncak Jaya", 22 December 2010. pp. 47-49.

14 Ibid. pp. 49-50.

15 Ibid, p 40.

the one in the video of torture, there would have been no follow up and no investigations of suspected personnel. This was also demonstrated in the murder of Reverend Gilman Gire and 30 others.¹⁶

Murib said the matter of the Puncak Jaya torture incident being brought to a military court was irrelevant because this case is considered as a gross human rights violation. Military court is an internal process to improve professionalism. Yet from the perspective of human rights, it should be brought to a human rights courts, as it can be seen as part of a series of events beginning in 2004 as a systematic violence commenced through repeated instructions, operation and involving numerous victims¹⁷

The Komnas HAM Papua representative recommended National Commission on Human Rights to set up an Investigating Commission on Human Rights Violations (*Komisi Penyelidikan Pelanggaran Hak Asasi Manusia/KPP HAM*) to carry out inquire on cases to be brought to human rights courts, because according to Komans HAM Papua, there has been strong indications for gross human rights violations in Puncak Jaya. Yet the findings issued by Komnas HAM in Jakarta was different:¹⁸ there were no gross human rights violations in Puncak Jaya.

This finding shows the unclear stand of Komnas HAM in dealing with cases of torture.¹⁹ Aside from saying that there was no gross human rights violation, the Commission did not recommend any follow investigation by police. Actually, the inquiry should have concluded that such violence in Puncak Jaya was systematic.²⁰ The methodology of the Komnas HAM in gathering information and validating data is also questionable since the team did not even go to the location of the incident in Tingginambut, but merely stayed in Mulia, the Puncak Jaya capital.

Death Penalty and the Protection of Migrant Workers from Capital Punishment

16 Interview with Matius Murib, Vice Head of National Commission on Human Rights Papua Representative, 19 January 2011.

17 Ibid

18 Ibid

19 See Kompas.com. Kasus Papua: Komnas HAM dinilai Mengambang, <http://nasional.kompas.com/read/2011/01/08/05080325/Komnas.HAM.Dinilai.Mengambang>.

20 Ibid

There is still no official Komnas HAM stand declaring the death penalty as a form of human rights violation. A Constitutional Court judgment in 2007 held that death penalty is constitutional for narcotics trafficking. A commissioner explained that the lack of a position was to avoid being trapped in political issues.²¹ This attitude cast doubt on Komnas HAM's work to promote and respect the right to life, since Indonesia is already a party to the International Covenant on Civil and Political Rights (ICCPR), with Law No. 12/2005 and also Article 28(I) of the Second Amendment of the 1945 Constitution.

The position rests on a commissioner's personal perspective. Actually, there are various positions on the death penalty in Komnas HAM: the Chairman, Irdhal Kasim is in favor of the abolition, while Commissioner Saharuddin Daming has repeatedly announced in some official trainings that death penalty is not against human rights. Since this indecisive stance was not declared publicly, this issue can be discussed in other formal agenda. Furthermore, Komnas HAM could not contribute in limiting the use of the death penalty in some new bills such as that on the Revision of Anti Corruption Act, and on the State Secrecy.

On the recent issue of execution and death sentences of Indonesians in other countries, Komnas HAM has thus far only issued public statements in the media. There are no further measures to engage other state institutions such as Ministry of Foreign Affairs, Ministry of Manpower or The National Agency for the Placement and Protection of Indonesian Migrant Workers (BNP2TKI).

Cooperation with NGOs

Since the murder of Munir in 2004, human rights defenders (HRDs) in Indonesia have demanded the government to recognize and protect the activities of HRDs throughout the country. Moreover, violations by state and non-state actors to HRDs are increasing significantly in Indonesia.

Komnas HAM in cooperation with the Coalition on the Protection of HRDs has encouraged government recognition to protect HRDs. The coalition agrees to support Komnas HAM as a focal

21 See <http://news.okezone.com/read/2007/11/08/1/59470/komnas-ham-gamang-sikapi-hukuman-mati>

point of the Draft Bill of HRD Protection proposed by the coalition. Also the coalition supports the inclusion of protection of HRDs in amendments to the Law No. 39/1999 on Human Rights.

Both parties already made the Third Commission of the Parliament in January 2011, discussing the important of recognition of HRDs through law. In this meeting, the coalition also urged the parliament to include the bill in the National Legislation Program 2011.

Conclusion

Komnas HAM still needs to increase its capacity and capability to work strategically. Therefore, some recommendations for its improvement are as follows:

- Develop leadership and teamwork skills to improve the performance and effectiveness of the Commission;
- Increase the understanding of Universal Human Rights;
- Increase the capacity of the Commissioners;
- Improve Commission's reputation within the government and House of Representatives;
- Encourage and support the Commission to be more active to develop their relations with other state institutions and the parliament, especially in handling human rights cases.
- Undertake serious political analysis, enabling the Commission to negotiate more effectively with other state institutions;
- Promote revisions to the Law no. 39/1999 on Human Rights and Law No.26/2000 on the Human Rights Court by securing support from the Indonesian government, parliament and civil society, to strengthen the Commission's capacity to handle legal matters.

Iran: The Need for an Independent and Accountable Commission

An Assessment of the performance of the Islamic Human Rights Commission of Iran in 2010

Arseh Sevom School¹

I. Introduction

The Islamic Human Rights Commission was established in Iran in 1995, following the passage of a resolution in the United Nations General Assembly for National Human Rights Institutions in 1993 otherwise known as the Paris Principles. For various reasons—including the lack of commitment to the Universal Declaration of Human Rights, and its replacement with the Islamic Declaration of Human Rights, its lack of legislation with Iran’s Parliament, and a lack of structural independence—the Islamic Human Rights Commission has not complied with the Paris Principles on national human rights institutions (NHRIs). This very fact caused the Islamic Human Rights Commission’s application for full membership in the Asia Pacific Forum of National Human Institutions (APF), to be rejected in 2008. But, this became an opportunity for the Islamic Human Rights Commission to take steps to comply with the Paris Principles from the legal, structural, and functional perspectives, and after one year, it would submit a re-application for member-

¹ Arseh Sevom School is a leading non-governmental organization that aims to empower civil society in Iran by promoting and protecting human rights, democracy and peace. It was established by a group of civil society activists, previously leading the Iranian Civil Society, Training and Researcher Center (ICTRC), formed in 2001, was attacked in 2007 and its offices were shut down and ordered to discontinue their activities.

ship. The APF would then re-evaluate the Commission's adherence to the Paris Principles.

Unfortunately, the reality of the matter is that the changing political conditions in Iran and the government's repression of human rights activists inside Iran, which has intensified since 2009 with the rise of the civil rights movement inside Iran, show that the Islamic Human Rights Commission has retreated from its previous operational functions. Not only has the commission refrained from promoting human rights in the country and protecting human rights defenders, in addition, it has dedicated itself to cooperation with the security organizations inside Iran, which has occupied all governmental institutions, including the Judiciary.

This report has been produced under conditions in which the majority of Iranian human rights activists are either in prison or under intense security pressures, and are unable to fulfill their roles as activists. Human rights organizations, including the Defenders of Human Rights Center, directed by Shirin Ebadi, the Nobel Peace Prize Laureate, have been attacked by security forces, and the Center's lawyers who defended the human rights defenders have been condemned to long-term imprisonment. The Human Rights Organization in Kurdistan has been forced by security forces to stop their activities, and human rights reporters are forbidden from producing reports about the widespread human rights abuses. The President of the Human Rights Organization of Kurdistan, Sedigh Kaboodvand, is serving out an 11-year prison sentence because of his defense of the human rights of people living in Iranian Kurdistan. Journalists have been targeted and the government has barred them from using all means of mass media and denied them access to information. Political activists and leaders are either in prison or under house arrest. It is obvious that producing a report about the performances of the Islamic Human Rights Commission under such conditions is very difficult.

This paper was developed based on information found in the website of the Commission, and with a deep knowledge on situation of human rights in Iran. The report aims to show the level of transparency, accountability, effectiveness and efficiency of its performance, and independence of the Islamic Human Rights Commission in the year 2010. It is obvious that, if the possibility had existed to review documents at the Islamic Human Rights Commission, the

documentation of this report would have been more in-depth than the cases mentioned in this report. Our hope is that this report provides the Islamic Human Rights Commission with a better identification of its duties in implementing necessary reforms to comply with the Paris Principles, and in accordance with the status of human rights inside Iran. These reforms are necessary if the Islamic Human Rights Commission wants to function as an effective NHRI.

The goal of this report is not to depict of the dire condition of human rights in Iran, because many international institutions, including the United Nations General Assembly, the Secretariat of the United Nations, and the United Nations Human Rights Council, have already provided an accurate portrayal in their reports of the past three years. Reports composed by national and international human rights organizations and contained in the “Universal Periodic Review of the conditions of human rights in Iran” in February 2009 have also reported on that issue. This report focuses on reviewing the function of the Islamic Human Rights Commission in Iran in 2010.

The Background of the Islamic Human Rights Commission

From the beginning of the 1990s, given the epochal changes in the field of world power, human rights attained greater importance and the world has paid more attention to it. Along those lines, in 1993 with the approval of a UNGA Resolution regarding the principles of human rights institutions, known as the Paris Principles, governments were encouraged to establish NHRIs based on the principles defined in the resolution. In the aforementioned template, it had been explained that NHRIs must be independent, incorporating all types of ideological views, and possessing all necessary qualifications. Their stated goal is to improve and maintain the condition of human rights, monitor cases of human rights violations, consult with governmental organs to advance human rights, and supervise the implementation process of the nations’ international human rights commitments.

In such an atmosphere, with the cooperation of some legal experts and government officials at the time in the year 1995, the founding bases for the creation of the Islamic Human Rights Commission took root. The founders of this commission claim that they are attempting to engage in productive cooperation with interna-

tional human rights organizations while doing the same with official and governmental organizations, so that they will be considered the official NHRI of Iran. Given the changes that happened at the 2005 in Iran, and the intensification of violations of systematic human rights abuses in the country, this commission's actions proved only somewhat ineffective in promoting their goals. Until the 2005, the Commission was recognized as a resource for reporting and in some cases following up on some human rights abuses. But following the political changes and the intensification of human rights abuses, and the willingness of the government to ignore the fundamental human rights of its citizens, and the lack of adherence to internal laws in Iran, this Commission has not been paid much attention to by either the government or the people of Iran. In effect, it has not been considered an effective resource for filing legal complaints for critics of the government's policies or the victims of human rights abuse. According to some of the members of the Syndicate of the Tehran and Suburban Bus Drivers, and also a number of students at the Polytechnic University, the Islamic Human Rights Commission took steps in the 2004-2005 to transmit the demands of prisoners associated with these organizations to Judiciary officials. However, this did not lead to any improvements in the prisoners' conditions. Nonetheless, similar examples of assistance cannot be found following the conflict-creating and controversial Iranian elections of June 2009. It was claimed in the newsletter, 21 January – 20 February 2010 (page 6) that a meeting was held for "hearing the reports of some of the families of the detained post-election political activists about the performance of officials from the view point of observing civilian rights (Feb. 8)". But there is no report about who attended the meeting, what actions were taken by IHRC and what the results of the hearing and follow-up actions were.

II. Assessment of the Performance of the Islamic Human Rights Commission

Reviewing and assessing the Islamic Human Rights Commission has been carried out based on (1) the level of success in accomplishing goals and fulfilling responsibilities as enshrined in its charter; (2) its degree of accountability to stakeholders and its credibility among them; and (3) international standards on NHRIs, particularly the Principles of Paris.

A. Assessment of Operations based on the Charter of the Islamic Human Rights Commission

Goals of the Commission

The goals of the Islamic Human Rights Commission based on Article 5 of its Charter are:

1. Explaining, educating about, and promoting the concept of human rights;
2. Supervising the method of adherence to and respect for human rights as applied to legal and real individuals;
3. Designing and implementing appropriate solutions and taking appropriate positions in response to cases of human rights violations, especially in relation to Muslims in all countries;
4. Addressing and following up on cases of human rights violations that are referred to the Commission by various means;
5. Cooperating with national and international organizations, particularly in addressing and following up on issues relating to the Islamic Republic of Iran;
6. Reviewing the human rights situation in the Islamic Republic in relation to international human rights covenants and conventions;

In reviewing the operations of the Islamic Human Rights Commission from the beginning of 2010 based on its defined goals, it was found that this Commission has not had much success in advancing human rights. In addition, the efficacy and the follow-up process of this organization have both had mixed progress, and a lack of consistency in the organization's fulfillment of its goals. It is such that some portion of its goals has suffered neglect, and in some cases, we witness deviation from the organization's stated goals. As an example in the field of explaining, educating about, and promoting the concept of human rights, most of the conferences that the Commission organized have been about solely theoretical or Islamic issues and issues such as International Worker's Day, Hejab, women's rights, intellectual exchange, and outlining viewpoints. Only one training workshop—the "Judicial Management and Fair Trials and Human Rights for Afghan Judges"—stands out

as having practical relevance in urgent human rights issues. If we interpret “promoting human rights” to mean improving the conditions and adherence to the standards of natural rights in the field of governance. Not only has no improvement occurred in this regard, but also in addition, the Commission has not even made any effort worth paying attention to.

With regards to the Commission’s second goal of “supervising the implementation of adherence to and respect for human rights for legal and real individuals,” no written report has been published on this matter on the Commission’s website. In addition, the Commission acknowledges that:

“At the end of every month, the Commission produces monthly reports on the content of adherence to human rights in Iran in various forms (16 prioritized variants), and later it exploits them for analysis and processing in macro-level follow-ups on improving the condition of human rights. **Up until now, for various reasons, these reports have never been published outside the Commission.**” [emphasis supplied]

If we assume that this claim is true, there is no independent means to evaluate these reports, and/or determine the regions to which these reports have been sent. Analyzing the contents of violations of human rights according to a monthly schedule, as part of a process for defending human rights, is a worthy endeavor, although without any follow up procedure, publication, or specification of legal processes, this it will not lead to the Commission’s goal of “supervising the implementation of adherence to and respect for human rights”. The experience of recent years illustrates that codifying such reports and/or even sending them to judicial officials has not made any impact to change the widespread process of human rights abuses in Iran.

In relation to the third goal, “designing and implementing appropriate solutions and taking appropriate positions in response to cases of human rights violations,” there has unfortunately been no public effort by the Commission to create changes or improvements in the laws within the legislative branch. There has been no effort by the Commission to improve adherence to human rights in law through proposing legislation to Iran’s Parliament, or any other governmental institution. Amongst the methods of influenc-

ing Iran's human rights situation for the better is the power to influence Iran's lawmaking and judicial institutions. Iran's human rights institutions are legally required to establish a dialogue and put pressure on those institutions to improve human rights conditions. But in this regard, no form of check and balance from the Islamic Human Rights Commission of Iran exists, and the circulars issued by the Judiciary are completely in violation of the human rights of the Iranian people.

Since last year, several bills are being reviewed by Parliament that are in violation to basic human rights, including the following:

- The Family Bill that is completely against women's rights. Due to women's hard efforts, it has not been passed yet, although and the parliament is working on it.
- The bill to Monitor the Establishment and Supervision over NGOs, which is a form of legalized death knell to any activity by NGOs. This bill puts the establishment of new NGOs under the control of security agencies. It was under review and was passed by parliament in April 2011. But due to international and national pressure, it was returned to the Social Affairs Commission of the Parliament, where it would be reviewed without changes in few weeks.
- The bill to supervise the members of parliament is a really bill to keep MPs silent.
- The bill to reform the Political Parties Law is similar the NGO monitoring bill.
- The bill to reform the Labor Law is completely against any labor protection which the current law provides.
- The Children Protection Law, which based on informal information, does not comply with the international treaties on children rights.

Additionally, examples of threats against citizen's rights include the following:

- The judiciary's intervention against the independence of the Bar Association. These threats lead to the establishment of a campaign to defend the independence Bar Association. In

2010, about half of the candidates in the election of the executive director of the Bar Association were disqualified by the Supreme Judiciary Council. The 36 candidates whose qualifications were denied were mostly human rights lawyers and political activists.

- Also, in last several years, many human rights lawyers were arrested and sent to prison just for their defence of their client's rights. Nasrin Sotudeh, Mohammad Seyfzadeh, Mohammad Dadkhah, Abdolfatah Solttani, Houtan Kian are just examples. Nasrin Sotudeh, a lawyer who defended many women rights activists and human rights defenders, was arrested and sentenced to an 11-year prison term and a 20-year ban of practice after the prison term. Recently Dr. Shirin Ebadi, Nobel Peace Prize Laureate, published a list of 42 lawyers who were persecuted by the government since June 2009. According to the website of the International Campaign for Human Rights in Iran,

"Nearly all of the 42 lawyers named in Ebadi's list have represented prisoners of conscience and have come under government attack due to their advocacy on behalf of their clients and their outspoken promotion of human rights and rule of law in Iran. Of the 42 lawyers, 32 have been subjected to judicial prosecution, and 10 have been subjected to official persecution. Of the 32 prosecuted lawyers, eight are currently in prison, two have completed their prison terms, another 21 are awaiting their final sentences, and one had charges against him were dropped."²

In all of none of these cases and laws did the IHRC say anything.

In relation to addressing and following up on cases of human rights abuse, which are referred to the Commission by various means, it is noteworthy that no form of written or published report on this activity exists. There is only one news report noted in official Commission organs regarding a conference with a number of families of political prisoners following the 2009 election. The methods by which this report influences institutions, its method of transmission to the relevant officials, or the responses of the judicial and security organizations, are all unclear. Merely provid-

2 <http://www.iranhumanrights.org/2011/08/bar-association-under-attack/>

ing an interpretation of information for the family members and/or victims of human rights abuses does not constitute addressing cases of human rights abuses.

In relation to goals 5 and 6 of the charter of the commission, “Cooperating with national and international organizations, particularly in addressing and following up on issues relating to the Islamic Republic of Iran,” and, “reviewing the human rights situation in the Islamic Republic in relation to international human rights covenants and conventions.” Not only does there not exist any form of report published on these matters, but in addition, just as the previous three goals, these goals have had no place in the Commission’s conferences and roundtables. The Commission has not produced any form of public or published report on reviewing Iran’s adherence to international covenants, protocols, or conventions, despite obligations of the government of Iran because of its ratifications of these treaties³ and domestic laws binding the government to said treaties.

On the other hand, there are signs that the Islamic Human Rights Commission has instead focused on pointing out human rights violations in foreign countries, instead of those in Iran. Further, it has published public statements on human rights in other countries. The Islamic Human Rights Commission has not published any kind of published report or statement presenting a report of the human rights situation in Iran, or any appeal to international organizations to put pressure on the government to improve human rights. Further, amongst international human rights organizations’ reports about Iran there are absolutely no references to any documents that contain appeals made by the Commission to international human rights organizations. The lack of such reports or the non-existence of such a procedure at the Islamic Human Rights Commission renders the Commission unable to realistically portray itself as an Iranian human rights resource at the national and international levels. This institution is not known for these functions.

The example of the reaction of the Islamic Human Rights Council in the Universal Periodic Review (UPR) of Iran in February 2010 indicates that the Council was not able to play its supervisory role on human rights violations in Iran at national and international levels. Based on Commission report in the newsletter, February

3 Iran has ratified ICERD, ICCPR, ICESCR, CRC, CRC OP 1 and 2, and the Disability Convention.

2010, the government did not consult with Commission for writing the national report. The Commission did not submit any independent report to the HRC and did not attend the Iran human Rights situation review under the UPR by the HRC.⁴

Documents produced by the Commission

Some 38% of the reports (39 cases) of the reports were about scientific and political issues, including 35 cases about scientific or work-related topics, and four reports related to events in Libya and Bahrain. Of 14 cases (13%) of the statements or announcements of this Commission relating to current human rights violations or issues: four are about international issues, such as events in Bahrain, Libya, criticism of Saudi Arabia, Syria, the earthquake in Japan, Islamophobia in America and the West, International Human Rights Day, Children's Day, the attack on the Gaza aide flotilla, and three cases (less than 3%) are about internal Iranian issues, including the terrorist attack on Zahedan, Chahbahar, and terrorist activity in Tehran. These are events that have also been condemned by

4 This is what the Council reported on UPR: "The last days of the previous month [January 2010] also coincided with an important event relating to IHRC working area which was the participation of an official delegation consisting of about 40 officials of different governmental agencies along a number of other non-official and non-governmental companions in the UN Human Rights Council for responding about the situation of human rights in Islamic Republic of Iran within the framework of Universal Periodical Review (UPR). The mentioned event had different and some-times opposing reflections in some internal and foreign media. According to the official internal media, this delegated committee succeeded in its mission and responded to all posed problems and objections but the critic and opposing media in Iran and abroad reflected the raised some objections and criticisms. Despite the invitation of United Nation, IHRC did not take part in UPR Session and did not submit a written report too. The submitted report of Iran's delegated committee to Human Rights Council was also written without any consultation with the IHRC. The reasons of the approach of IHRC (not to participate in the meeting) and the performance of Iran's official committee in the mentioned council have some thinkable points which definitely with settling down of the present political and excited atmosphere in future can be better criticized and evaluated by considering the rights of nation, constitutional law principles, Islamic values and recognized international obligations. But in short, it can be noted that the amendment of the problems of every society and its empowerment require the formation and presence of independent rooted bodies which are based on the legal principles and standards and consisted of different experts and elites. These bodies should act as the medium between nation and government and help removing damages and improving achievements by monitoring the performance of official agencies and by continuously pursuing for responding human rights violation cases. If this obvious and rational point were not realized, it might result in new and unsolvable problems and wasting national sources." See page 6 in this link: http://www.ihrc.ir/Images/Newsletter/Files/Bahman%20-%20En_201042819649.pdf

the government, all political groups, government critics, and the victims of human rights abuses. This type of activity strengthens the government's support from the Islamic Human Rights Commission. The lack of consideration for Iran's internal situation, the disproportionate ratio between positions taken on external issues and those that concern the government, and the covering up of the widespread human rights abuses inside Iran, have all severely damaged the credibility and stature of the Islamic Human Rights Commission amongst human rights activists.

Of the 103 cases announced as operations of the Commission from the beginning of 2010 to present, 23 cases (close to 8%) have been dedicated to current events, meetings, and similar issues relating to this Commission. Amongst these, only one report covered a meeting between the families of political prisoners with members of the Commission in mid-2010. The remaining reports were about meetings with disenfranchised groups in society, and sometimes the Commission members' dealings with foreign officials. Amongst the 103 reports listed on the website, there are no references to cases of human rights abuses, responses to abuse, attempts to improve Iran's situation, or attempts to prevent the current situation from perpetuating itself. It should be noted that in the newsletter, 21 February – 20 March 2010, the Commission reported on sending a letter to the government on the bloody protest on the *Ashura* religious day, on 27 December 2009, which was brutally dispersed. The letter was not published, but based on the newsletter it could be said the Commission took the position in favor of the government against protestors while trying to show a neutral position. As neither the letter nor the impact of the letter were published, it was difficult to find out what the outcome was.

In terms of content, these published documents under the titles such as women's rights, children's rights, or minorities rights do not really contain information on these rights. For example, the Commission's website features a news item under the title of "women's rights" is about the government's support of women households. However, at the same time the Parliament is enacting anti-women's rights laws, women's rights activists taking to the streets in large protests against the Family Support Law, and security forces are arresting or harassing women's rights activists. Under the topic of "promoting minority rights," is an item headlined, "The support of the Pope and Christianity of Judaism is a sign of their lack of cour-

age." which only fuels the clash of religions, in a way irrelevant to Iran. Meanwhile, minority Bahai's in Iran face intense discrimination and pressure, as scores are currently imprisoned for their beliefs; mother language rights activists of minorities groups are being imprisoned; 60% of children whose mother tongue is not Persian are forbidden from receiving education in their mother language, contrary to the law; and civil rights activists are executed in Kurdistan province to prevent them to defend the minorities rights in the area. In an article about the appointing of a Special UN Human Rights Rapporteur for Iran, the Commission described the incident as a political move in favor of Western nations' interests, which essentially reinforced the position of the government. In this manner, the Commission manipulates the concept of human rights in claiming to support women's rights, minority rights, and other rights. The Commission's formulations are completely detached from the fundamental principles outlined in international human rights documents and essentially serves to propagate the government's distorted interpretation of human rights.

Activities under "Supervision" of Human Rights

Based on the charter of the Islamic Human Rights Commission, the range of activities of the Commission includes various categories such as "Supervision over adherence to human rights" and "Supervision over the government's adherence to and respect for human rights" which is divided into two sections, domestic and international.

Regarding supervision of the adherence to human rights in the foreign section, in the last two years and especially after the new wave of democracy uprisings in the Middle East, a significant portion of the Commission's activities have been refocused on this subject. There is a tendency for the Commission to conform to the Islamic Republic's foreign policy. The majority of the Commission's efforts have consisted of declarations and position papers on events in Libya and Bahrain, announcements about human rights abuses in the West, and reactions to Western human rights pressure on Iran. The Commission also wrote about the earthquake in Japan, and the necessity to help victims there.

In the field of domestic human rights abuses, monthly reports about human rights violations in Iran that are analyzed and com-

piled by the Commission are not published publicly, as the Commission itself acknowledges. Meanwhile, since the beginning of 2010 the Commission has kept silent nor has attempted to follow up the following cases of human rights abuses⁵:

- the widespread arrest of protesters on the day of Ashura (27 December 2009), and the running over of innocents by a security forces vehicle in Vali Asr Square,
- the assassination of relatives of Mir Hossein Mousavi in end of December 2010,
- the widespread arrests on 11 February 2010, and the brutal and violent repression of Iranians (one example of which was the beating of Mehdi Karroubi's son on the streets and his subsequent arrest and torture, which garnered the attention of human rights periodicals in Iran),
- the widespread arrests in June 2010, and the house arrest of opposition leaders Mousavi and Karroubi,
- the arrest, beating, and maiming of participants in the February 2011 protests in solidarity with Middle Eastern movements,
- the dissolution of three major political parties—The Iran Participation Front, the Mujahideen of the Islamic Revolution Organization, and the Society of Teachers and Researcher of Qom Seminary), and the non-issuance of permits for these parties to gather and their prevention from holding party meetings,
- the breaking up of funeral ceremonies for family members or political figures, for example the breaking up of Mir Hossein Mousavi's father's funeral procession, or the inability to hold a burial for Mr. Amini's mother, and/or the prevention of the organizing of mourning ceremonies for those killed in recent events, including the lack of permission to hold a burial ceremony for Ezzatollah Sahabi, one of the leaders of the 1979 Revolution, and the cutting off of his funeral ceremony, and the killing of his daughter at the ceremony itself,

5 The commission published two newsletters in 2010 (21 January – 20 February and 21 February 2010 – 20 March 2010) and no more newsletters are available after these dates. The only incident was reported was the Ashura in the second newsletter without publicizing the letter and the result of its action.

- the lack of following-up on the conditions of political prisoners, and the ignoring of letters written about the torture of political prisoners (Abdollah Momeni, Hamzeh Karami, and Mehdi Mahmoudian), ignoring the bad conditions of prisoners and the lack of access to minimum requirements for living in prison (as written in the letter of Zia Nabavi), not paying attention to the illegal judicial processes used in the court system,
- the violent confrontation of senior clerics and the closing of Grand Ayatollahs' offices such as Ayatollahs Montazeri and Saanei,
- the destruction of the Daravish Gonabadi shrine,
- the continuation of pressure against Bahai's, the destruction of their offices, their being arrested, and the prevention of Bahai's from obtaining education,
- violent confrontation of human rights activists like Nasrin Sotudeh and Mohammad Seifzadeh, Narges Mohammadi, Abdolfateh Soltani, Abdolreza Tajik, and others,
- confrontations with a number of newspapers, including suspensions and closures,
- the arrest of reporters and bloggers,
- the intensification of limitations placed on ethnic minorities,
- the continuation of the politics of the hostage-taking of political parties, activists, and civic institutions in Iran,
- the continuation of the execution policy and the lack of transparency in issuing political death sentences, especially the great number of executions of political and human rights activists in Kurdistan as a dominant trend,
- the lack of any process for fair trial for all of the arrested,
- the lack of observance of domestic laws in Iran, including the Statute for Citizens' Rights

Education Programmes

According to the charter of the Commission, the organization's educational programs are divided into four fields: (1) Education about human rights for the public; (2) Human rights training for human rights activists (volunteers); (3) Human rights education for particular groups in society, who have the most influence on human rights in the country, such as clerics, judges, legal experts in municipal government, workers' organizations across the nation, news agency employees, and others; (4) Educating and training human rights teachers.;

Based on information in its website, the Commission has organized one workshop on human rights for judges from Afghanistan. The conference "Judicial management, fair judicial processes, and advancing human rights" was held for a group of Afghan judges on 27 February 2011. This workshop stand in contrast with the Iranian government's flouting of domestic laws and regulations, and repeated violations of the Constitution and criminal laws of Iran. Further, conditions in Iranian prisons are lamentable regarding detainee health and providing fundamental necessities of life. Now more than ever, these situations demand follow-up, education, and implementation of the principles of human rights within the Iranian government.

In the fields of research and investigation, the Commission has not reported any research program since 2007 to the present.. In the website, the titles of the designs of investigations are available, but contents were lasted edited in 2007. In addition there is also no information on mechanisms for organizing, securing, and transferring funds for research. In terms of subject matter, most of these titles do not consider the necessary and important issues of human rights violations. Indeed, it appears there is a great discrepancy between urgent topics in human rights that need study and research and those chosen by the Commission. Regarding the documentation of human rights and the possibility of a library, because of the lack of publishing news updates by this Commission, no information exists about whether such resources exist or not. There is also no information if such resources are available for outside researchers.

B. Assessment from the viewpoint of stakeholders

The key stakeholders of the Islamic Human Rights Commission are civic organizations, human rights activists, victims of human rights abuses, the Iranian government (including the security forces, judicial branch, and executive branch), and international human rights organizations. Because of the lack of information about human rights violations from the Commission, and the lack of its serious efforts to improve human rights conditions in Iran, the Commission has not won the confidence of political activists, civic organizations, human rights activists, or human rights abuse victims. This lack of credibility inside Iran has also damaged the Commission's stature amongst international groups. Amongst the yearly reports and cases produced by international institutions, not one instance of a name or report from the Commission is mentioned. This by itself reduces the dignity of the Commission as an institution in the eyes of international human rights organizations. These conditions, in addition to its international relationships, have cast the Commission in a negative light, and it has been unsuccessful in establishing relationships with international and regional organizations. Its inability to present itself as an accredited human rights resource and an institution with the necessary qualifications and abilities to protect human rights in Iran, and its inability to gain fame for performing human rights functions, are amongst the failures of the Commission. Not being consulted by the judiciary and government for reporting to the UPR and not actively reporting to the UPR as an independent human rights institution and being absent at the UPR session on Iran is just an example of inability to present itself as an accredited human rights resources at all levels.

Since the year 2000, the IHRC has a Status "C" accreditation under the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). Under the accreditation system, a Status "C" accreditation means non-compliance with the Paris Principles and makes it ineligible for membership in the ICC . The Commission has not been reviewed since.

C. Assessment according to international standards (Paris Principles)

In evaluating the level of success of the Commission, this report generally uses criteria such as efficiency and effectiveness, accountability, and transparency. Measuring the operations of the Islamic Human Rights Commission with these criteria shows, once again, a lack of success.

Effectiveness

In reviewing the performance of the Islamic Human Rights Commission and its effectiveness in [protecting/working with] human rights defenders in Iran, it is found that this institution has experienced fluctuations. Across the changes in the political power structure and the personnel changes in the Judiciary, the Islamic Human Rights Commission has had various effects on the human rights atmosphere in the country. It seems that, depending on personal relationships and political successes in the country, the effectiveness of the Commission in improving the human rights situation in the country or defending human rights activists has been greater than expected based on its legal stature, its institutional functional conditions, and its level of acceptance amongst the organs of political power.

The political conditions of Iran in the past two years have been extraordinarily securitized, and the political environment has been under a red alert of sorts during this period. Under these conditions, in addition to the changes in the leadership of the Judiciary, Iran's security forces, who were the most common violators of human rights in Iran, have taken complete control and responsibility of the political environment, including the three branches of power. Because of the instability in the position of the Commission and the weakening of its relationships with the Judiciary because of personnel changes, there are absolutely no signs of this organization's former limited effectiveness existing today. In order for it to be officially considered an effective institution in promoting human rights in Iran, the Islamic Human Rights Commission should try to address the human rights situation in the nation, announce cases of human rights violations, and investigate such violations. Right now, it does not perform such actions, and it is not recognized as an effective institution. Last month for example, a docu-

ment was published showing the Judiciary's rejection of the Commission's request for the immediate hospitalization of Hossein Ronaghi-Maleki outside prison. This institution could not convince the Judiciary to send Maleki outside of prison to be hospitalized.

Because the Commission lacks an appropriate legal standing and depends on personal relationships, the Commission is not particularly effective and is not considered an effective institution by human rights activist organizations.

In addition, one of the items stipulated in the Paris Principles in expressing the role of national human rights organizations, is the issue of the qualification of these organizations to protect and improve human rights conditions in their countries. The matters of: how effective a national institution is in improving human rights conditions by publishing reports of violations, or supporting human rights activists, and/or whether they have established productive relationships with other national human rights organizations, are the two most important qualifications to consider.. Currently the Commission does not address the issue of the banning of NGOs, political parties advocating greater pluralism and democracy, including the Defenders of Human Rights Center and Human Rights Organization of Kurdistan and the Human Rights Committee of Advar⁶ Organization. It has no significant relationship with any of these groups nor has it appealed the order of shut down of the organizations. It appears that the commission has defined its relationship as only being within the orbit of security and judicial institutions. The programs and operations of this institution, more than being directed towards improving the human rights situation in Iran, are directed towards the survival and preservation of this institution from government repression and attacks. Therefore, under current conditions, the Islamic Human Rights Commission does not possess the necessary competence to serve as a national institution for the promotion and protection of human rights.

Transparency

Although this institution is supposed to be independent of the Iranian government, and portrays itself to be the only legitimate human rights institution in Iran, it lacks any form of transparency in

6 Advar Tahkim-Vahdat is a student alumni association that functions akin to a trade union

its sources of funding, or its relationships and arrangements with other government institutions. The Commission's lack of transparency is further demonstrated by the absence of published reports⁷, the lack of any accessible document of its work to address human rights abuses, and the tendency of its leadership to take similar human rights positions as the Islamic Republic, particularly on international affairs. The presence of official government representatives at one of the regional headquarters of the Commission, such as Hojatoleslam Pourreza⁸, and a statement of condemnation by the Commission's Tabriz branch about Western sanctions against human rights violators and Iranian security and judicial officials, have all bolstered perceptions that the Commission lacks transparency and independence.

Accountability

According to the official organ of the Islamic Human Rights Commission, reports regarding the human rights situation in Iran are not published and are not available to the public. Likewise, attempts by the families or even victims themselves of human rights abuses to follow their cases up with the Commission do not require a written response, and are sometimes met with a mere verbal statement by Commission officials. The Tabriz regional office of the Islamic Human Rights Commission, in a strange move, attempted to designate the Governor of Tabriz as an official "human rights activist", which caused great surprise amongst human rights activists in the region. This office named the Governor as such for the "reverent feedback of city residents," which made him deserving of the nomination. Meanwhile, Hotan Kian, the lawyer of Sakineh Mohammadi Ashtiani, also a resident of Tabriz, was sentenced to long-term imprisonment for his attempts to defend his client, Sakineh. Likewise, tens of ethnic minority activists have been arrested in Tabriz in recent years. Just in March 2011, people who had gathered in Urumeih Lake to protest the policies led to the risk of , 70 environmentalists were arrested and transferred in Tabriz prison.

7 Some of those reports which were published, i.e. two newsletters in 2010, are completely vague and no precise information distributed, such as "Meetings with the presence of professors of different legal faculties for serving different subjects and so on," in which is not clear who the professors are, from which legal faculties, and which subjects were discussed.

8 The Supreme Leader's Representative and Friday Prayer leader of Rasht

Because of the structure of the Commission, the organization does not consider itself accountable to stakeholders such as civic organizations. It has only provided a platform for government officials and organizations to influence the general population. Likewise, the Commission is silent on victims of violations related to political issues, because the website publishes only complaint reports of unidentified detainees or convicts of non-political crimes. In any case, there is no mention of the results of the Commission's attempts to follow-up, or the legal or political barriers encountered in securing the basic rights of Iranian citizens.

III. Conclusion

In evaluating the activities of the Islamic Human Rights Commission, this report has analyzed the performances of this institution using a variety of tools. We have taken into consideration the goals laid out in its charter, and evaluated it from the viewpoint of an NGO stakeholder: its reputation amongst human rights defending organizations and human rights activists, and international criteria. The operations of this organization from 2010 to present have not achieved the goals laid out in its charter. Furthermore, it has been left without an appropriate level of respect amongst political forces, human rights activists, and international human rights organizations. The lack of attention paid to the Commission in human rights reports nationally and internationally serves as evidence of this claim. On the other hand, this organization fails in its evaluation according to criteria such as transparency, accountability, and efficacy. It does not have enough influence over the legal and political processes of the Iranian government to defend human rights, or move the political situation in Iran towards improving its human rights situation. It appears that the decision-making, actions, and measures of accomplishment of this organization are a function of two different variables:

The general trend towards greater securitization of the country. Given the extent that security forces are in complete control of the leadership of the Judiciary and other organizations involved in Iranian citizenship rights, they are in control of all processes relating to issuing arrest warrants, issuing convictions, scheduling trial dates and prison furloughs, prisoner visitation, freeing detainees, collecting bail, and all others affairs relating to detention. Neither

the Judiciary nor the Islamic Human Rights Commission has a definitive role outside of what the security forces will allow, and these forces, are the most notorious abusers of human rights, are given free rein.

The relationship of the Commission to Judiciary officials is the second variable. According to the admission of the President of the Commission, because of the closer relationship that existed when Hashemi Shahroudi was Chief of Judiciary and Jamshidi was the Judiciary spokesman, the Commission's attempts to follow-up had greater effect. They had greater opportunities and influence in policy. In this new era, Commission officials' relationships with the Judiciary is not as close, and consequently the Commission has lost the clout it once had over policy.

In addition, it appears that the main strategy of this organization in the recent era has been to preserve itself and prevent its closure at any cost. Therefore, under current conditions, the Commission is adapting itself to the political framework of the Islamic Republic, making itself more dependent on the government. The preservation of this organization, whether in the area of security threats or in securing financing, has moved the Commission towards promoting the official policies of the Islamic Republic in the field of human rights in the Middle East region and the West.

In order to preserve itself, it has resorted to cooperation and silence in the face of widespread and systematic human rights abuses in Iran.

South Korea: The NHRCK Trapped in a Dark Tunnel

Korean House for International Solidarity (KHIS)¹

I. General Overview

The National Human Rights Commission of Korea (NHRCK) has been considered a model national human rights institution in Asia. Prior South Korean governments have at least shown respect for the independence of the NHRCK, while the South Korean civil society held the basic belief that the NHRCK would operate in accordance with the Paris Principles. However, since the current government came into power in 2008, the human rights situation in the Republic of Korea has been steadily deteriorating.

Frank La Rue, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, also pointed out the worsening human rights situation in his mission report:

“the Special Rapporteur expresses his concern that since the candlelight demonstrations of 2008, there have been increased restrictions on individuals’ right to freedom of opinion and expression, primarily due to an increasing number of prosecutions, based on laws that are often not in conformity with international standards, of individuals who express views which are not in agreement with the position of the Government.” (AHRC/17/27/Add.2)

The Lee Myung-Bak government regards the NHRCK as an obstacle to its pro-business economic agenda and conservative social policies. Since the NHRCK was established in 2001, the NHRCK has

1 . Prepared by Mr Na Hyun Phil

played a crucial role as a watchdog of the government and guardian of human rights. Notably, the Commission criticized the forced repression of protesters by the police during the candlelight demonstrations in 2008. The government was uncomfortable for the NHRCK to have such roles and functions, and argued that the main mission of the NHRCK was not to blame the police who protect law and order from illegal demonstrations, but to focus on the human rights situation of North Korea. In fact, the current government has repeatedly expressed that the NHRCK will focus on human rights in North Korea instead of domestic human rights issues.

In 2009, in order to weaken the Commission, the government coercively reduced the NHRCK staff by 21%. Additionally, inexperienced individuals have been appointed as Commissioners of the NHRCK thus far under the current government. The NHRCK has been restrained from dealing with politically sensitive issues, and has not even attempted to investigate pressing human rights issues.

NHRCK Chairperson Hyun Byung-Chul, who was appointed by President Lee Myung-Bak in 2009, does not have sufficient background in the field of human rights. Since his appointment, Mr Hyun has been silent on human rights violations committed by the government, and has been criticized by some of his fellow Commissioners due to his undemocratic management of organizational and personnel issues in the NHRCK.

In protest to the Commission's continued inappropriate operation, three Commissioners of the NHRCK—Moon Kyung-Ran, Yu Nam-Young, and Cho Gook—resigned in November 2010, and were immediately followed by In addition, 61 members of NHRCK special committees. Former Commissioners, former staff members of the NHRCK, about 600 NGOs, and 300 lawyers and law professors published a statement criticizing the NHRCK. Additionally, the winners of a human rights award given by the NHRCK refused to receive their awards in December 2010.

Such occurrences within the NHRCK have not changed at all in 2011. In February 2011, the NHRCK rejected the extension of the contract of an employee, who was a vice leader of the NHRCK's labor union. It is assumed that the NHRCK intentionally fired her, since the NHRCK usually extends a contract so far as long as there had been no particular reason for disqualification. Human rights NGOs and the labor union of the NHRCK insisted that this dis-

missal was because she had criticized the crippled operation of the NHRCK since the inauguration of Mr Hyun. In fact, the NHRCK's union said in a statement that "the NHRCK, which is supposed to rectify discrimination of irregular workers, fired one of its workers because of her position as a member of the union. It is an absurd incident that intends to suppress the union". In addition the union raised an appeal against the NHRCK for "discrimination against an employee due to her activities in the union." This resulted in the absurd situation of the NHRCK receiving an appeal about the NHRCK itself, via the union.

Meanwhile, Mr Hyun conducted an inspection of employees who staged one-person demonstrations to protest unfair dismissals in February 2011. A one-person demonstration is regarded as a legally legitimate way of expressing one's opinions according to South Korean law, without any legal ramifications. In executing the inspection, Mr Hyun, the chairperson of the NHRCK, suppressed freedom of expression within the NHRCK. Eventually, Mr Hyun decided on 29 July to take disciplinary action against 11 staff members who were involved in the demonstrations. The supreme irony here is that while the NHRCK's duty is to protect against human rights violators, the Commission itself is now playing a role of a human rights violator.

In addition, some lawmakers of the National Assembly called for the resignation of Mr Hyun. The NHRCK reported its activities to the National Assembly in April 2011 and several lawmakers strongly criticized the crippled operation of the NHRCK. the dismissal of an employee, and the international conference for North Korean human rights initiated by the NHRCK. In response to lawmakers' call for his resignation, Mr Hyun replied that the inspection against staff members who are involved in the demonstration should not be stopped and insisted that the NHRCK is working properly.

II. Independence

During the accreditation review of the NHRCK in November 2008, the Sub-Committee of Accreditation (SCA) of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC-NHRI) recommended the following:

The NHRCK is considered a “central government institution” under the National Fiscal Act, and as such does not enjoy complete functional autonomy from the government. This is in contrast to “independent institutions”, which are constitutionally entrenched;

Under article 5 of the founding Act, the process of appointing Commissioners, on nomination from the President, the National Assembly or the Chief Justice of the Supreme Court neither provides for formal public consultation in the recruitment and scrutiny of candidates nor for the participation of civil society. The Sub-Committee refers to General Observations 2.1 “Ensuring pluralism” and 2.2 “Selection and appointment of the governing body” and encourages the adoption of procedures that ensure a broad and transparent appointment process. This should be done through public advertisement and a broad consultation procedure;

It acknowledges the action taken during the recent Candle Light Vigils and encourages the NHRCK to consider issuing public statements and reports through the media in a timely manner to address urgent human rights violations;

It stresses the need for the NHRCK to have more autonomy to appoint its own staff in a manner that does not unnecessarily delay the fulfillment of the NHRCK needs. The Sub-Committee refers to General Observation 2.7 “Staff of an NHRI.”

The Sub-Committee expresses its concern about the recent proposal to place the Commission directly under the Office of the President and subsequent interventions in the Commission’s financial and administrative affairs. It refers to General Observation 2.10 “Administrative regulation.”

In order for the NHRCK to maintain an “A” status, the South Korean government should follow the recommendations of the ICC-SCA. However, the ICC-SCA’s concerns at that time about the South Korean government’s potential “interventions in the Commission’s financial and administrative affairs” became the reality in 2009, when the government downsized the NHRCK. This development drew concerns from the then chairperson of the ICC-NHRI Ms Jennifer Lynch, , and United Nations High Commissioner for Human Rights Ms Navanethem Pillay. Since 2008, the government has already showed its intention to control the Commission and to ignore its international commitments regarding NHRIs.

Law of Act

Based on the current National Human Rights Commission Act, the government has proven it can degrade the Commission's independence through a variety of measures. For example, in downsizing the staff of the NHRCK, the government referred to Article 18 of the Act which states that "matters necessary for the organization of the Commission shall be prescribed by Presidential Decree." When the NHRCK was established in 2001, South Korean civil society expected that the Government would not misuse the Act because the NHRCK was an outgrowth of South Korea's historical development and international commitments. Unfortunately, the current government broke this belief and utilized the weak points of this Act.

The Constitutional Court also confirmed the weakness of the NHRCK as a "central government institution" raised by ICC-SCA in 2008. Before his resignation, the former chairperson, Mr. Ahn Kyong-Whan petitioned the Constitutional Court requesting adjudication on jurisdictional disputes regarding the downsizing of the NHRCK. The Constitutional Court dismissed the petition on 28 October 2010 based on the fact that the NHRCK is not a constitutional body, and is therefore not qualified to file such a petition to the Constitutional Court.

In order to fulfill this specific recommendation of the SCA, a constitutional amendment is required in order for the Commission to become an independent institution as a constitutional body. However, it is difficult to amend the constitution in a timely and democratic manner. The passage of proposed amendments to the constitution by the National Assembly requires the concurrent vote of two thirds or more of the members of the National Assembly. Additionally, the proposed amendments to the constitution shall only be approved in a referendum determined by more than one half of all votes cast by eligible voters. The amendment of the constitution is a very sensitive and controversial issue in the Republic of Korea. Still, even though they have a majority in the National Assembly, the current government has not even proposed such an amendment of the constitution.

Even if the Commission becomes an independent institution through a constitutional amendment, the government may still be able to harm the independence of the NHRCK. For instance, in January 2011, President Lee Myung-Bak attempted to appoint his

senior secretary to be the chairperson of the Board of Audit and Inspection (BAI), a constitutional agency, and the supreme audit institution of the Republic of Korea. While the BAI is under the President, but it retains independence in performing its duties. Even though his appointment failed due to a bribery scandal and opposition from the public, this attempt showed that government intervention will still be possible to a constitutional agency. Ultimately, the most important factor to maintain the independence of a national human rights institution (NHRIs) is the government's respect for the Paris Principles relating to the Status of NHRIs.

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

As mentioned earlier, a notable trend in the actions of the current NHRCK is to avoid politically sensitive issues. In a session of the National Assembly in September 2009, Mr Hyun already said that “The Commission belongs to the Executive branch”. Despite criticism from civil society, Mr Hyun persistently showcased through his conduct that as the chairperson of the NHRCK, his role is to appease the Lee government.

Table 1. Major Cases avoided by the current Commission

Date	Cases
2009. 12. 1.	The Commission refused to state their position on the PD Notebook case, where a television producer of the investigative program “PD’s Notebook” at the country’s second-biggest television network was prosecuted for “misleading” reports about the problems of US beef imports. The report was believed to be the spark that led to massive street demonstrations against the Government’s decision regarding US beef imports.
2009. 12.28.	The Chair of the Commission arbitrarily closed a plenary meeting, to discuss the ‘Yongsan case’, in which Police used excessive force to disperse protesters at the Yongsan redevelopment project area, which consequently led to the deaths of five protestors and one police officer in a fire. NHRCK did not express it position because of the early closure of the plenary meeting, the on the ‘Yongsan case’.
2010. 4.26.	The Commission rejected expressing a position on a government defamation case against NGO leader Park Won-sun for allegedly maligning the National Intelligence Agency.

2010. 7. 7.	The Commission decided not to investigate the case that the Prime Minister's office conducted illegally surveillance against civilians who posted criticisms against the President of the Republic of Korea on their personal blogs.
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The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue undertook an official mission to the Republic of Korea from 6-7 May 2010. When during the said mission, Mr La Rue reportedly asked for a joint meeting with all the commissioners of the NHRCK. Chairperson Hyun continuously refused to grant the request of the Special Rapporteur for a joint meeting. Instead, Mr Hyun held a one-on-one interview with Mr La Rue because Hyun worried that some commissioners who were trying to protect the independence of NHRCK would disclose the above-mentioned cases to the Special Rapporteur in a joint meeting. In order to protect government agencies, which had violated human rights and basic freedoms, the chairperson of the Commission did not to cooperate with the Special Rapporteur, which resulted in the disruption of the objectives of the mission.

In the press conference after his official visit, the Special Rapporteur expressed regret about the attitude of the NHRCK. His concern with the NHRCK was also included in his mission report:

“the NHRCK has reportedly decided not to adopt a decision on key cases involving violations of the right to freedom of expression, with the majority of Commissioners reasoning that the Commission should wait until the cases are resolved in the courts. This includes the prohibition of demonstrations after sunset as stipulated in article 10 of the Assemblies and Demonstrations Act and the defamation suit filed by the NIS against Mr Park Won-soon.” (AHRC/17/27/Add.2).

In this context, on 25 October 2010, Chairperson Hyun, together with some non-standing commissioners, proposed a draft amendment to the NHRCK's managerial regulations to its Plenary Committee.. The draft amendment gives power to the chairperson to decide whether or not the NHRCK will express its opinions or makes recommendations, and restrict the power of the standing committee. This will change current regulations which give this power to the standing committee.

In protest, two standing commissioners, Mr Yu Nam-Young and Ms Moon Kyung-Ran, resigned on 1 November 2010. Even Hwang Yung-Chul, a legislator from the ruling Grand National Party (GNP), said to Prime Minister Kim Hwang-shik at a parliamentary committee session on 4 November that “I don’t want to hear such criticisms that the human rights situation has retrogressed with the advent of the President Lee Myung-Bak administration,” adding that the Prime Minister should ask Chairman Hyun to resign. Mr Cho Gook, a non-standing commissioner also resigned on 10 November. All political parties, except the ruling party, strongly opposed the draft amendment, and called for the resignation of the chairperson. In addition, 15 former NHRCK commissioners, 334 legal scholars and lawyers, and 660 civil and human rights organizations also joined in calls for Mr Hyun’s resignation.

However, President Lee gave a clear message to civil society on 11 November by appointing a new standing commissioner, Ms Kim Yang-Hye, from an organization that supports government policy, and is linked to the ruling party. This appointment signaled that the government prefers Mr Hyun’s management style, since he behaves as if the commission were an agency under the administrative branch of the government. During the previous set of commissioners, the NHRCK maintained good relations with other governmental organizations based on its independence and professionalism on human rights issues.

Membership and Selection

According to the National Human Rights Commission Act, a candidate Commissioner should “possess professional knowledge and experience with human rights matters and should be recognized as capable of fairly and independently performing duties for the protection and promotion of human rights.” However, under the current system, as the selection, nomination and appointment process is confidential and civil society is not entitled to participate, a non-qualifying person may become Chairperson or a Commissioner. Therefore, the current government could choose to appoint unqualified Commissioners and nominate an unqualified individual as Chairperson. In addition, the Commission, composed of eleven Commissioners, includes two persons selected by the ruling party,

and four persons (including the Chairperson) nominated by President of the Republic of Korea. In other words, the government can systemically hold a majority of the Commission.

Chairperson Hyun Byung-Chul failed to display any insights or resolute will as Commission chairperson after his appointment. Rather, he often disclosed his ignorance on human rights issues, as demonstrated by his remark, "Does discrimination against females still exist in my country?" Additionally, according to MBC's "Current Affairs Magazine 2580" broadcast program, Mr Hyun even used a derogatory Korean word "Ggamdunng-i" to refer to black people during a tea session with a group of lawyer interns last July 2010. If true, that is a hardly acceptable, senseless word to come out of a human rights commission's chairperson's mouth. Even more reprehensible is that Mr Hyun consistently makes one excuse after another whenever his thoughtless remarks stir up social controversies. For instance, he officially explained that the remark he made about using the word "Gamdunng-i" as an example of human rights violations in multi-cultural society. However, some staff members of the NHRCK openly refuted that his actual clarificatory remarks were "Korean society has become multicultural. Therefore, 'Gamdunng-I' are living together.

Since the Grand National Party became the ruling party in April 2008, the ruling party has appointed unqualified persons as Commissioners, which is in contrast with when it was an opposition party. The Grand National Party appointed Ms Moon Kyung-Ran on February 2008 while the party was in opposition, contributed to the development of the NHRCK as a standing commissioner.

However, the Grand National Party recommended Mr Hong Jin-Pyo, a right-wing activist who has focused his activism on North Korean human rights, to be a Standing Commissioner as the successor to Ms Moon Kyung-Ran. Mr Hong is a person who is not linked to human rights issues in South Korean society. Instead, he became known for his anti-North Korea activities after his conversion from being a believer in North Korea's ideology. A glance at the list of his books is enough to show what his activities are centered around.

It is difficult to see which activity area of the Commission he could fit into, seeing that he has authored *One Hundred Days of Lies and Madness* that deals with the candlelight demonstrations,

A Study of Pro-North Korea, I Want to Live in a World Where There is no National Teachers' Trade Union and Truths About North Korea That Textbooks do not Teach, and so on. The current government placed a 'new-rightist' person in the central position of the Commission, who would lead an ideological conflict within the NHRCK. In contrast, Ms Moon publicly stated that the standards of human rights are beyond ideology.

The National Assembly announced that it will undertake a confirmation hearing for the next nominee for NHRCK Chairperson on 28 June 2011. In response, South Korean civil society urged that confirmation hearing should be extended to Commissioners, and additionally called for the institutionalization of civil society's right to participate in reviewing nominees for the commission.

Resourcing the NHRI

Since the downsizing of the NHRCK in 2009, the Commission has called for an increase of staff members to deal with the growing number of pending issues and petitions. Moreover, the current government promised that the number of staff members who investigate discrimination against disabled persons would increase in accordance with the implementation of the Disability Discrimination Act. However, after the passage of the Disability Discrimination Act in 2008, the current government did not augment staff numbers, and instead reduced by 9.7 percent the 2010 NHRCK budget for the promotion of human rights of disabled persons. Disability organizations criticized the government for showing no consideration for social minority groups, and that Chairperson Hyun did not resolve the NHRCK's human resources' deficiency for dealing with disabled person's cases. Disability organizations have continuously demanded adding more investigators for disability cases, and have even resorted to occupying the facilities of the NHRCK in a December 2010 protest.

The sit-in demonstration of the disabled groups resulted in the death of a disability human rights defender. . Mr Woo Dong-Min, who had disability from brain lesions, died of acute pneumonia on 2 January 2011, after catching fatal pneumonia from participating in an extended sit-in demonstration at the NHRCK for increasing support for people with disabilities, and calling for the resignation of NHRCK Chairperson Hyun Byung-chul. Woo and 30 other ac-

tivists with disabilities had to endure cold nights without any heat because the electricity supply in the NHRCK offices was cut off after midnight. Eventually, the NHRCK increased the 2011 budget by 56.1 percent for promoting human rights of the disabled after the Commission could no longer disregard the reproaches made by the disability organizations.

In contrast with other parts of the NHRCK, the Commission increased both the budget and the number of projects dealing with North Korean human rights issues in 2010 and 2011. The 2010 NHRCK's North Korean human rights' budget was increased by 136.4 percent, in spite of the total NHRCK budget being cut by 5.38 percent. Additionally, the NHRCK held an international symposium about human rights in North Korea in January 2011, and opened the North Korean Human Rights Violations Reporting Center in March 2011. These activities were undertaken even though, according to the National Human Rights Act, the North Korea is out of the jurisdiction of the NHRCK. This leads to a suspicion that the current government is politically utilizing North Korea for its own sake.

The total budget of the NHRCK has decreased since the 2009 downsizing. Because of this, the Commission must spread its human resources across the spectrum of issues in its mandate in order to restore its normal function. The government's preferred human rights issues, such as human rights in North Korea, are the only supported human rights' issues due to the political advantages it gives the government.

III. Effectiveness

The NHRCK received a total of 9,159 cases in 2010, of which 70.5 percent (6,457 cases) of complaints were regarding human rights violations, while the rest were related to discriminatory acts and other incidents. In comparison with 2009, the numbers of complaints that were regarded as human rights violations increased by 22.2 percent, and the number of complaints about discriminatory acts received in 2010 increased by 990 cases from the previous year. That is, the NHRCK dealt with a total of 2,675 complaints against discriminatory acts, an increase by almost 1.6-fold, compared with the previous year.

The table below presents a comparative overview of the cases received by the NHRCK in 2010 and 2009, on the actions taken on cases and the types of complaints received by the Commission.

NHRCK Action on Cases of Human Rights Violations

Action on Cases	2010	2009
Accepted	331	207
Dismissed	1,831	626
Rejected	3,906	1,224
Transferred	130	23
Suspended	63	28
Types of Complaints		
Human Rights Violations	6,457	5,282
Discrimination	2,675	1,685
Other Incidents	27	18

According to the 2010 annual report of the NHRCK, the sharp increase in discrimination complaints was mainly attributed to rise in complaints on disability-based discrimination, which the current capacity of the NHRCK could not cover. In reality, the Commission recognized this situation on its 2010 annual report:

“the Commission experienced difficulties in providing prompt relief of rights due to the protracted period of processing complaints due to the sharp rise in the number of complaints despite the scaling-down of its organization and personnel in 2009. It was also faced with limitations in responding to various social issues in a swift and proactive manner.”

In addition to this, Chairperson Hyun contributed to the diminished capacity of the NHRCK, which was already reeling from the downsizing in 2009. The Commission fired Ms Kang In-Young, whose contract expired in February 2011. Ms Kang had worked for the NHRCK since its establishment in 2001, was an expert who had dealt with many significant incidents of human rights violations and discrimination, and was a vice president of the NHRCK labor union.

South Korean civil society really worries that the NHRCK will become a typical bureaucratic organization under Chairperson Hyun. The former Secretaries General of the Commission were hu-

man rights experts and selected from outside the government. In contrast, in July 2010, Mr Hyun picked as Secretary General, Mr Sohn Sim-gil, the former Director for Planning and Coordination of the Commission. In choosing an inside employee as the Secretary General, Chairperson Hyun gave this message to NHRCK staff members: "If you want to be promoted to a higher level, you must never forget that you are not human rights activists but government officials who should follow the orders of the chairperson." For this reason, Mr Sohn has tried to reinforce the predominance of Chairperson Hyun, and is leading the disciplinary action against the staff members who protested against the Chairperson. If the staff members of the Commission should act in compliance with such a politicised situation, the Commission's effectiveness will be seriously affected. Due to these regulations of the NHRCK, many staff members have resigned from the Commission., Former staff members and Commissioners established the "Research Center for Human Rights Policy", dubbed an alternative to the NHRCK, in April 2011.

From the time Mr Hyun became chairperson on 20 July to the end of September 2010, the Commission made 395 recommendations, of which only 176 recommendations (44.6 percent) were accepted.. The rate of acceptance from the NHRCK's recommendations has sharply declined compared to the 79.3 percent average rate of acceptance of NHRCK recommendations during the previous government. This demonstrates how the Commission has lost its authority as human rights watchdog of the government and an object of ridicule by South Korean society.

IV. Consultation & Cooperation with Civil Society

The NHRCK had cooperated with civil society by undertaking a partnership project and annual consultation with human rights organizations since 2009. Within two years, however, the relationship between the Commission and civil society had collapsed.

Almost all South Korean civil organizations declared that they do not expect the Commission to develop under Chairperson Hyun after the resignation of Standing Commissioners. In order to show the will of NGOs, they did not submit any application for the partnership project and stopped their consultations with the Commission.

In addition, South Korean civil society organized a mass boycott campaign against the Republic of Korea Human Rights Awards. The NHRCK created the awards in 2003 to honor individuals and human rights groups that worked to improve the human rights situation in South Korea. The awardees—including high school students, a sexual minority organization, and a migrant activist—announced their intent to refuse the awards on 8 December 2010. They said, “The NHRCK is not qualified to give such awards.” In 2009, 45 civic organizations already declined their awards in protest of Hyun’s arbitrary management of the Commission in 2009.

However, the Commission never tried to develop relations with civil society and instead exasperated NGOs by its actions. The Human Rights Solidarity for New Society, a South Korean human rights NGO, published a report that criticized the NHRCK since it does not cooperate with external human rights experts. In March 2011, in preparing an opinion on the issue of Bill of Criminal Procedure, the NHRCK received only two consultations from external experts. The low response to the NHRCK can reasonably be attributed to the refusal of the many human rights experts to cooperate with the Commission. This also shows the crippled operation of the NHRCK at the moment.

In addition, NGOs criticized for lack of proper preparations for an international conference organized by the NHRCK. The NHRCK announced that it would host the ‘Consultation of International Civic Groups to Strengthen the United Nations Human Rights Treaty Body System’ on 19-20 April 2011. As the conference title indicates, the conference should have been organized and prepared with close cooperation and consultations with human rights NGOs. However, the NHRCK invited NGOs to attend the conference only one month before the scheduled date. In response, 57 South Korean human rights NGOs severely criticized these actions of the NHRCK regarding the conference, and announced that they would not attend the conference. Furthermore, those NGOs made these criticisms known to international NGOs invited to participate in the conference, and even held an informal meeting with them.

The NHRCK has also taken steps to restrict citizens participation. Mr Hyun revised the rules for public admission to the committee meetings of the NHRCK. According to the new regulations, applications for admission should be submitted three hours ahead

of the meeting; recording and filming are also prohibited. Furthermore, a person is removed from the audience for causing a commotion will not be permitted to attend a committee meeting for the next three to six months. In response to these new rules, the Human Rights Solidarity for New Society paradoxically made a petition against the NHRCK to the NHRCK in April 2011 that the revised regulations violate the people's right to know and 'principles of open proceedings' under Article 14 of the NHRCK Act. ("The proceedings of the Commission shall be made public, but they may not be made public if deemed necessary by the Commission or a subcommittee")

Furthermore, a delegation of the Asian NGO Network on National Human Rights Institutions (ANNI) made an solidarity mission on 11-12 May 2011 to South Korea in order address the issues related to the NHRCK. The mission planned to undertake interviews with relevant persons in connection with the NHRCK issues. The ANNI mission failed to meet the ther NHRCK Chairperson and Commissioners; and an interview with the Ministry of Public Administration and Safety (MOPAS) that was responsible for the downsizing of the NHRCK in 2009 was also rejected. The delegation was appraised of the many problems raised by South Korean human rights NGOs, such as the independence of the NHRCK and the appointment process of commissioners.

In addition, the South Korean Branch of Amnesty International published its 2011 Annual Report in May. This report shows deep concerns about human rights in South Korea and the crippled operation of the NHRCK.

Finally, there seems to be no sign of warming relations between the NHRCK and civil society, as demonstrated by the Commission's handling of the letter of the ICC-NHRI Chairperson of the ICC-NHRI outlining their concerns about the relationship between the NHRCK and civil society. The letter was to both the Commission and ANNI in April 2011. In telling the media about the letter, the Commission twisted the contents of the ICC-NHRI letter and intentionally leaked these false statements. *Dong-A ilbo*, a major newspaper in South Korea, reported that the ICC-NHRI as saying that "the ANNI's concerns were biased against the NHRCK," and that "left-leaning organizations could not represent a view of the whole (civil society), and the ANNI unilaterally brought up

issues". The ICC-NHRI letter did not contain the said quotations made in the 15 June *Dong-A ilbo* article, and which was confirmed by the NHRCK. However, the reporter who wrote the news article argued that she did not see the letter but learned about its contents through the NHRCK.

KHIS, on the behalf of ANNI, submitted complaints about this news article to the Press Arbitration Committee on 7 July 2011.

V. Conclusion and Recommendations

The NHRCK has not performed its appropriate role since the inauguration of the Lee Government, and its independence has been severely damaged. Unqualified persons took up the positions of the Chairperson and the Commissioners and many people, who are experts in the field of human rights, have left the Commission. The downsizing of the NHRCK in 2009 resulted in the serious impairment of the Commission in performing its functions of dealing with domestic human rights issues. Instead, Chairperson Hyun shifted the Commission's focus on North Korean human rights, following the government's preferences for the NHRCK. Meanwhile, in spite of strong criticism from civil society, the Commission has intensified its regulations against critical staff members, which has weakened its role as a watchdog of the government.

For the past three years, South Korean and international civil society have tried to explain to the government the importance of an independent and effective NHRI, but the government still does not seem to understand the reasons why the NHRCK should comply with the Paris Principles. Therefore, it seems unlikely for any improvement in the near future. Now, South Korean NGOs can only hope that the Government would not further deteriorate the situation of the NHRCK for the rest of the President's term in office.

Japan: The Proposal Falls Short

Civil society views on the latest developments on the establishment of a human rights remedy institution in Japan

Citizens' Council for Human Rights Japan (CCHRJ)¹

General Overview of the Country's Human Rights Situation

When the Democratic Party of Japan (DPJ) became the ruling party in September 2009 human rights organizations in the country expected substantial improvements in the human rights situation under the new administration. It should be recalled that the Justice Minister had contributed to raise expectations by publicly prioritizing three human rights issues: the establishment of a national human rights institution (NHRI), recognition of the competence of UN human rights committees to receive individual complaints; and review of police and prosecutor's office interrogation procedures. However, the DPJ suffered a major electoral defeat in the upper house (House of Councilors) election in July 2010, including the loss of the then Justice Minister. Thus though the DPJ retains the majority in the lower house (House of Representatives), they now take only 44% of the House of Councilors, making it impossible to pursue any agenda on not only human rights issues but also any other issues without an agreement with other opposition parties.

Against such a political backdrop, the three human rights issues raised by the first Justice Minister under the DPJ administration did not make substantial progress. As for the establishment of an NHRI, officials of the Ministry of Justice (MOJ) released a June

1 . Prepared by Ms Shoko Fukui

2010 interim report on the establishment of a “new human rights remedy organization”. However, the final report was not released afterwards, partly due to the loss of the upper house mentioned above which changed the political situation.

With regards to individual communications to the Committees such as Civil and Political Rights (CCPR), the Division for Implementation of Human Rights Treaties in the Ministry of Foreign Affairs seemed to almost complete the review of this matter. However, the concrete schedule to ratify the optional protocols of the relevant International human rights treaties or simply declare its acceptance was yet made public.

The Justice Minister’s private advisory body issued a proposal in the end of March 2010 on the demand for video or audio recording of the entire interrogation process under the police or Public Prosecutor’s Office. However it merely suggested that they continue discussions about the introduction of such recording system.

As part of the effort in recent years, the Cabinet Office set up a promotion council on systemic reform for persons with disability in December 2009 in pursuit of ratifying the disability rights convention. Two task forces were also set up in order to discuss any issues for drafting the relevant bills, including on comprehensive welfare for the persons with disability in 2012 fiscal year, and one against discrimination of such persons in 2013 fiscal year.

Japan underwent the Universal Periodic Review process in May 2008. There were 26 recommendations including on the establishment of an NHRI made by participating countries. The Japanese government submitted the addendum to follow up the 12 recommendations (including the one on NHRI) during the eighth session of the UN Human Rights Council in June 2008.

In March 2011, the Japanese government released the mid-term progress report on its implementation of the UPR recommendations. In the report, the government stated that ‘Japan will continue to work on studies toward the establishment of a national human rights institution in accordance with the Paris Principles in order to realize a more effective remedy for the victims of human rights infringements’.² Japan was also reviewed by Committee on the

2 . The government of Japan, Human Rights Council: 16th Session Universal Periodic Review. Mid-term progress report by Japan on its implementation of recommendations

Elimination of Racial Discrimination (CERD), whose Concluding Observations were published in April 2010³. The concluding observations also included one about the establishment of an NHRI, and also urged the government to provide follow-up information within one year of the adoption of the conclusions. In March 2011, the government provided such comments stating that ‘the Government of Japan considers the establishment of a national human rights institution that is independent of the Government an important issue and intends to continue making necessary preparations for the establishment of the institution’.⁴

Rapid development of establishing NHRI in Japan

As mentioned earlier, the 21 June 2010 interim MOJ report clearly stated that a “Human Rights Committee” will be established as a “human rights remedy institution”, independent of the government, in compliance with the Paris Principles. The same report said that the said body would be established under the Cabinet Office and that important issues such as the constitution of the organization or its remedial powers would be discussed continuously. While each of the Justice Ministers, who have been replaced three times within one year, repeatedly said that they continue the discussions on Human Rights Relief Institution, there has been very little substantial progress, beyond this report.

On the other hand the Project Team (PT) on the Human Rights Remedy Institution in the ruling Democratic Party of Japan (DPJ) was formed in March 2011 to clarify and discuss the issues in a practical manner. The PT conducted hearings three times: with the MOJ, the Japan Federation of Bar Associations, and academic and civil society organizations. The last hearing with academic and civil society organizations was held in mid-May 2011. Those who participated the hearing reminded the PT of the critical issues such as the independence of the institution, the capacity to deal with the

made in May 2008, March 2011. Available from <http://www.mofa.go.jp/announce/ps/pdfs/state110301.pdf> Document Last Accessed: 31 July 2011

3 The Concluding Observations is available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/415/82/PDF/G1041582.pdf>

4 . The Government of Japan, Comments by the Government of Japan regarding the Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD/C/JPN/CO/3-6), March 2011. Available from http://www.mofa.go.jp/policy/human/pdfs/race_rep_concluding_fu1103.pdf Document Last Accessed: 31 July 2011

human rights violations done by the public sector, the definition of the discrimination and human rights, the power to make recommendations to the government, and ensuring the diversity in the institution. The PT subsequently prepared on 9 June 2011 another interim report with an endorsement of Policy Research Committee of DPJ and submitted it to the Justice Minister. This means that the interim report was acknowledged as an official document that reflects the Party's position, as according to the Minister's e-mail magazine, "the MOJ and the ruling party will cooperate with each other to draft the relevant bill."

The main points of the interim report are as follows;

1. The Human Rights Commission (HRC) will be established under Article 3 of the National Government Organization Law.
 - This type of organization has the power to perform appointments of its personnel, and may define rules and regulations of the agency. This is considered to be the best choice under the current legal structure.
2. The HRC will be established under the MOJ.
 - The MOJ's Legal Affairs Bureau (LAB), which has conducted human rights remedy activities, should be utilized in order to transfer the function into the new HRC in a smooth manner.
3. The LAB and its regional offices will be utilized as the national institution.
 - This enables the remedy to be conducted in the same way and the same level nationwide. The regional offices should liaise closely with HRC to address the issues in a careful manner.
 - The selection of the personnel of the regional offices is crucial. Consideration should be given to hiring someone from the civil society in order to ensure the close cooperation with and smooth organizational operations of the HRC.
4. The current Civil Liberties Commissioners will remain unpaid as is and the current organizational system will be utilized.
 - This enables the smooth organizational transfer into the new system. While they remain unpaid, actual expenditures

would be compensated more generously.

- The Civil Liberties Commissioners should be limited to persons who have the voting rights in local elections. Needless to say that Human Rights Commissioners be restricted to Japanese national.
5. Even if the investigations by the HRC are rejected, the pecuniary penalty will not be imposed for the time being.
 - There are strong voices against giving the HRC the power to impose pecuniary penalty as it gives the body unnecessarily strong powers.
 - The administration of the pecuniary penalty might cause unnecessary disputes and interrupt the remedial procedures.
 - While the pecuniary penalty will not be introduced, however, the mechanism must ensure that the HRC's request to investigate the violations by the public sector in particular be granted.
 6. The category of "special remedial procedures" will not be set up.
 7. For the time being, HRC will not have the power to join a lawsuit or file an injunction.
 8. The previously mentioned special provisions to address human rights violations by the media will not be laid down. The media sector itself must address these problems
 9. A clause is added to review the institution itself, its practices, its institutional positioning etc. after five years of its establishment.

Civil Society activities in the establishment of an NHRI

Civil society organizations including the Citizens' Council for Human Rights Japan (CCHRJ) have built a loose network to work together for establishing NHRI. They submitted public statements to the Prime Minister, Justice Minister and the DPJ to call for setting up a Paris Principles-compliant institution. Another CSO network,

the Japan NGO Network for the Elimination of Racial Discrimination (ERD-Net), have organized consultation meetings with relevant government offices in order to gather inputs from such offices then send NGO comments on the replies by the government⁵ to the CERD concluding observations. On the other hand, the group of legal scholars, lawyers and members of Buraku Liberation League held discussions to draft a desirable NHRI proposal.

Main issues

As indicated above, the latest DPJ proposal is to set up a HRC under the MOJ, to absorb the current Civil Liberties Volunteers System, and to restrict the HRC Commissioners and the Commission staff to Japanese national. The latter point means that DPJ turned down the recommendations by Mr Doudou Diene, UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance in 2006, that “there should be no Japanese nationality clause to become investigator of this commission, as such a clause would be discriminatory” and NGO demands for “ensure diversity.” In summary, the interim report ignores most issues insisted upon by NGOs.

CSOs have insisted that the proposed NHRI should be established under the Cabinet Office, rather than under the MOJ. In response to such proposal, the PT took a firm stand against NGOs arguing that since the Public Safety Commission or Police are attached to the Cabinet Office, if the NHRI were also established under the same Cabinet Office, the NHRI would not be able to deal with violations done by these two administrative organizations. Consequently, it would have the same adverse effect as the case of the NHRI being established under the MOJ.

Civil Liberties Volunteers focus on counselling and attending human rights public events. As for counselling, the Volunteers rarely settle any issues by themselves. In most cases, they simply give legal advice as the main form of “assistance” such as recommend someone to visit relevant governmental agencies or public/private organizations for further help, which is far from a one-stop solution. Moreover, they cannot deal with human rights violations committed by other public sector. CSOs in Japan want an institu-

5 http://www.mofa.go.jp/policy/human/pdfs/race_rep_concluding_fu1103.pdf

tion that could deal with issues which the current Human Rights Remedies System cannot. The institution proposed in PT's interim report falls short of a proper national human rights institution.

Recommendations

Various CSOs in Japan want a Human Rights Commission which complies with the Paris Principles, effectively deals with human rights violations committed by the public sector, and has the capacity to make policy recommendations on human rights. Therefore they make the following recommendations to the government and legislatures:

1. The HRC should be independent. The independence must be secured with several points, including specified terms of office and independent financial resources.
2. The HRC must have strong power to address human rights violations by public sector.
3. The HRC must address all human rights specified in the Constitution and the international human rights treaties which Japan has ratified.
4. The HRC must have the function and the power to make effective recommendations or proposals based on the international human rights standards to the existing laws, bills or administrative measures.
5. The HRC must reflect the diversity of the civil society, be gender balanced and the mechanism to utilize the minorities who are subjected to the discrimination.

Malaysia: A Fresh Look at the Commission

ERA Conumer Malaysia¹

I. General Overview

The human rights situation in Malaysia is rather controversial owing to the fact that numerous human rights abuses were recorded throughout the year 2010. Apart from the preventive detention laws—such as the Internal Security Act (ISA) and Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EO) which provides for detention without trial or charge—human rights organisations and civil society are also concerned about blatant human rights violations by the Royal Malaysian Police. Almost everyday news on some human rights violations by the police is reported.

After amending the Human Rights Commission Act 1999 in 2009, the act now limits the tenure of the commissioners to three years with an option of extending it with another term. This amendment caused the term of the previous commission to cease with immediate effect on April 2010. However, the government took 45 days before appointing a new set of commissioners, causing some disruption to the flow of the commission.²

The year 2010 was not an easy year for the commission as it had to deal with various issues such as the appointment of new commissioners, the continuous invoking of ISA and violation of constitutional and human rights by Malaysian government such as, the denial of peaceful assembly.

1 Prepared by Mr Ravin Karunanidhi, Legal Executive, Human Rights Desk

2 <http://thestar.com.my/news/story.asp?file=/2010/6/8/nation/6423356& sec=nation>

II. Independence

A. Enabling Law

The Human Rights Commission of Malaysia (SUHAKAM) was established in 2000 by statute, namely the Human Rights Commission Act 1999 (Act 597). It was set up to provide public with a channel to submit complaints and grouses about violations and abuse of human rights, as well as to create awareness and understanding of human rights issues in Malaysia.³ The Malaysian government established its own national human rights institution (NHRI) amidst huge international pressure for greater respect for human rights between 1998 and 1999. This was a period of political turmoil, during which various human rights violations were witnessed, and fundamental freedom and liberties were abused.⁴ Due to national and international pressure, the Government in 1999 rushed the Act through Parliament without consultation with NGOs and other relevant parties. The public was also left out of the process, without any venue to provide feedback on the draft bill. To top it off, the Government did not provide any explanation to a memorandum submitted by the 34 NGOs and political parties about the lack of consultation in drafting the bill and passing it in Parliament using their 2/3 majority.

The then-Minister of Foreign Affairs Syed Hamid Albar said in Parliament that the Paris Principles were used as a guideline for the proposed Human Rights Commission of Malaysia, and independence of the Commission is its top priority.⁵ Nevertheless, his statement remains highly doubtful to this day.

Prior to the amendments made to Act 597 in 2009, section 5 of the said Act states that members of the Commission shall be appointed by the *Yang di-Pertuan Agong* on the recommendation of the Prime Minister. It further states that the members of the com-

3 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.

4 This was the period that saw the sacking and imprisonment of then-Deputy Prime Minister of Malaysia, Datuk Seri Anwar Ibrahim and the huge clamp down and detention without trial of the “*Reformasi*” activists.

5 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 Albar.

mission shall be appointed from amongst prominent personalities, including those from various religious and racial backgrounds, and they shall hold office for a period of two years with an eligibility for reappointment. This particular section undermined SUHAKAM's independence, and it risked being downgraded by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC-NHRI) from "A" status to "B" status.

Apart from the selection of the Commissioners, there are other concerns with regards to the independence of the Commission. Section 22 of the Act stipulates that "the Minister-in-charge of SUHAKAM may make regulations for the purpose of carrying out or giving effect to the provisions of this Act, including for prescribing the procedure to be followed in the conduct of inquiries under this Act". The possible involvement of the Minister in the Commission's duties demonstrates the non independence of the body. It will only be independent if SUHAKAM is put under the purview of the Parliament rather than the Minister.

Another concern that is prevalent with SUHAKAM is with regards to the relevance of its recommendations. Despite its enabling Act requiring the Commission to prepare an annual report and make recommendations to its findings, the Government has continuously failed to act on SUHAKAM's recommendations. The enabling Act also provides for the Commission to submit special reports to the Parliament, as necessary in respect of any particular matter or matters referred to it and for specific action needed. taken in respect thereof. However, the Parliament has never debated any of SUHAKAM's reports since its inception, and neither has the government acted on the Commission's major recommendations, except in cognisance of often insignificant matters.

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

SUHAKAM operates under the jurisdiction and purview of the Prime Minister's Department. This has seriously undermined its credibility, and claims that it has independence of the Executive branch are often dismissed.

The enabling Act of SUHAKAM requires public authorities to

cooperate with the Commission. However, this requirement has remained purely academic as cooperation from these authorities is rare. In August 2008, the former SUHAKAM chairman Abu Talib said, "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."⁶ This sentiment has been repeated again during a press conference on 26 April 2011 wherein current Chairperson of SUHAKAM, Tan Sri Hasmy Agam said, "Please pay more serious attention to our report". He expressed his hope that the Parliament would discuss the annual report this year.⁷

Two recent examples of the lack of cooperation towards SUHAKAM's work can be seen through the shooting of Aminul Rashid and the death of Pakiam. In the case of Aminul Rashid⁸, the police refused to provide its standard operating procedures on the use of firearms when the Commission requested for it.⁹ It is to be noted that SUHAKAM decided not to inquire into the incident as it had been brought before the court. However SUHAKAM wrote in August 2010 to Y.B Datuk Wira Abu Seman bin Yusop, head of the Special Panel instituted by the government to monitor the police investigation into the incident, requesting for information on its actions or recommendations pertaining to the rules on the use of firearms by police personnel. In a written reply to SUHAKAM, Yusop informed that the panel was satisfied with the police investigation which was transparent, expeditious and covered all aspects. He also said that the panel recommended a few improvements to the Inspector General of Police Standing Order (IGPSO). However, he did not provide any details on the recommendations made.¹⁰

Whereas in the case of Pakiam¹¹, SUHAKAM wrote to the Di-

6 "Suhakam treads an arduous path", News Straits Times, 3 August 2008.

7 <http://www.freemalaysiatoday.com/2011/04/26/suhakam-laments-parliamentary-snub/>

8 Aminul Rashid was a 15-year old student who was shot dead by the Royal Malaysian Police while allegedly fleeing from a car that crashed as he was driving. Police allegedly fired 19 bullets during the incident.

9 "Suhakam denied shooting guidelines", *The Nut Graph*, 30 April 2010, <http://www.thenutgraph.com/shukam-denied-shooting-guidelines/>

10 SUHAKAM (2011) *2010 Annual Report*, Kuala Lumpur : Report of The Complaints and Inquiries Working Group (pg38)

11 Pakiam is a young woman who died five months into her marriage. The victim's father believes that the deceased was a victim of domestic violence after seeing the severe injuries that she had allegedly sustained.

rector of Serdang Hospital on 27 May 2011 requesting to see the body of Pakiam the following day at 11 a.m. The letter was faxed to the director's office at 6 p.m. on 27 May 2011. SUHAKAM's delegation went to the hospital on 28 May 2011 prior to receiving any approval or acknowledgement from the Hospital. The delegation was denied entry as there had been no approval from the Ministry of Health (MOH). SUHAKAM was requested to obtain approval from the MOH, which it did by way of a letter on 28 May 2011 requesting to see the body. Approval was granted and Commissioner Muhammad Sha'ani and an officer managed to see the body on 30 May 2011.¹²

Despite being perceived as a toothless tiger and not independent, SUHAKAM has shown some independence and consistency since the new Commissioners took office. They have been calling the government to recognise the rights on freedom of assembly as expressed in the Malaysian Constitution and Universal Declaration of Human Rights (UDHR). It expressed its regret over the inability of the public to assemble peacefully during the 50 years of ISA vigil that took place on 1 August 2010 at Dataran Petaling Jaya.¹³ It reiterated its stand in regards to freedom of assembly and association for the Bersih Rally which is planned to be held on 9 July 2011 as that right was provided for under Article 10(1)(b) of the Federal Constitution as well as Article 20(1) of the Universal Declaration of Human Rights.¹⁴ However, the government of Malaysia has continued to ignore the view of SUHAKAM. SUHAKAM also took the unusual step of monitoring the event despite the insistence of the Police that it was an illegal assembly.

Apart from recommendations on freedom of assembly, SUHAKAM has also repeatedly called for the repeal of draconian laws such as ISA and EO which gives the government the power to arbitrarily arrest a person and detain them without trial for up to 2 years.

With regards to the Commission's relationship with the judiciary, Act 597 does not give SUHAKAM any power to intervene in

12 <http://www.freemalaysiatoday.com/2011/05/28/suhakam-not-allowed-to-view-abuse-victims-body/>

13 <http://www.mmail.com.my/content/45087-suhakam-regrets-police-arrests-30-gmi-activists-released>

14 <http://www.themalaysianinsider.com/malaysia/article/allow-july-9-rallies-suhakam-tells-putrajaya/>

court proceedings in any capacity. In fact, Section 12(2) of Act 597 explicitly says that the Commission cannot inquire into any complaint relating to any allegation of the infringement of human rights which is the subject matter of any pending court proceedings or has been finally determined by any court.

Notwithstanding absence of any enabling provisions in the Human Rights Commission Act 1999, SUHAKAM has decided to enlarge its role by applying to courts in as *amicus curiae* (friend of the court), to hold watching brief, and to act as an observer, in cases involving human rights. To date, the Commission had held watching brief for the case *Low Swee Siong v Tan Siew Siew* and *Noorfadilla binti Saikin v Chayed bin Basirun and 5 ors*. These two cases involved child rights, and women rights issues, respectively. SUHAKAM plans to pursue more cases involving human rights with the hope that the human rights principles would be given more recognition by the judiciary.

C. Membership and Selection

Prior to the amendments made to Act 597, the appointment process of the Commissioners was one of the weakest points in SUHAKAM, and was a major concern of the ICC-NHRI. Although the new batch of Commissioners appointed in April 2010 are in conformity with the amended Act, SUHAKAM's independence and transparency is still under major doubt.

The amended Act now says that members of the Commission shall be appointed by the *Yang di-Pertuan Agong* on the advice of the Prime Minister upon being consulted by a committee. It also states that a member of the Commission shall be appointed for a term of three years with the option of being reappointed for another term. The committee mentioned above consists of the Chief Secretary to the government who shall act as the chair, the Chairman of the Commission, and three other members, from amongst eminent persons, to be appointed by the Prime Minister.

On 22 June 2009, further amendments to Act 597 were tabled in Parliament. The further amendment was passed wherein the words "eminent persons" was replaced with "three other members of the civil society who have knowledge of or who have practical experience in human rights matters, to be appointed by the

Prime Minister". However, the provision of the civil society is not explained and thus led to concerns that the members of civil societies appointed by the Prime Minister might be ones that are established by or work closely with the government of the day.

Despite the amendments, the independence of the Commission is still doubtful as there was no provision to ensure the rest of civil society's full and transparent participation. The members of the selection committee appointed by the Prime Minister in 2010 were kept secret until it was disclosed by an unnamed source to the media on 1 April 2010. However, the government only acknowledged the report after five days due to heavy pressure from the civil society to reveal the members of the selection committee.

Selected Malaysian civil organisations received a letter from the Director General of the Prime Minister's Department in February 2010 about the nomination of candidates for new Commissioners, wherein each organisation was allowed to give one nominee within a short deadline of one week. In response, three civil society organisations¹⁵ wrote to the Prime Minister's Department to open up the nomination process and allow public nominations to ensure inclusiveness in the selection process. Civil society organisations sent another letter signed by 29 NGOs to the Chief Secretary on 24 February 2010 urging him to ensure that the Commission is selected from a pool of qualified candidates proposed through a transparent, participatory and inclusive process guided by the Paris Principles and international human rights standards. The group also asked the selection committee to make public all names and profiles of candidates received, and to hold public interviews. However, neither the Prime Minister nor the Chief Secretary to the government replied to any of those letters, as the selection process was kept secret. In addition, Deputy Minister Liew Vui Keong said in Parliament that there is no provision in the enabling law of SUHAKAM which obliges the Prime Minister discuss with NGOs before making any appointments.¹⁶

Apart from the failure to include qualification provisions of Commissioners, Act 597 also does not provide for the composition of the SUHAKAM members. However, the lack of provision did

15 SUARAM, Tenaganita and Amnesty International

16 Liew Vui Keong (6 April 2010) First Meeting, Third Session of Twelfth Parliament, Hansard, DR.6.4.2010 (p. 11) <http://www.parlimen.gov.my/hindex/pdfDR-06042010.pdf>

not affect the composition in practical terms as the membership of the Commission consists of a near satisfactory pluralism, although a better gender representation would have been more favourable.

Currently, the amended Act provides the Commissioners to hold office for a period of three years with further eligibility for one reappointment. However, this term of three years is still not enough as the Commissioners will need one year to familiarise with the system and to plan out their strategy. With that, they will only be left with two years to implement their plan. In fact, the current chairman, Tan Sri Hasmy Agam, has groused that the 3 year term is too short.¹⁷

It is unprecedented and commendable that more than half of the new Commission, four out of the seven Commissioners¹⁸, including the Chairman serve the Commission on a full time basis. All previous Commissioners served the Commission on a part-time basis as they wore various hats at the same time. This arrangement compromised the independence and effectiveness of the Commission, and portrayed a picture that the Commissioners and government were not committed to upholding human rights in Malaysia. However, it is pertinent to note that it is the goodwill and self-imposed responsibility of the new Commissioners to serve on a full-time basis as neither Act 597 nor its amendments specifically specify the need for them to do so. The government should have required the Commissioners to serve on a full time basis when amendments to Act 597 were made in 2009, as recommended by civil society organisations. Apart from being more effective, these amendments would have been in conformity with the recommendation made by ICC-NHRI in April 2008 which said, "Members of the NHRIs should include full-time remunerated members [...]"¹⁹

D. Resourcing the NHRI

Section 19(1) of Act 597 stipulates that the government shall provide the Commission with adequate funds for its operation;

17 <http://www.freemalaysiatoday.com/2011/04/18/three-year-term-is-too-short-says-suhakam-chief/>

18 Tan Sri Hasmy Agam (Chairman), Mr Muhammad Sha'ani Abdullah, Mr James Naya-gam and Mrs Jannie Lasimbang

19 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, "Report and Recommendations of the Sub-Committee of Accreditation", Geneva, 21-23 April 2008 (p.12)

while section 19(2) prohibits the Commission from receiving foreign funding. Further, section 19(3) only allows local funding from individuals or organisations for the purposes of promoting awareness or for human rights education. In 2010, the commission received a grant for 9,319,075.00 Malaysian Ringgit (MYR) from the Government and another 6,440 MYR from *Hibah* ('gift') given by the bank.²⁰

II. Effectiveness

A. Concrete work in the area of promotion and protection of human rights, with focus on complaint handling.

One of SUHAKAM's weaknesses is its ineffectiveness in pushing through major legislative and institutional changes in Malaysia in accord with universal human rights principles and standards. The government has thus far only implemented few of SUHAKAM's recommendations²¹ namely:

- i. The improvement of conditions in detention centres and police lock-ups (however, this claim is highly doubtful);
- ii. The ratification of the Convention on the Rights of Persons with Disabilities;
- iii. The enactment of the Anti-Trafficking in Persons Act 2007;
- iv. The withdrawal of reservations to Articles 1, 13 and 15 of the Convention on the Rights of the Child and Articles 5(a), 7(b) and 16(2) of the Convention on the Elimination of All Forms of Discrimination Against Women;
- v. Some improvements in public housing and accessibility to healthcare (a very vague claim); and
- vi. Making primary education compulsory.

²⁰ SUHAKAM (2011) *2010 Annual Report*, Kuala Lumpur: SUHAKAM (pp 197)

²¹ SUHAKAM (2011) *2010 Annual Report*, Kuala Lumpur: Chairman's Message (pg1-2)

However, the SUHAKAM has failed to convince and urge the government to ratify the six core human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The failure of the government to ratify these treaties will only portray SUHAKAM as weak, and the country as lacking commitment to enhancing human dignity as well as promoting and protecting human rights of Malaysians to the eyes of the world.

SUHAKAM has a complaint handling mechanism—the Complaints and Inquiries Working Group (CIWG)—which inquires and looks into allegations of human rights violations and abuse. There is no provision which sets out how complaints should be made as it can be made in the form of a memorandum²² or via SUHAKAM’s official web portal²³. Upon receiving a complaint, an officer will carry out the official written order by the Commission or the Commissioner in charge which is in accordance with precedence.

Upon receiving a complaint, it will be filed and be given a file number and notification will be given to the complainant within three working days. The officer receiving the complaint (in the event the complainant complains personally in SUHAKAM’s office) will conduct the first evaluation and make recommendations and plan actions in regards to the complaint with the Assistant Chief Secretary of the CIWG (Supervisor). If the complaint is received in other forms (emails, letters), the Supervisor is responsible for evaluating the complaints. Decisions on case classifications will be made by the Commissioner or Supervisor responsible, based on past precedents. For complaints outside the Commission’s jurisdiction, a letter will be sent to the complainant describing that specific decision/classification.

Cases with element of human rights violations will then be passed on to the relevant officers, and an investigation on the complaint will be carried out. The contents of all correspondence has

22 SUHAKAM (2011) *2010 Annual Report*, Kuala Lumpur: Report of the Complaints and Inquiries Working Group (pg35). It was reported that out of the 1,005 reports received by the Commission, 42 were in the form of a memoranda.

23 <http://www.suhakam.org.my/sumber;jsessionid=265BD6403EA6179A105771C60B58D99A>

to be acknowledged, approved and signed by commissioners only, as the officers are not allowed to sign any official letters. Officers intending to make any visits for the purpose of facts collecting must obtain approval of the Commissioner, and the report of the visit has to be presented to the Commission. The final process is the case evaluation wherein SUHAKAM will take note of the accusation, and the reply by the alleged perpetrator. Evaluations are based on physical evidence and not on perception. The officer in charge will then inform and discuss the development of the case with the Supervisor and Commissioner until the case is solved. Finally, a notification letter signed by the Commissioner will be sent to the complainant.

It has to be noted here that the Commissioner has the liberty to give any suitable instruction as regards to a case at any stage of its development of the case. Apart from that, each case will be decided by the Commission or Commissioner and the officer is not allowed to take any action that does not conform to the precedent, without the approval of the Commission or Commissioner.

From January to December 2010, the Commission received 1,005 complaints of which 42 were in the form of memoranda. Out of the 1,005 complaints, 437 were found to be out of SUHAKAM's jurisdiction—including administrative issues which should be addressed by the relevant agencies; criminal cases to be referred to the police and other investigation agencies; those that were pending before Courts or had been disposed off by the Courts; and those under the jurisdiction of professional bodies. The Commission accepted 572 cases in relation to human rights violations, including cases on police force's in action, excessive use of force and abuse of power, immigration department, prison department, the Emergency (public Order and Prevention of Crime) Ordinance 1969, Internal Security Act 1960, land matters, refugees, freedom of religion and freedom of expression.

However, of the 572 cases accepted, investigations have only been completed on only 215 cases.²⁴ It is strongly believed that the absence of commissioners from 23 April 2010 to 7 June 2010 contributed to the large backlog of cases. It is also interesting to note that the complaints varied at each location as the complaints in peninsular Malaysia were mainly related to preventive detention

24 SUHAKAM (2011) *2010 Annual Report*, Kuala Lumpur: Report of the Complaints and Inquiries Working Group (pg35-36)

laws especially the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (64 cases) and police inaction (57 cases); in Sabah, the majority of the complaints were about land matters (92 cases) and citizenship issues (56 cases); in Sarawak the grievances were about infringement of the indigenous peoples' customary rights to land (27 cases).

One of the major limitations in regards to receiving complaints is that SUHAKAM only has offices in the major cities—Kuala Lumpur (KL), Kuching and Kota Kinabalu—thus making it difficult for those in rural areas or in other states to reach it. The effectiveness of e-complaints cannot be ascertained as it has never been reported in SUHAKAM's annual report. There is also no ground or mobile team to move around the country, especially in the rural areas. Therefore, the victim has to travel long distances to lodge a complaint in person.

SUHAKAM has been organising regular roadshows in all states since 2002. This is a part of an on-going human rights awareness programme, where all members of society comprising political leaders, community leaders, civil servants, members of NGOs, districts chiefs, school teachers and principals, students are invited to attend briefings on the role and functions of SUHAKAM, and to have a dialogue session on human rights issues and awareness. The roadshow also provides an avenue for submission of complaints by the public.

IV. Thematic Focus

A. Specific activities on the promotion and protection of HRDs and WHRDs

In 2009, SUHAKAM announced that it had set up a human rights defenders (HRDs) desk to improve the protection of HRDs in Malaysia. Commissioner Michael Yeoh who made the announcement in a Roundtable Discussion with NGOs on 11 March 2009 said, "The 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.”²⁵

It is to be noted that the HRD desk is responsible to receive and to investigate complaints on human rights violations through phone calls, emails, submissions of written statements and memorandums from the public including from HRDs. There is also a mechanism within SUHAKAM that responds to requests for assistance to HRDs at risk. It does so by conducting investigation, monitoring as well as visitations and meetings with relevant stakeholders. However, the effectiveness of this is questionable because of past incidents. For example, those participating in the peaceful candle light vigils during the 50th Anniversary of the ISA were arrested by the police despite the presence of SUHAKAM commissioners.²⁶ Nevertheless, SUHAKAM must be commended for sending its team to monitor the vigil and condemning the police for arresting those in the peaceful assembly.

Despite having a few roundtable discussions with civil society organisations (CSOs), SUHAKAM has never lobbied the government openly for the adoption of international standards for the protection of HRDs such as the UN Declaration on Human Rights Defenders into domestic law. To add more, no dialogue has been held between the government of Malaysia and UN Special Rapporteurs on HRDs.

B. Interaction with the international human rights mechanisms

SUHAKAM met with the UN Working Group on Arbitrary Detention (UNWGAD) on 15 June 2010, and later released a press statement in response to the UNWGAD’s initial findings. In 2009, SUHAKAM submitted its statement to the 11th Session of Human Rights Council in response to the Report made by the Special Rapporteur on the Right to Education on his mission to Malaysia. A SUHAKAM delegation also held a meeting with the Special Rapporteur to discuss effective ways of ensuring that the education system complies with international human rights standards. SUHAKAM also participated in a consultation chaired by the UN

²⁵ Report of the Roundtable Discussion on Economic, Social and Cultural, Civil and Political Rights with NGOs, 11 march 2009 (p.2)

²⁶ <http://thestar.com.my/news/story.asp?file=/2010/8/3/nation/20100803145014&sec=nation>

Special Representative to the Secretary-General (SRSG) on Business and Human Rights on 11 and 12 October 2010 in Geneva, as well as the 8th session of Human Rights Council (HRC) Working Group on the Effective Implementation of the Durban Declaration and Programme of Action on 13 Oct 2010.

Apart from that, SUHAKAM engages with the HRC directly and through the Asia Pacific Forum of NHRIs (APF) and the ICC-NHRI, particularly in advocating for the ICC-NHRI Strategy Paper on the review of the HRC's work and function by the UN General Assembly. It has also attended a number of HRC sessions and submitted written submissions as well as delivered oral statements to the HRC. At the 23rd Session of the ICC-NHRI held from 23 to 25 March 2010 in Geneva, SUHAKAM and three other human rights institutions were elected as members of the ICC-NHRI Bureau.²⁷ The Commission attended two ICC-NHRI Bureau Meetings held on 22 March and 7 October 2010 in Geneva and Edinburgh respectively.

SUHAKAM participated in the UN Universal Periodic Review (UPR) on Malaysia in 2009 and had also submitted its stakeholder report to the UPR Working Group in Geneva. SUHAKAM is currently following up the UPR outcomes with the relevant stakeholders through consultation meetings. The civil society was updated on several positive steps taken by the government to implement the UPR recommendations via a briefing session held on 11 May 2010 by the Ministry of Foreign Affairs. SUHAKAM has been monitoring the UPR implementation by the government agencies with the assistance of an Inter-Working Group Committee.

SUHAKAM is a member of the ICC-NHRI Bureau, and has engaged with the ICC-NHRI and its Sub-Committee on Accreditation (SCA) in past especially during the ICC-NHRI Bureau and General Meetings. It is worthy to note that during the ICC-NHRI's accreditation review in 2008, the ICC-SCA gave a one-year notice to SUHAKAM to make the following improvements regarding its independence and conformity with the Paris Principles, failing to do so would mean downgrading its accreditation from A status to B:

1. The independence of the Commission needed to be strengthened by the provision of clear and transparent appointment

27 SUHAKAM (2011) 2010 Annual Report, Kuala Lumpur: Report of the International Issues and cooperation Committee (pg 84 -86).

and dismissal process in the founding legal documents.

2. With regard to the appointment of the members of the commission, the Sub-Committee noted the short term of office of two years.
3. The importance of ensuring the representation and involvement of different segments of society in suggesting or recommending candidates to the governing body of the Commission.
4. The need for SUHAKAM to interact and participate more with mechanisms of the international human rights system, and making recommendations at national level.

In its special review on 26 March 2009, the ICC-NHRI recommended that “consideration of the accreditation status of SUHAKAM be deferred to its next session” as the amendments to the enabling law of SUHAKAM were then still before the Upper House of the Parliament. The ICC-NHRI also noted that “some of the concerns it raised at its April session have been addressed (eg. The expansion of the term of office to 3 years renewable)”²⁸. The ICC-NHRI further²⁹:

1. Expressed its disappointment that the amendments do not make the process more transparent though 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;
2. Expressed its concern with regard to the inclusion of performance indicators, used in relation to re-appointment or dismissal decisions, and stressed that such requirements must be clearly established and appropriately circumscribed, so as not to interfere in the independence of members and made public; and
3. Stressed the need for SUHAKAM to continue to promote ratification and implementation of international human rights instruments.

²⁸ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, “Reports and Recommendations of the Session of the Sub-Committee on Accreditation”, Geneva, 26-30 March 2009 (p.10)

²⁹ Ibid

In November 2009, the ICC-NHRI resumed its special review to determine SUHAKAM's status, during which the Commission was accredited with an "A" status. The ICC-NHRI nevertheless noted that the final amendments may not, in practice, address all concerns raised in previous sessions, namely:³⁰

1. The selection of civil society representative on the selection committee is at the sole discretion of the Prime Minister; and
2. The decision of the selection committee are only recommendatory, since the Prime Minister is required merely to consult with, but is not bound to accept its decisions.

The ICC-NHRI also noted the need to assess the proposal to develop performance indicators during re-appointment or in cases of dismissal and whether these are "clearly established; appropriately circumscribed, so as not to interfere in the independence of members; and made public".

On 28 January 2011, the ICC-NHRI confirmed SUHAKAM's "A" status again. The ICC-SCA welcomed the adoption in 2009 of the two Human Rights Commission of Malaysia (Amendment) Acts³¹ and expressed its appreciation for the constructive approach taken by SUHAKAM in pursuing both sets of amendments with the government. Nevertheless, the ICC-SCA commented as follows:³²

1. The SCA notes the ongoing development of Key Performance Indicators (KPIs) and its previous recommendation that once adopted, they be made public. KPIs should not be used to infringe upon the functional independence and organizational and financial autonomy of an NHRI. The SCA therefore encourages SUHAKAM to ensure that the finalization of KPIs does not restrict the institution's ability to review and revise its priorities, dependent upon its assessment of the domestic human rights situation.

30 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, "Reports and Recommendations of the Session of the Sub-Committee on Accreditation", Geneva, 16-18 November 2009 (p.8-9)

31 Laws of Malaysia Act A1353 Human Rights Commission of Malaysia (Amendment) Act 2009 and Laws of Malaysia Act A1357 Human Rights Commission of Malaysia (Amendment) Act 2009

32 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, "Reports and Recommendations of the Session of the Sub-Committee on Accreditation", Geneva, 11-15 October 2010 (p.12)

2. It refers to General Observation 1.5 “Cooperation of NHRIs with other human rights institutions” and encourages SUHAKAM to work closely with civil society organizations.

SUHAKAM is encouraged to continue to seek advice and assistance from OHCHR and the APF.

C. Follow-up or implementation of references by the ACJ

According to Home Minister Hishamuddin Hussein’s reply to opposition parliamentarian, Liew Chin Tong’s question in April 2011, 441 persons had been sentenced to death since 1960. The minister added that as of 22 February 2011, another 696 are waiting for execution in Malaysian prisons. Apart from Malaysia and Singapore, all the other countries in the Commonwealth have declared the mandatory capital punishment as “cruel and unusual punishment” as the mandatory nature gives no room for mitigation, and takes away the powers of the judge because upon being found guilty, the judge would have no choice but to hand down the death penalty to the accused. In fact, SUHAKAM has in the past and most recently on 2 February 2011 called the government to reconsider capital punishment. Its Chairman said that the Commission is against capital punishment as it is against the UDHR and other international human rights conventions.³³

Human trafficking is among the major human rights issues faced by Malaysia as it is among the popular destinations for traffickers. A very small number of Malaysian women and children are trafficked for sexual exploitation in Singapore, Hong Kong, Taiwan and the United States of America. On the other hand, Malaysia is a destination country for a significant number of men, women and children who are trafficked from Indonesia, Thailand, Philippines, Cambodia, Vietnam, China, India, Sri Lanka and Bangladesh for sexual and labour exploitation. Although many victims voluntarily migrate to Malaysia to work in various sectors, these victims are eventually coerced into debt bondage or involuntary servitude. However, Malaysia’s record as a human trafficking centre has improved recently. The United States Trafficking in Persons (TIP) Report upgraded Malaysia’s status from Tier 3 to

33 <http://biz.thestar.com.my/news/story.asp?file=%2F2011%2F2%2F5%2Fbusiness%2F7925350&sec=business>

Tier 2 in recognition of the country's efforts to prevent human trafficking crimes.³⁴ Among the "efforts" taken by the government is the usage of the draconian ISA instead of the existing anti-human trafficking laws on alleged traffickers.

The amendments to the Anti-Trafficking in Persons Act 2007 also covers the smuggling of migrants. SUHAKAM expressed its concerns and said that trafficking in persons and smuggling of migrants should be treated as separate issues so as to avoid problems in identifying victims of human trafficking.³⁵

Between 2002 to 2008, a total of 34,923 foreigners were caned by the Malaysian authorities for immigration offences.³⁶ Instead of calling to an end for such inhuman acts, the Malaysian government has been glorifying caning, notwithstanding the fact that such systematic torture and ill-treatment leaves victims with permanent physical and psychological scars. Most torture victims in the country are foreigners including refugees as the Malaysian law does not recognise refugees.³⁷ Apart from physical torture, the Malaysian government also administers mental torture by using the draconian ISA and EO. The ISA has been the symbol of injustice and torture in Malaysia for the past 51 years. Despite continuous pressure from NGOs, the public and opposition politicians to repeal the ISA, it has fallen on the government's deaf ears. In an interview conducted by *The Nut Graph* recently the SUHAKAM Chairman expressed his dissatisfaction on torture by saying, "Personally, I've always felt it's embarrassing that Malaysia has yet to ratify these conventions, especially the Convention Against Torture. We cannot condone torture. It's a long-haul fight. We will continue to engage with the government. I'll be happy if the government is willing to come on board".³⁸

It has to be noted here that despite research and enquiries made, SUHAKAM's implementation on ACJ's recommendation could not be found. Nevertheless, it is pertinent to note that the

34 <http://www.malaysianmirror.com/homedetail/6-national/42911-closer-to-stopping-human-trafficking>

35 SUHAKAM (2011) *2010 Annual Report*, Kuala Lumpur: Key Issues (pg 14)

36 <http://www.theaustralian.com.au/news/world/caning-in-malaysia-is-torture/story-e6frg6so-1225967236394>

37 <http://www.heraldsun.com.au/news/more-news/refugees-claims-of-torture-in-malaysia/story-fn7x8me2-1226067473033>

38 <http://www.thenutgraph.com/suhakam-chief-%E2%80%9Cwere-an-independent-entity%E2%80%9D/>

Commission's mandate is advisory in nature and it is up to the government to take up the recommendations as the Commission has no enforcement power.

V. Consultation & Cooperation with Civil Society

Formal Relationships with Civil Society in General

There is no specific rule or law available to formalize the relationship between SUHAKAM and civil society organisations in Malaysia. However, there are accepted criteria wherein the civil society group that SUHAKAM engages with must be a human rights organisation or an organisation which champions similar issues. Hence, there is no hard or fast rule in terms of forging the said relationship. It is to be noted that the Commission is open in its engagement with civil society groups in Malaysia. Having said that, there is reluctance on the part of civil society to engage with SUHAKAM because of their own perception and SUHAKAM's history which led to it being boycotted by NGOs, most notably when 42 organisations boycotted SUHAKAM's 10th year anniversary on 8 September 2009.

However, there are some NGOs and stakeholders such as the Bar Council, Royal Malaysian Police and some enforcement agencies that work closely with SUHAKAM. Whereas, most other NGOs work with SUHAKAM on project basis and sit in various committees.

In addition, in its first ever "National Inquiry into the Land Rights of the Indigenous People in Malaysia", SUHAKAM has actively engaged the Indigenous Peoples (IP), NGOs and media as well as other stakeholders including government agencies which is essential in ensuring full participation and inclusiveness of the process.

The role of corporations in the area of human rights is increasingly coming under scrutiny by the international society due to a considerable impact on the lives and human rights of people. The government bears the primary obligation to ensure the promotion and protection of human rights while companies also have the duty to promote and protect the human rights. Hence, a series of consul-

tations with the government agencies, non-governmental agencies (NGOs), community based organisations (CBOs) as well as the business sector was organised by SUHAKAM through the Economic, Social and Cultural Rights Working Group (ECOSOCWG) to discuss the relation and issues pertaining to business and human rights and also to highlight the importance of having a national policy or guideline on business and human rights in Malaysia.

VI. Conclusion

After 10 years in existence, SUHAKAM now has a new batch of Commissioners for the first time in 2010. This fresh appointment gave much promise for a better upholding of human rights in Malaysia as their appointment was made following the 2009 amendments on Act 597. Despite taking office only in June 2010, the Commission has done a considerable amount of work by going down to the ground, and engaging the various agencies to provide for a better human rights situation in Malaysia. However, it has to be noted that their work does not have much bite as their powers are curtailed by the very Act that formed this Commission.

With an improved pluralism and four out of the seven Commissioners serving on a full time basis, the nation expects that the deplorable human rights situation in Malaysia will improve. It is commendable that the new set of Commissioners has been more vocal on issues affecting the human rights and constitutional rights of Malaysians. As they were in office for only six months in 2010, it is only fair that they are given more time before their true capabilities can be assessed.

Recommendation

To the Government

- To implement all recommendations made by SUAHAKAM especially on the ratification of the remaining six human rights core treaties;
- To make the appointment process of Commissioners more transparent;

- To ensure that the Commissioners serve the Commission on a full time basis;
- To give SUHAKAM more powers to conduct spot checks in places of detention;
- To act on investigations conducted by SUHAKAM
- To abolish all laws on detention without criminal charges; and
- To uphold all constitutional rights and stop violating them, especially freedom to speech and freedom of assembly.

To the Parliament

- To give more importance to SUHAKAM's annual report by debating it in Parliament;
- To push the government to put SUHAKAM under the purview of the Parliament and not the Prime Minister's office; and
- To push for further amendments to Act 597, Act A1353 and Act A1357.

To SUHAKAM

- To continue being vocal in their stand;
- To organise more public campaigns especially on those issues that the government has continuously failed to act on;
- To act as middle person between the government and civil society in holding more meaningful meetings; and
- To be independent and not submersive to the government.

The Maldives: A New Commission

Maldivian Democracy Network¹

I. Political Context

The Maldivian journey towards democracy began with prison riots in 2003 to which the state responded with force. These riots later evolved into demonstrations in the capital Male', demanding political reforms, democracy and respect for human rights. These pressures eventually led to the adoption of a new Constitution in August 2008 which, for the first time in the country's history, established the separation of powers, as well as creating independent commissions which provided a check and balance of state powers. Soon after, in October 2008, the country held its first multi-party presidential elections, bringing an end to 30 years of uninterrupted rule by the incumbent, as the opposition Maldivian Democratic Party (MDP) came to power on a coalition platform. However, in March 2009, the ousted Dhivehi Rayyithunge Party (DRP) gained a majority in the parliamentary elections. The country has also made its first foray into decentralization with local councils elected at the island, city and atoll level for the first time in February 2011. The Maldives is thus a young and fragile democracy grappling with severe economic and social problems against a backdrop of raised expectations and political polarization. Some groups seem to already be disillusioned with the democratic experience, and the language of human rights is seeming becoming increasingly unpopular, with ultra-conservative Islam and the previous non-democratic system of government being proposed as possible alternatives.

Character of the HRCM

1 Prepared by Mr Ahmed Irfan, Executive Director

The Human Rights Commission of the Maldives (HRCM) is both a Constitutional and a statutory body, but it was first established by presidential decree in 2003. However, a law was passed in 2005 establishing the Commission. This law was amended in 2006², and it is the current Human Rights Commission Act which now defines the functions and powers of the HRCM.

II. Independence

The Constitution states that: “The Human Rights Commission is an independent and impartial institution. It shall promote respect for human rights impartially without favour and prejudice.”³ This independence is reiterated in the Human Rights Commission Act (hereafter ‘the Act’) which states that “The Commission is an independent legal entity with a separate seal, possessing power to sue and suit against and to make undertakings in its own capacity.”

In case of a previously unforeseen conflict of interest arising during a Commission member’s tenure, the Act empowers the President of the Republic to request parliament to either dismiss or suspend the said member. A two-thirds majority is required in parliament to carry through this motion.

Remuneration to Commission members is decided by parliament but cannot be altered until their tenure is over.

The HRCM is accountable to parliament and to the President of the Republic to the extent that it must submit an annual report and financial audit to both. The annual report must contain the cases filed at the Commission; its decisions and recommendations to the government; and the recommendations adopted or abandoned by government.

Given the strong emphasis on independence in the legislative framework of the Commission and the background of the current Commissioners in place, the Maldivian Democracy Network (MDN) does not believe that independence from the executive, parliament or judiciary is an issue. The HRCM’s stance during the ‘political crisis’ of July and August 2010 is illustrative of the institution’s independence from the both the executive and parliament.

2 Law No: 6/2006

3 Section (b), Article 189

The en masse resignation of the cabinet in June of 2010 brought great political uncertainty to the country, and was closely followed by the arrest of several prominent parliamentarians on charges of corruption and sedition⁴. This led to street violence between the opposing party supporters and the deployment of the army on to the streets of the capital. Prior to the cabinet resignations, the HRCM released a statement on the 28th of March 2010⁵ condemning acts of political violence; citing inconsistencies in the application of the regulation on assembly by the security forces; calling upon the security forces to deal with all parties in an even-handed and fair manner; and expressing concern over actions within parliament which the HRCM said 'brought disrepute' to the institution. Upon resignation of the cabinet in June of 2010, the HRCM expressed concern⁶ on the limitations placed on the rights and freedoms guaranteed by the Constitution.

Most significantly perhaps, the HRCM clearly stated its position that the detention of an opposition leader on the pretence of the military to put him in 'protective custody' was in violation of his Constitutional rights and called upon the government to release him immediately⁷. It is doubly significant that the HRCM issued this strong statement on the same day that the President's Office sent the names of the nominees to the new Commission for approval to the People's Majlis⁸.

The financial independence of the Commission remains one area of concern. Article 30 of the Human Rights Commission Act states that "The state treasury shall provide the Commission the funds from the annual budget approved by the People's Majlis, essential to undertake the responsibilities of the Commission".

However, for the fiscal year 2010, MDN understands that the Commission had to reduce the number of staff and the activities it carried out due to a lack of funds. Even after these reductions, the HRCM requested MRf 17,592,702 (approx. USD 1,379,820) but was allocated only MRf 15,463,678 (approx. USD 1,212,837).

Nonetheless, for the fiscal year 2011, it is noteworthy that the

4 <http://haveeru.com.mv/?page=details&id=98034&tbl=archiv&cat=search>

5 HRCM press release PR-004/2010

6 HRCM press release PR-007/2010

7 <http://haveeru.com.mv/?page=details&id=98756&tbl=archiv&cat=search>

8 <http://haveeru.com.mv/?page=details&id=98749&tbl=archiv&cat=search>

parliament awarded the HRCM MRf 23,780,489 which is almost 95% of the requested amount of Mrf 25,200,513, which was the result of negotiations between the HRCM and the Ministry of Finance and Treasury (MoF).

An issue of more serious concern regarding financial independence is that the HRCM does not have an independent bank account, and all payments need to go through its account at the MoF. This has led to several delays in paying creditors which have, by its own admission, made it extremely difficult for the Commission to function⁹. Furthermore, the government remains in a position where it can potentially block expenditures of the Commission, as exemplified by a requirement that the Commission obtain approval from the MoF for all international travel during the 'economic crisis' of 2010.

MDN and other NGOs have repeatedly expressed concern over the lack of financial autonomy of all independent institutions in the country, including the Elections Commission, Anti-Corruption Commission and the Human Rights Commission of the Maldives.

A. The New Commission

1. Appointment

Both the Constitution¹⁰ and the Act state that the President of the Republic shall nominate names for membership of the Commission to the parliament. Those names approved by a parliamentary majority shall be appointed as members. The Act specifies that a seven-member ad hoc committee shall be formed in parliament to review the nominees, interview candidates and prepare recommendations for parliament¹¹. This same procedure is followed for the appointment of a President and Vice-President of the Commission from among its members.

The enabling legislation does not require the President of the Republic or parliament to engage in a consultative process or advertise vacancies for the Commission widely. It is unfortunate that in the absence of a legislative necessity to do so, neither the Presi-

9 Annual report of the HRCM, p.87

10 Constitution of the Republic of Maldives, Article 190

11 Human Rights Commission Act, Article 5

dent's Office nor the parliamentary committee consulted with civil society on the nominations to the HRCM.

The previous commission had been appointed in 2006, and since each commission has a tenure of five years¹², the end of its term should fall in 2011. However, since the Commission had been appointed prior to the ratification of the 2008 Constitution, the commission was deemed an 'interim institution' following Article 297 of the Constitution. This meant that its members would have to be re-appointed within two years after the new Constitution took effect on 7 August 2008. Accordingly, the President's Office announced openings for applicants to the Commission in the government gazette on 3 June 2010, with a two-week deadline¹³. MDN learnt that 57 individuals applied during the two-week period, and eight applicants were sent for parliamentary consideration on 20 July 2010. These eight names included only two of the five incumbent commissioners, and omitted the then vice-president of the Commission Mohamed Zahid. The two commission members who were included among the eight nominees were Ahmed Saleem, then President of the Commission, and Ms Mariyam Azra.

Parliament voted on the President's nominations to the Commission on 12 August 2010, and approved only three of the eight nominations. Commission President Ahmed Saleem failed to gain parliamentary approval by one vote, although Mariyam Azra was approved, with 69 out of 71 votes in favour. The other two confirmations were Ms Jeehaan Mahmood (58 out of 72 votes in favour, 10 abstentions) and Mr Ahmed Tholal (70 out of 72 votes in favour)¹⁴. The three confirmed members were sworn in on 17th August 2010.

The President's office made six new nominations for the two vacant Commission seats on 18 August 2010. One of these six nominees was former Commission member Shaikh Ahmed Abdul Kareem. Shaikh Kareem has a background in religious studies, and was likely nominated in response to comments by some parliamentarians criticizing the government for not proposing anyone with a religious background in the previous round of nominations¹⁵. Of the six nominations, parliament confirmed Shaikh Kareem (64 votes in favour out of 64 cast) and Dr. Aly Shameem (65

12 Human Rights Commission Act, Article 7

13 Government Gazette Volume 39, Issue 59

14 <http://www.haveeru.com.mv/?page=details&id=99567&tbl=archiv&cat=search>

15 <http://www.haveeru.com.mv/?page=details&id=99779&tbl=archiv&cat=search>

votes in favour out of the 65 votes cast).

It is disappointing to note that although Parliament confirmed the last two nominees to the Commission on 30 August 2010, they were not officially sworn in and thus could not assume their responsibilities until 13 September 2010.

To the Commission's credit, it continued to receive and investigate complaints despite being two members short and not having a president or vice-president in place¹⁶.

Given that the parliament is controlled by the opposition party, the comfortable majorities by which all five commission members were eventually confirmed by parliament augurs well for the legitimacy and credibility of the institution.

a. Appointment of President and Vice-President to the Commission

According to Article 8 of the Act, the President and Vice-President of the Commission shall be appointed from among the members of the Commission by the President of the Republic, upon the advice of the People's Majlis.

Accordingly, the President nominated to parliament, Ms Mariyam Azra as President and Ms Jeehaan Mahmood as Vice-President of the Commission. A seven member ad-hoc committee in parliament reviewed the nominations, and the committee report was discussed on the floor of parliament on 30 August 2010. One member from each political party and independent member was allowed to speak for three minutes on the committee report which recommended that both nominations be approved by parliament¹⁷.

It was extremely disappointing that during the discussion on the parliament floor, some members took issue with the fact that the nominees for both the presidency and vice-presidency were women. A deputy leader of the majority party in parliament, (DRP) Mr Ilham Ahmed said that while he believed both nominees were 'capable' he also believed that according to 'Islamic principles' at least one of the two positions should be filled by a man¹⁸. Speaking in a similar vein, independent MP for Kudahuvadhoo

16 <http://haveeru.com.mv/?page=details&id=100329&tbl=archiv&cat=search>

17 Minutes of the Majlis session of 30th August 2010, page 69

18 Minutes of the Majlis session of 30th August 2010, page 72

constituency Mr Ahmed Amir remarked that he did not think having female nominees for both posts was 'in accordance with human rights'¹⁹. Furthermore, the Majlis session of the day, which was the last session before a one month recess, did not vote on the nominees despite having finished the debate on the matter. As a result the Commission had to operate without a President until the confirmation vote was on 4 October 2010. This delay was criticized by civil society in a joint statement by eight NGOs on 2 September 2010 which stated:

“According to Article 9 of the HRCM Act, the President of the Commission holds the chair in all meetings of the Commission and is also tasked with assigning complaints that the Commission receives to the different members. The Vice-President of the Commission takes over these responsibilities when the President is either absent or unable to perform these duties. Thus, the non appointment of either a President or a Vice-President is an immense obstacle to the effective functioning of the Commission.

“It is the duty of the People’s Majlis to ensure that an important institution such as the HRCM does not fall into a legal void. The NGOs participating in this statement believe that keeping the HRCM in this legal void until the Majlis reconvenes in October 2010 would be a great disservice to the people of the Maldives. We call upon the Majlis to conclude the matter of the President’s nominees to the Presidency and Vice-Presidency of the HRCM at the earliest possible before October 2010.”²⁰

The parliamentary vote on 4 October 2010²¹ confirmed Ms Mariyam Azra as president by consensus of the 54 MPs who voted. However, Ms Jeehaan Mahmood failed to be confirmed with 22 votes in her favour but 32 votes against. By inference from the debates, this result could show support for the view that both posts should not be held by women, and brings into sharp focus the challenge faced by Maldivian women in claiming their rightful and equal place in society. In a country where some independent commissions, such as the Elections Commission, does not have

19 Minutes of the Majlis session of 30th August 2010, page 74

20 <http://www.mvdemocracynetwork.org/wp-content/uploads/2010/09/Press-Release-re-HRCM-pres-Eng.pdf>

21 Minutes of the Majlis session of 4th October 2010, page 109 and 110

a single female member, the remarks made in the Majlis and the subsequent result of the vote gives great cause for concern and strengthens the case for the HRCM Act to be amended to require a minimum gender balance on the Commission.

The Vice-President of the HRCM has not been appointed at the time of publication.

III. Performance and Effectiveness

A. Protection of Human Rights Defenders

The setting up of a dedicated desk for the protection of Human Rights Defenders has been a recommendation from MDN to the HRCM for several years. This recommendation has not been taken up by the Commission to date. In a written response to MDN on this matter this year, the HRCM stated:

“HRCM believes that human rights issues could be dealt with more closely through an NGO network, rather than a specific desk. As the islands of the Maldives are geographically scattered across large distances, a specific desk may not be practical to duly address the day-to-day human rights issues. On the contrary, the NGO network, which the HRCM has established, is spread throughout the atolls, thus paving the way for close monitoring by these human rights defenders. As such, those NGOs are well versed and aware of the specific situations of their respective regions. Decent budgets for financial support are allocated for these NGOs in HRCM’s budget for 2010/2011, where some are provided with requirement-specific assistance.”

While the threats faced by human rights defenders in the Maldives might not be comparable to counterparts in other Asian countries, it is questionable whether the NGO Network setup by the Commission would be able to provide the legal, physical and financial support required by a human rights defender under threat. The fundamental purpose of a dedicated desk or other such mechanism within the National Human Rights Institution would be to have a State-sponsored mechanism to ensure that human

rights defenders are given adequate support and protection.

It should be acknowledged that the NGO Network will facilitate the HRCM's presence in the atolls, and will likely improve the access to the Commission by local human rights defenders. However, the need remains for a mechanism and resources within the Commission dedicated to the protection and support of human rights defenders.

B. Interaction with International Human Rights Mechanisms

1. Submissions by the HRCM

The Maldives underwent the Universal Periodic Review (UPR) process for the first time in 2010. The HRCM played a positive role in this process by not only submitting a stakeholder report, which was both comprehensive and balanced, but also by taking the initiative to bring together civil society members from across the country to help a civil society report.

Furthermore, MDN understands that the HRCM has made its submission for the list of Issues for International Covenant on Civil and Political Rights (ICCPR) , and will be working on its shadow report during this year. Also, the HRCM is working on the ICERD shadow report due on 22 July 2011.

2. Reporting by the State

The Maldives is over due on several of its reporting obligations to treaty bodies while others have been submitted late²².

The State report under the Convention against Torture (CAT) was due in May 2005, and had not yet been submitted at the time of this report.

The State report under the International Covenant on Civil and Political Rights (ICCPR) was submitted in February 2010, more than two years after the due date.

The State report under the Convention on the Elimination of

22 <http://www.unhcr.ch/tbs/doc.nsf/NewhvVAIISPRByCountry?OpenView&Start=1&Count=250&Collapse=106#106>

All Forms of Discrimination against Women (CEDAW) was due in July 2010 and had not been submitted at the time of this report. The last State report under CEDAW was submitted in June 2005, nearly three years after the due date.

The State report under the International Covenant on Economic, Social and Cultural Rights (ICESCR) was due in June 2008 and had not been submitted at the time of this report.

The last State report under the Convention on the Rights of the Child (CRC) was submitted in March 2006, nearly 3 years after it was due.

In a written response to MDN on the matter, the HRCM stated:

“The issue has been discussed at various policy level meetings held with government stakeholders, and during these discussions HRCM has urged the government to abide the reporting schedule of the treaties”

What is perhaps even more worrying than the apparent ineffectiveness of the HRCM’s lobbying on this count is the Commission’s claim that the government has been unwilling to share the State report to CAT prior to its submission for comments by the HRCM.

3. UN Human Rights Council

The Maldives was elected as a member of the UN Human Rights Council (HRC) in May 2010 with a record number of votes in favour of its membership²³. Membership of the Council was an honour for the Maldives and recognition of the progress that the country had made in terms of its adherence to international human rights principles.

HRC Membership has also provided the HRCM with an additional opportunity to leverage the Maldives’ position on the Council to help effect positive changes domestically. An excellent example of this opportunity was the September 2010 Council resolution on Freedom of Assembly and Association (resolution A/HRC/15/L.23) which was co-tabled by the Maldives²⁴. The Maldives itself still has domestic regulations which place unreasonable and undemocratic

23 http://www.maldivesembassy.jp/cat_001/655

24 <http://www.icnl.org/knowledge/news/2010/09-30.htm>

restrictions on the freedom of assembly. Although these regulations are not implemented as a matter of course, the HRCM could possibly have used the Human Rights Council resolution as an opportunity to urge the State to revise domestic laws and regulations in line with international obligations.

It is disappointing that the HRCM has failed to leverage this opportunity to advance human rights work up to this point. This is an area which the HRCM must look at much more closely in the near future.

C. Follow-up on Advisory Council of Jurists' (ACJ) references²⁵

1. The ACJ reference on Torture

The Maldives is widely thought to have progressed greatly in terms of reducing systematic torture by security forces and in places of detention.

On this issue, in a written statement to MDN, the HRCM stated:

“HRCM is currently commenting on the proposed Anti-Torture Bill to be passed by the Parliament. Its related work is also included in this year’s work plan. The National Preventative Mechanism (NPM) is also giving a high priority to what needs to be done in this regard, as HRCM highly rates the importance of the terms of reference on torture by ACJ. The Legal and Policy department in making comments to the bill shall refer to international human rights instruments, best practices, standards and legal jurisprudence”

a. Ratification of relevant international instruments

Although the Maldives has ratified the key human rights instruments, it has not made a declaration under Article 22 which would allow individuals to lodge complaints to the Committee Against Torture. The HRCM has not made any effort to encourage the State to make a declaration under this Article.

b. Legislative implementation of international obligations

25 www.asiapacificforum.net/acj/.../acj...torture/...torture/acj-torture-report.pdf

An anti-torture bill is at the committee stage in parliament at the time of this report. This bill was put forward by a member of parliament from the ruling Maldivian Democratic Party, and covers all the areas highlighted in the ACJ reference. MDN understands that the HRCM has commented on this bill but was not involved in its formulation.

c. Legislative implementation

The ACJ reference calls on NHRIs to ‘...stress the importance of effective witness and victim protection regimes... in this regard, the introduction of “whistleblowing” legislation will be of significance’.

The Maldives does not currently have any “whistleblowing” legislation, and witness protection is an issue of great concern in the Maldivian criminal justice system. The HRCM has not been able to do any significant work on helping to ensure the speedy formulation and effective implementation of “whistleblowing” legislation.

d. International bodies

The Maldives has standing invitations to all human rights special procedures of the UN, and was visited by the Subcommittee on Prevention of Torture (SPT) in 2007.

However, as mentioned earlier, the Maldives’ state report under CAT was due in 2005 and has still not been submitted. The HRCM states that it has corresponded with the Ministry of Foreign Affairs and the Ministry of Home Affairs on the issue of reporting under CAT, but these correspondences do not appear to have been successful up to the time of this report. Furthermore, the HRCM claims that the government has been unwilling to share its report under CAT for comments prior to submission.

It should be noted that the HRCM translated and submitted the 2009 visit reports by the National Preventative Mechanism (NPM) to the SPT.

e. Alternative measures to combat torture

The ACJ reference specifically recommends that the NHRI encourage members of the judiciary involved in making detention related decisions to visit detention facilities on a regular basis.

A post-sentencing link between the judiciary and convicts is al-

most completely absent in the Maldivian criminal justice system. MDN is not aware of the HRCM having made any effort towards establishing or promoting such a link as recommended by the ACJ reference.

f. Monitoring

The HRCM, through its role as the National Preventative Mechanism fulfils a monitoring role and, in theory, is provided with unfettered access to all places of detention. However, MDN understands that in practice, the HRCM has encountered some difficulties in gaining timely access to some prison and jail facilities.

The HRCM's visited 12 different locations in 2010, including juvenile detention centres and psychiatric care facilities. These visits have resulted in comprehensive reports with concrete recommendations to the State.

For the purposes of this report, the HRCM shared with MDN several instances where recommendations made following visits by the NPM resulted in concrete action being taken by the authorities to improve the conditions of those under State custody, including one instance where a temporary jail was closed down following concerns raised by the NPM. However, 35 recommendations made by the HRCM following visits by the NPM, are not acted upon by the State.

g. Training and Education

The ACJ reference recommends that NHRIs should take an active role in educating all sectors of the community on the meaning and application of the international law on torture, and cruel, inhuman or degrading punishment or treatment.

The HRCM has been focusing its human rights awareness raising efforts for 2010 and 2011 to school heads and teachers. However, upon a request by the Maldives Police Service, human rights awareness programmes were conducted in February 2011 for all the staff working in the police custodial department. Trainings were also conducted for staff of the Department of Penitentiary and Rehabilitation Services, for police regional commanders and for members of the HRCM's NGO Network.

However it should be noted that the trainings were not spe-

cific to the issue of torture, although they involved a session on human rights conventions during which the CAT was discussed. Attendees were also informed of the role of the NPM. Given that these were short trainings during which torture was only one component, there is ample room for more vigorous efforts to increase awareness regarding torture, especially for custodial staff.

h. Minimum Interrogation Standards (MIS)

The ACJ reference recommends that the NHRI should promote MIS developed by the ACJ, translate and disseminate the MIS, and even acquire additional resources for this purpose. No work has been done by the HRCM in this area.

2. The ACJ reference on the death penalty

In a written response to MDN on the matter, the HRCM stated that:

“The Legal and Policy Department has completed and submitted the concept and legal opinion on the implementation of the Death Penalty in the Maldives from an international Human Rights and Legal perspective, including a Shari’ah Law and Maldivian legal system perspective. They address the major part of terms of references submitted by ACJ. The issue is being considered by the Commission Members. In addition, HRCM have [sic] shared this information with the President’s Office.”

The Maldives has been practicing an unofficial moratorium on the death penalty with the last execution in 1953²⁶. However, there have been increasingly vocal and popular calls for the reinstatement of the death penalty in the Maldives in response to an increase in violent crime. A bill which would make enforcement of the death penalty mandatory was discussed in parliament in 2011. Furthermore, the Maldives is not a party to the Second Optional Protocol of the ICCPR.

The final report of the ACJ on the reference on the death penalty²⁷ clearly states the ACJ position that it considers both the resumption of executions by the government and the enactment of

²⁶ <http://madaveli.org/?p=1036>

²⁷ <http://www.asiapacificforum.net/acj/references/death-penalty/related-files/reference-on-the-death-penalty/final.pdf>

laws that reintroduce the death penalty to be inconsistent with the spirit and intent of international human rights law.

There is an urgent need for the HRCM to clearly put forward the reasoned case against the implementation of the death penalty to the Maldivian public. The current dialogue on the matter appears to be dominated by religious groups and reactionary politicians responding to public alarm at increased levels of violent crime. Crucially, the HRCM needs to publicly explain, as well as the government and other political actors, the Sharia jurisprudence which many Islamic countries have cited for the de-facto abolition of the death penalty. The Maldives runs a serious risk of reverting to capital punishment if the HRCM shirks on this responsibility.

3. The ACJ reference on Trafficking (2002)

In a written response to MDN on the matter, the HRCM stated that:

“According to the Australian Attorney General’s Office (together with the [sic] input from the Ministry of Foreign Affairs and the Maldives Attorney General’s Office) trafficking of persons into the Maldives is taking place at an alarming level. In order to combat this, and according to the concept notes and TOR’s submitted by the Australian Attorney General’s Office, the Foreign Ministry is undertaking the drafting of a piece of legislation to combat this crime. The HRCM has given the go ahead for this concept note and TOR and eagerly awaits the completion of this law. As the Maldives is not a party to the International Convention on the Rights of Migrant Workers and their Families, there is no mechanism in place to protect the rights of migrant workers and they may be considered as a vulnerable minority with very little access to the justice system. HRCM is also pushing for Maldives to sign and ratify this Convention at the earliest possible period.”

It should also be noted that the Maldives was placed on the Tier 2 watch list in the 2010 Trafficking in Persons report published by the United States State Department²⁸.

28 <http://www.state.gov/g/tip/rls/tiprpt/2010/138377.htm>

a. The need to ratify

In addition to the Convention on the Protection of the Rights of Migrant Workers and their Families (ICPMW), the Maldives has not signed the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children²⁹. The ACJ reference on trafficking specifically urges States to ratify this protocol.

In a response to MDN, the HRCM stated that it made written communications with the Ministry of Foreign Affairs in 2007, 2008 and 2009 arguing for the need to ratify the ICPMW. It also convened a meeting with the Department of Immigration and Emigration and the then Ministry of Human Resources, Youth and Sports in April 2009 to encourage the ratification of the ICPMW.

The HRCM did not indicate having done any work to continue lobbying efforts for the ratification of the ICPMW since 2009. Furthermore, MDN is not aware of any significant efforts on the part of the HRCM to encourage the Maldivian State to sign the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. This is extremely disappointing given the HRCM's own admission of the gravity of the situation concerning migrant rights and human trafficking in the Maldives.

b. Implementation

Furthermore, the ACJ reference on trafficking recommends that before the ratification of the Protocol, the NHRI should encourage the State to use existing criminal laws and procedures as well as appropriate welfare measures to deal with various aspects of trafficking and help the victims thereof.

Apart from providing input to the draft anti-trafficking legislation being prepared jointly by the Maldivian and Australian governments, the HRCM has not done any work to encourage the State to use existing laws and mechanisms to protect and help the many victims of trafficking in the Maldives.

c. Enforcement

The ACJ reference on trafficking states that:

“Innovative ways need to be devised to identify the vic-

29 <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>

tims of trafficking and encourage them (and others with whom they come into contact) to come forward to report traffickers, and co-operate with enforcement agencies as available witnesses. It is here that Non-Government Organizations (NGOs) who operate at the 'grass-roots' level would be able to provide vital information, motivation and support. At the same time, law enforcement authorities should develop proactive mechanisms and processes which decrease their reliance on victim or witness testimony." [Underscoring supplied]

An independent and vibrant civil society has not yet been fully established in the Maldives. In particular, there is a dearth of well organised NGOs working on human rights issues in the country. While the HRCM is undertaking some commendable efforts to build civil society capacity, none of these efforts are aimed specifically at strengthening civil society capacity in the area of human trafficking. This is an area in which the HRCM should seek to play a stronger role in the future.

d. Protection of victims

While the HRCM in its written statement to MDN acknowledges that, "...trafficking of persons into the Maldives is taking place at an alarming level..." it is important that the HRCM put in place mechanisms to provide assistance to the victims of these crimes. This is particularly pertinent given that there do not appear to be any adequate alternative State or civil society mechanisms in place for this purpose.

It is of serious concern that in a country which has a legally registered migrant population of close to 100,000 (approximately one third of the country's entire population). The Human Rights Commission does not have any in-house translators to communicate with migrants who are often not fluent in the local language Dhivehi. Complaints can only be lodged to the Commission in either Dhivehi or English. This effectively means that a large portion of the population living in the Maldives, and arguably some of the most vulnerable, have no effective means of communicating with the Commission and registering their issues.

The HRCM has also made no efforts to encourage or assist the State to establish such a mechanism.

While the legislation on anti-trafficking is a positive sign, it does not negate the need for the HRCM to urgently address the issue without waiting for the legislation to come into place.

e. Research and education

The ACJ reference identifies NHRIs as uniquely positioned to encourage and facilitate research and analysis on trafficking and its related issues, which can provide a sound basis for policy recommendations by the NHRI.

The only work done on this area to date by the HRCM is a Rapid Situation Assessment of Employment in the country conducted in 2009, which touched on some issues relating to human trafficking. However, the HRCM reports that a Rapid Situation Assessment of Human Trafficking in the Maldives is to be conducted in 2011 with support from UNIFEM.

While the HRCM organized a public lecture on the issue of human trafficking in May of 2011, the Commission has not made any concrete efforts to reach out to and educate key sectors of society such as judges, parliamentarians, police officials and labour officials on this issue.

D. Follow-up on some select recommendations made in the 2010 ANNI report

1. Urgently pursue financial independence by lobbying both the government to amend financial regulations and parliament to amend laws as necessary for this purpose.

The government financial regulations remain unchanged and the HRCM Act has not been amended. The HRCM does not enjoy full financial independence. The HRCM reports that, "The HRCM Act is currently being reviewed for amendments."

2. Urgently take steps to ensure that the HRCM offices are easily accessible by persons with disabilities

The HRCM office premises have not been modified to make it more accessible to persons with disability. It is important that the HRCM lead by example in this area.

3. Implement measures to open branch offices in the Atolls

In a written response to MDN on this matter the HRCM stated:

“Under the Strategic Plan 2010-2014 one of the objectives is to strengthen the administration of HRCM. To achieve this objective one of the activities in 2010 work plan was to establish branch offices in 7 provinces within 5 years time. However, due to financial and human resource constraints, HRCM decided to work closely with the civil society and to strengthen the capacity of the civil society organization to assist HRCM to fulfil its mandate without establishing branch offices in the near future”

No branch offices have been opened at the time of this report. While the NGO network is a positive measure in terms of increasing the HRCM’s presence in the atolls, it is not a substitute for some form of physical presence in the atolls by the Commission itself. It should be noted that the members of the HRCM’s NGO network do not receive training which would equip them to receive or deal with human rights violations or complaints in a manner that would obviate the need for a presence by the Commission itself.

4. Take steps, either through the NGO Network or outside of it, to ensure that the HRCM builds coalitions and consensus within civil society in order to further strengthen its own lobbying efforts

While the HRCM shared its strategic plan with NGO partners for comments, The HRCM has taken no concrete steps towards incorporating civil society actors in its lobbying efforts with the State since the ANNI report of 2010.

5. Take proactive steps to reach out to the journalistic community in order to encourage them to both report incidents of intimidation, as well as seek the support of the HRCM

No work has been done by the HRCM in this area. The HRCM did release on press statement in October 2010 condemning alleged obstructions by security forces of journalists covering a protest in the capital Male’.

6. Advocate more aggressively for the harmony between Islam and Human Rights.

In a positive step, the HRCM has included a one-hour presentation

on Islam and Human Rights in its regular training. However, there remains an urgent need for the HRCM to take the lead in addressing the threat posed by increasingly conservative interpretations of Islam to the protection of fundamental rights and freedoms enshrined in the Maldivian Constitution.

V. Consultation & Cooperation with Civil Society

HRCM established its “NGO Network” in 2009 in order to strengthen and extend their engagement with the civil society across the country and better coordinate with relevant civil society partners. HRCM has successfully conducted several activities in collaboration with NGOs.

In addition, MDN has the following comments:

- 1) MDN believes the HRCM should be more proactive in building coalitions within civil society in its efforts to lobby the government to implement its recommendations. This would mainstream efforts currently being made by disparate actors and improve effectiveness.
- 2) MDN happily notes that HRCM has made ‘Human Rights Defenders’ as one of their main thematic focus areas for the year 2011. The commission recently participated in a Youth Festival in the capital Male’ to promote this theme, where they opened registration for individuals interested in being a Human Rights Defender. MDN collaborated with HRCM in this event and made a verbal agreement to provide MDN’s Human Rights Defenders training to these individuals. However, the need for a Human Rights Defenders focal point within the commission still remains.
- 3) MDN believes the HRCM should make more of an effort to improve the provision of its service to the media. MDN is aware of multiple cases where journalists have been threatened or intimidated for their work and feel that they do not have an authority they can approach with ease. HRCM should make a proactive effort to ensure that a climate of fear does not overtake the journalism profession and that when threats do occur, journalists feel that the HRCM is an approachable institution. Furthermore, human rights training targeting journalists

should be a priority for the country, given the current lack of awareness.

- 4) MDN is pleased to note that the HRCM has made an active effort to involve NGOs in its consultations and trainings. HRCM has also initiated a project to support NGOs financially which would enhance the role of NGOs in protecting, monitoring and advocating for human rights in a more sustainable manner. HRCM had already granted aid to five local NGOs last year under this project.
- 5) MDN is also pleased to note the HRCM's public backing for the role of NGOs in promoting and protecting human rights in the country.

VI. Concluding remarks

The HRCM remains a politically independent institution which has repeatedly demonstrated this independence over the years. The dedication and increasing levels of skills and expertise of HRCM staff are one of the greatest assets at the Commission's disposal. The challenge for the Commission remains to leverage its assets and opportunities in the most effective and meaningful manner. This report has highlighted several areas in which the Commission needs to dramatically and urgently improve its performance. The appointment of a new set of commissioners represents yet another opportunity for the HRCM to aggressively address these issues.

Recommendations

- Seek amendments to the HRCM Act which would ensure public participation in the selection process of members to the Commission;
- Seek amendments to the HRCM Act which would ensure a gender balance in the Commission;
- Establish a dedicated human rights defenders desk at the HRCM to provide advice, protection and support to human rights defenders, especially to those at risk;

- Apply greater efforts to ensure timely reporting to treaty bodies by the State;
- Seek to utilize opportunities for domestic human rights reforms generated by the membership of the Maldives in the UN Human Rights Council;
- Apply greater efforts to urge the State to make a declaration under Article 22 of the Convention Against Torture;
- Take steps to ensure the speedy formulation and implementation of “whistleblowing” legislation in the Maldives;
- Explore avenues for establishing linkages between judges responsible for sentencing convicts and the welfare of the sentenced convicts in places of detention;
- Conduct awareness raising and training sessions specific to the issue of torture, especially for personnel working with detainees;
- Translate, promote and disseminate the Minimum Interrogation Standards developed by the ACJ;
- Urgently put forward to the Maldivian public a reasoned argument against the implementation of the death penalty. This should include, but not be limited to, the Islamic Shari’a jurisprudence which many Islamic countries, including the Maldives, have cited for the non-implementation of the death penalty;
- Redouble efforts to encourage the Maldivian State to speedily sign and ratify the ICPMW;
- Encourage the Maldivian State to sign the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;
- Take immediate steps to encourage the State to use existing laws and mechanisms to protect and help the victims of trafficking in the Maldives;
- Explore ways in which civil society capacity could be strengthened to address the issue of human trafficking;

- Institutionalize internal mechanisms and procedures to provide support and protection to victims of human trafficking;
- Institutionalize mechanisms, such as the hiring of translators, to ensure that the HRCM is accessible to the Maldives' migrant population;
- Make greater efforts to raise awareness regarding human trafficking across all sectors of Maldivian society;

Recommendations repeated from the 2010 ANNI report

- Urgently seek amendments to the HRCM Act to ensure financial independence for the HRCM;
- Urgently take steps to ensure that the HRCM offices are easily accessible by persons with disabilities;
- Implement measures to open branch offices in the atolls;
- Take steps, either through the NGO Network or outside of it, to ensure that the HRCM builds coalitions and consensus within civil society in order to further strengthen its own lobbying efforts;
- Take proactive steps to reach out to the journalistic community in order to encourage them to both report incidences of intimidation as well as seek the support of the HRCM;
- Advocate more aggressively for the harmony between Islam and Human Rights to the general public;

Annex 1: Response from HRCM to ANNI Report

1. The setting up of a specific desk, or other such mechanism, for the protection of and support to Human Rights Defenders. Steps taken towards ensuring that the HRCM has specific procedures in place to protect Human Rights Defenders in the Maldives?

HRCM believes that human rights issues could be dealt with more closely through an NGO network, rather than a specific desk. As the islands of the Maldives are geographically scattered across large distances, a specific desk may not be practical, to duly address the day-to-day human rights issues. On the contrary, the NGO network, which HRCM has established, is spread throughout the atolls, thus paving the way for close monitoring by these human rights defenders. As such, those NGOs are well versed and aware of the specific situations of their respective regions. Decent budgets for financial support are allocated for these NGOs in HRCM's budget for 2010/2011, where some are provided with requirement-specific assistance. An NGO completely dedicated to human rights is currently based in Addu Atoll, named Take Care.

2. What has been done in terms of following up the Advisory Council of Jurist's (ACJ) reference on Torture?

HRCM is currently commenting on the proposed Anti-Torture Bill to be passed by the parliament. Its related work is also included in this year's work plan. The National Preventive Mechanism (NPM) is also giving a high priority to what needs to be done on this regard, as HRCM highly rates the importance of the terms of reference on torture by ACJ. The Legal and Policy department in making comments to the bill shall refer to international human rights instruments, best practices, standards and legal jurisprudence.

3. What has been done in terms of following up the Advisory Council of Jurist's (ACJ) reference on Child Pornography?

On the issue of Child Pornography, we are relying on the respec-

tive criminal laws which prohibit child pornography as well as sexual misconduct and abuse against children. We draw strength in the implementation of this punishment for this crime together with the penal code, the Child Rights Act, Prevention of Sexual Abuse against Children's Act as well. We are also aware of the fact and lobby for the quick drafting and presentation of the new Child Rights Act which is undertaken by the Ministry of Health, Gender and Family Protection Department. However, since there is an inherent lack of adequate jailing facilities as well the inherent problems in the judiciary in understanding the nature and gravity of the offence, perpetrators of this crime are let loose into the society which further aggravates the situation in Maldives. HRCM is constantly advocating for the protection of children's vulnerability in such cases and is actively involved in calling the judiciary and other relevant authorities to take the matter more seriously. Apart from that we have been following the involvement of the police services in the apprehension of perpetrators who promote and distribute child pornography.

4. What has been done in terms of following up the Advisory Council of Jurist's (ACJ) reference on Trafficking?

According to the Australian Attorney General's Office (together with the input from the Ministry of Foreign Affairs and the Maldives Attorney General's Office) trafficking of persons into the Maldives is taking place at an alarming level. In order to combat this, and according to the concept notes and TOR's submitted by the Australian Attorney General's Office, the Foreign Ministry is undertaking the drafting of a piece of legislation to combat this crime. HRCM has given the go ahead for this concept note and TOR and eagerly awaits the completion of this law. As the Maldives is not party to the International Convention on the Rights of Migrant Workers and their Families, there is no mechanism in place to protect the rights of migrant workers and they may be considered as a vulnerable minority with very little access to the justice system. HRCM is also pushing for Maldives to sign and ratify this Convention at the earliest possible period.

5. What has been done in terms of following up the Advisory Council of Jurist's (ACJ) reference on the Death penalty?

The Legal and Policy Department has completed and submitted the concept and legal opinion on the implementation of the Death

Penalty in the Maldives from an international Human Rights and Legal perspective, including a Shari'ah Law and Maldivian legal system perspective. They address the major part of terms of references submitted by ACJ. The issue is being considered by the Commission Members. In addition, we have shared this information with the Presidents office.

6. Profile of the newly appointed commission members

See Annex 2.

7. Budget amount requested from People's Majlis for 2011 and the amount which has been granted to the Commission.

Amount Requested: Mrf 25,200,513

Amount received: Mrf 23,780,489

Annex 2: Profile of the HRCM Commissioners

The New Commissioners

For the purposes of this report, MDN requested the HRCM to provide MDN with profiles of the new commission members. The profiles provided below are abridged versions of the profiles received.

Ms Maryam Azra Ahmed (President)

Ms Ahmed was first appointed as a member of the Commission on 27 November 2006. During her first term as member she was engaged in raising awareness on human rights and conducting training programs across the country, and was tasked with overseeing the work of the education and media department of the Commission.

Ms Ahmed holds a Masters degree from the University of East Anglia, and joined the education sector after working for some time in the Department of Finance. She also studied Education and Management at Moray House College of Education, Edinburgh.

In addition to serving as headmistress of various schools for a period of eight years, Ms Ahmed held various posts at the Education Development Centre (EDC). During her tenure at the EDC she was involved in coordinating various projects with international partners, developing the National Curriculum for Social Studies, coordinating the National Symposium on Primary Curriculum Review, coordinating the activities of the Curriculum Unit, and overseeing all activities of the EDC as Curriculum Development Coordinator.

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Sheikh Kareem worked in the education sector both at the EDC and at Aminiya School. He also served as a part-time lecturer at the Kuliyya Dhiraasa Al Islamiyya in Male' and at the Maldives College of Higher Education.

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Mongolia: The NHRC at 10 years

Center for Human Rights and Development (CHRD)¹

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

1. During the period of January 2010 to the first half of 2011, several important developments occurred which are expected to have positive impacts on the human rights situation in Mongolia.
2. The Mongolian President opened a citizen's hall in the Government Palace where citizens may discuss on policy issues and draft laws. Since its opening many draft laws and policy issues have been discussed with involvement of citizens, CSOs and other interested groups. Often, MPs and government officials attend these discussions. Most importantly this hall has become an accessible venue for CSOs to organize multi-stakeholder consultations on policy issues;
3. Parliament standing committees started organizing public hearings on human rights issues. A couple of such hearings were remarkable from human rights perspectives. One public hearing was on the 1 July human rights violations organized by the Parliament Subcommittee on Human Rights tackled human rights violations². This public hearing continued for two days and all stakeholders— police, victims, their lawyers, commissioners of the NHRC of Mongolia, etc—were invited for testimonies:. The public hearing was broadcast in full on television. Another important public hearing was on the draft

1 .Prepared by Ms Gombosuren Urantsooj, Executive Director.

2 There was a public riot opposing results of the parliament elections on July 1st, 2008. More than 700 people were arrested and many of them were imprisoned.

law on access to information which has been pending for almost a decade;

4. Mongolia underwent the Universal Periodic Review of the UN Human Rights Council (HRC) in November 2010. Co-ordinated information and campaign efforts of civil society organizations (CSOs) and media resulted in effective public information on the UPR review process and human rights issues in the country. Furthermore, CSO involvement in the UPR process obliged the government to undertake early follow-up steps to the UPR recommendations;
5. Important laws have been approved such as Law on Gender Equality in early 2011 and Law on Access to Information in June 2011.

In the period covered by this report, two major developments happened that seem to have affected the work of the National Human Rights Commission (NHRC) of Mongolia: One, the Chief Commissioner of the NHRC-Mongolia resigned and needed to be replaced. The appointment process of the new Chief Commissioner took for almost six to seven months. Two, the NHRC marked its 10th anniversary of establishment in early 2011, and needed to evaluate and assess its work for 10 years.

These circumstances seem to have impacted in work of the NHRC during the reporting period. From the outside, it is not clear which human rights issues the NHRI had worked. It even did not make submission for the UPR.³

II. Independence

A. Law

The Law on the NHRC of Mongolia was adopted in 2000, and following this law, the NHRC of Mongolia was established in 2001. There were debates and consultations during the design of the law on the NHRC. Many comments made by CSOs have not been fully

³ During the process for preparation of submissions to UPR NGOs wanted to know about the content of the submission of the NHRC and approached it. However the Commission did not provide with submission, and did not invite any member of the Mongolia's NGO Forum on UPR in any discussion on it.

reflected in the law at that time. Despite this, the approval of the law and the establishment of the NHRC were accepted as important positive developments. As years pass, the needs to amend the enabling law have become clearer to more and more people. There have been several initiatives to amend the law. One was led by the Vice Prime Minister and another by a group of MPs. The vice prime minister has set up a working group which included Mr Dashdorj, a commissioner of the NHRC and some NGOs which had certain proposals for amendments in the law. Another initiative was made by the Parliament Subcommittee on Human Rights, and set up a new working group in late 2010. This working group also includes Mr Dashdorj and one NGO representative.⁴

The current law has a special provision (3.3) which says that the NHRC of Mongolia will comply with the principle of independence in its work. However this provision alone is not enough to ensure the independence of the NHRC of Mongolia. The NHRC of Mongolia has initiated some proposals to amend the law but policy makers have not shown much support for their efforts.

The NHRC of Mongolia is empowered by its enabling law to operate during states of emergency, or other exceptional conditions. Unfortunately, this provision is of no use in protecting and promoting human rights when the commission lacks independence. Full independence would be better ensured when the law ensures an open, participatory nomination and appointment process of commissioners, who are selected based on their high level of expertise in human rights, and demonstrated experience in fulfillment of human rights principles and social justice. The Commission should also have secured and sufficient funding for its activities.

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

The NHRC of Mongolia is able to conduct scrutiny of the Government, its ministries and agencies. However, organizations set up by the Parliament are beyond the scrutiny of the NHRC. Therefore the NHRC of Mongolia requests for cooperation to these organizations when it is necessary.

4 CHRD is mentioned member of these two working groups on drafting a law of the NHRC of Mongolia.

It is not possible for any agency to unreasonably obstruct the work of the NHRC. However, during the last economic crisis the Ministry of Finance reduced the NHRC activity budget by 50%. While there are no legal grounds for obstruction by the Ministry of Finance or any other agency, this action still risks of possible indirect effect on the Commission's work. Reduction of NHRC activity funds by 50% will have quite a negative impact on its work. On the other hand, it is highly doubtful if the Commission may ever scrutinise the Ministry of Finance, for example.

Public authorities are required by law to cooperate with the NHRC. There is no evidence of ignorance or negligence of the NHRC by public authorities or organizations. The NHRC of Mongolia is separate from the Executive in law and in practice, while it may cooperate with the Executive on certain issues. Up to now, the Executive has not been observed to intervene in the work of the Commission.

According to its enabling law the NHRI has to report to the Parliament annually, within the first quarter of a year. Thus far, the NHRC has been reporting to the Parliament every year, with its 10th report submitted to the Parliament on 25 April 2011. The 10th report is significant because of the 10th year anniversary of the NHRC. The 10th report intended to assess the work of the Commission and the impact of its previous nine reports, by reviewing the implementation of the conclusions and recommendations. The report also mentions the fact that four previous reports have not been considered at all by the Parliament. Also, of the 143 recommendations made in all the reports, 43 recommendations (28.6%) have been implemented completely, 45 recommendations (31.4%) not completely implemented, 57 recommendations or 39,6% were not implemented at all.

Aside from the submission of annual reports, the NHRC does not have regular consultation sessions with the Parliament on human rights issues in the country, although the Commission may express formal interest and organize a consultation or meeting with MPs. Legally, commissioners may attend special sessions of the Parliament on human rights issues, but this attendance is not obligatory. The Parliament also receives written comments from the NHRC on draft laws.

According to the Law on Public Service Council, all staff of the NHRC except for its accountants, which are contracted, are public

employees. Although, NHRC employees are often transferred from other organizations their independence is not influenced.

There was not a single case when the government declined to act on a recommendation by the NHRC, which may use its power of subpoena. However there is no available data on how effective the Commission has used this power. So far the Government has expressed its position on the need to strengthen the capacity of the NHRC, but it has not start talking of its independence.

Courts recognize the status of the NHRC, and do not intervene into the Commission's activities. The NHRC is entitled to submit claims directly to courts if victims have agreed to be represented by the Commission.

The NHRC has no right to intervene in cases pending in courts. However, when the NHRC submits claims, which courts accept. However, courts never transfers cases to the jurisdiction of the NHRC. Once, the parliament plenary session made recommendations to courts in relation to torture based on the recommendations from the NHRC. It was observed in general that the NHRC works independently from courts despite the fact that one of three commissioners is former judge appointed by the Supreme Court.

There was not any observation of a serious challenge made by the Commission towards the government,, nor has it been in any position of confrontation with the government.

The NHRC has close relationships with specialized institutions in the country such as the National Committee on Gender Equality, National Authority for Children, etc. For example, one commissioner is also a member of the National Committee on Gender Equality, and was involved in lobby for approval of the law on Gender Equality. The NHRC of Mongolia cooperates with the National Authority for Children and organizes joint trainings and other activities with this agency.

C. Membership and Selection

The selection process for nomination and appointment of new members of the NHRC is not rigorous and transparent. The law does not require an open call for nominations, nor a participatory process in selection of nominees. Although the law includes

some criteria for commissioners, these are inadequate in relation to requirements for human rights expertise and experience. Only three bodies may nominate for commissioners: Parliament legal standing committee, President, and the Supreme Court. Last year, the Parliament Legal Standing Committee had to nominate the Chief Commissioner. The nomination and appointment process took seven months. The appointment process revealed clear signs of a deal between the two main political parties but not equal in fact. So far all of the appointed commissioners have come from public administration offices. There is also no transparent process for short-listing of nominees, no publicised interview procedure which would be able to ascertain independence and human rights expertise of the nominee, and no public hearings to select and confirm new members of the NHRC of Mongolia.

The law on public service council requires that vacancies filled promptly and properly as they arise. Unfortunately the chief commissioner, who resigned in April 2010, was appointed only in November of 2010.

While the law defines the qualifications of commissioners, these qualifications are limited to only adequate knowledge, and do not require involvement in civil society activities. The current law does not require that the composition of the NHRC reflect pluralism, including gender balance, and representation of minorities and vulnerable groups.

The law provides for a fixed term of six years of office for a commissioner, with a further extension for another term. The term of 6 years maybe regarded as adequate because it is beyond the 4 year cycle for national political offices. The law also has a provision for removal or impeachment of NHRC commissioners.

According to the code of ethics implemented by the government service council, commissioners are required to avoid, or at least declare, outside interests. Therefore it is expected that the NHRC is independent of non-governmental interests, e.g. political parties, major civil society organizations and private sector interests. The law requires members of the NHRC to suspend from political party membership, so that their actions will be free from political influence. However the appointment of the chief commissioner, who usually leads the position of the NHRC, may depend on the political party in power to nominate the chief commissioner.

Although the law does not ensure gender balance in the composition of the membership of the NHRC, the existing composition of commission represents gender balance since of its three members is woman. There are no measures in the selection process taken to ensure gender balance in the membership of the NHRC.

It should be stated that commissioners are not provided with appropriate training, including human rights knowledge and the principle of independence. There is no official procedure for commissioners that can guide them act independently, e.g. toward human rights defenders, and civil society activists.

D. Resourcing the NHRC of Mongolia

NHRC funding has always been insufficient especially for to cover costs of activities for trainings, public outreach and activities in the provinces. In order to secure sufficient funds the NHRC mostly writes project proposals and applies for funding separate from the regular state allocation. Since its establishment in 2001 until 2011, it has implemented 16 such projects. The NHRC has the power to determine how to direct its resources, within the appropriate framework of accountability.

The NHRC has built enough capacity and technical expertise to undertake all aspects of its mandate. However human and financial resources have not always been enough. The total nationwide operational human resource strength of the NHRC is 20 persons, including the three commissioners, and NHRC drivers.

The budget is approved by the Parliament, and delivered through the Ministry of Finance. According to the Law on Public Budget Organizations Management and Finance, the NHRC has to report on finances to the Ministry of Finance. The budget of the NHRC is not protected legally from interference and reductions. Financial reports of the NHRC may be accessed by official request if they do not include information related to the organizational secrecy.

The NHRC should inform the Government Service Council of vacancies, and select appropriate individuals for its staff positions.

III. Effectiveness

Concrete work in the area of promotion and protection of human rights, with focus on complaints-handling

The NHRC has a complaints-handling mechanism by its enabling law, through Articles 9-12 of Chapter 3. Article 9 says that everyone is entitled to complain on violations of their human rights and freedoms enshrined in the Constitution of Mongolia, and international human rights conventions by any enterprise, entity, organization, authority and individual. Complaints may be submitted in writing, or orally. Since the NHRC does not have focal points in rural areas, it also receives complaints through e-mail. However, not all people in rural areas have access to the Internet. The lack of focal points hinders rural citizens from availing of assistance from the NHRC.

Complaints should include the name and address, and signed by complainants. According to the law complaints should be decided within 30 days. If necessary, additional research and investigation may the period extended up to 60 days. So far, there is no available information on the effectiveness and fairness of this mechanism.

Within 2010, 192 complaints and 10 requests were received. Currently, 16 cases are active, with one case forwarded by the NHRC to the courts, another undergoing mediation, and the rest have been resolved. There is no dismissed case during this period.

According to the opinion of an NHRC staff member, the NHRC uses its subpoena power, which is recognized by government authorities, to conduct an analysis of the complaints it receives and reports through its website, and also regularly to the National Security Council.

IV. Thematic Focus

A. Specific activities on the promotion and protection of HRDs and WHRDs

The NHRC of Mongolia has assigned one member of its staff to be prepared as expert on issues of human rights defenders. Currently, the NHRC does not have an urgent assistance mechanism

for HRDs and WHRDs at risk. On the other hand, the NHRC is lobbying to incorporate international standards for the protection of HRDs and WHRDs into domestic law. In these lobby activities, the NHRC cooperates with CSOs, and the Human Rights and Civil Participation Advisor to the President. The NHRC of Mongolia has not yet started a facilitation dialogue between the government and the UN Special Rapporteur on HRDs.

B. Interaction with international human rights mechanisms

The NHRC cooperates with the UN Special Rapporteurs on torture and education. In the Preparations for the UPR, the NHRC missed the opportunity to consult on the government report, and to make its submission public during the preparation for UPR. However, the NHRC is expected to play important role in the UPR follow up activities, especially to support the government in implementing of the UPR recommendations. The UPR is a good opportunity for the NHRC to initiate and develop its interactions with the Human Rights Council. The NHRC also provided LGBT Centre with support, which has been sustained in the implementation of related UPR recommendations.

The NHRC makes efforts to disseminate information on the recommendations of UN Human Rights Treaty Bodies through its training and communication activities to support the implementation of the recommendations.

The NHRC has been accredited with “A” status twice by the ICC-NHRI. Currently, the ICC-NHRI is cooperating with the NHRC for the assessment of its capacity.

C. Follow-up or implementation of ACJ references on torture, death penalty, trafficking, and child pornography

Mongolia is party to the UN Convention against Torture (CAT). In order to facilitate the ratification of the Optional Protocol of CAT, the NHRC organized an open discussion in cooperation with government and non-government organizations in spring of 2011. It also made a recommendation in its 2011 report to pay attention on the implementation of the CAT and consider the ratification of its optional protocol. The NHRC recommended to urgently amend

article 44.1 of the Criminal Code, which did not regard torture as a crime if one damaged legally protected interest or in order to fulfill an order.⁵

In relation to the death penalty, Mongolian President Ts. Elbegdorj has declared his decision to suspend execution of death penalty, and proposed on 14 January 2010 for the Parliament to legislate the end to the death penalty. This decision of the President may be regarded as important step towards making Mongolia a country of democracy and human rights.⁶ The Mongolian Government made decision to accede the second Optional Protocol of the ICCPR on its session of 29 December 2010 and submitted a draft law to the Parliament.⁷

The crime of human trafficking comes mainly in the forms of forced prostitution abroad and domestically, fake marriage with foreigners, forced work like slavery, and kidnapping of children. Most of the victims are girls, young women, and young men sent abroad for labour exploitation. Between 2006 and 2010, 51 cases of human trafficking have been registered and investigated,⁸ with an increasing trend over this period. By 31 December 2010, the courts resolved 14 human trafficking cases, with 25 individuals were prosecuted and 82 people victims of this crime. There is a new draft law on combating crime of trafficking, which according to NGOs working on this issue, has little chances of becoming considered by the Parliament in fall of 2011. The government has adopted a national programme on the "Protection of Women and Girls from Trafficking and Sexual Exploitation" in 2005, which will be implemented until 2015 in three stages.

V. Consultation and Cooperation with NGOs

A. Formal Relationships with Civil Society in General

Article 24.3 of the Law on the NHRC states that the Commission

5 Web of the NHRC of Mongolia

6 P.Oyunchimeg, commissioner of the NHRC. "Situations emerging during the death penalty and torture", in j. HUMAN RIGHTS. UB. 2011.

7 NHRC of Mongolia 10th report on the human rights and freedom in Mongolia. UB. 2011.

8 From the presentation made in the Citizen's Hall in 2011 by J.Bumnanjid, chief of the Information and research centre of the General Police Office.

will have a ex-officio Civil Society Council (CSC) consisting of advocates association, trade unions and NGOs working on human rights issues. The purpose of the CSC is to assist the NHRC in implementation of its activities. This year, the number of organizations in the CSC has doubled. Currently, there are 19 CSOs in the CSC working on wide range of human rights issues and representing different groups such as national and sexual minorities, women, children, workers, disabled persons, journalists and couple of research NGOs. Although these organizations are working on human rights issues, their selection did not consider their legitimacy to represent the vast number civil society organisations. In the first meeting of the CSC, two CSO representatives expressed this concern but the NHRC and majority of CSOs did not show the same concern.

Some improvements have been observed in terms of the cooperation between the NHRC with civil society. Last year, the NHRC organized a consultation with CSOs to assess cooperation. Civil society representatives also gave presentations⁹ during the 10th year anniversary conference, along with representatives from the government ministries and agencies. Recently the NHRC declared that it will conduct regular meetings with CSOs every 6 months to report on past activities and to exchange opinions on forthcoming activities.

VI. Conclusion and Recommendations

In the 10 years of existence of the NHRC of Mongolia, it has made significant efforts to improve the human rights situation, the implementation of the UN human rights instruments, as well as its capacity, and public awareness on human rights in the country. However the 10 year work of the NHRC was hindered significantly by the gaps in its enabling law which did not provide with full guarantee to act independently, and with enough funds for its effective operations. Therefore the following recommendations are made to improve the effectiveness of the NHRC of Mongolia.

1. The law on NHRC of Mongolia needs to be amended to ensure and protect the independence of commissioners and their positions through introducing provisions for an open, transparent

9 ANNI reports were basis for the CSO presentations.

and participatory process of nomination and appointment. The criteria for nominees should ensure high level of human rights expertise and demonstrated capacity to fulfill the principles of human rights, independence and social justice;

2. The Parliament of Mongolia and its Sub-committee on Human Rights should ensure enough funding allocated in the annual state budget for the effective functioning of the NHRC, to enable it to contract focal points in aimags (provinces), and undertake fact finding missions on serious human rights violations. The Parliament should ensure that budget of the NHRC cannot be reduced in any circumstances including during financial crises;
3. These efforts to improve cooperation with civil society, especially through regular interactions, should be continued to build effective collaborations with CSOs for advocacy to amend its enabling law, approval of adequate funding, and responding emerging human rights issues;
4. The NHRC should engage effectively with the Parliament, its standing committees, especially with the Legal Standing Committee and its Subcommittee on Human Rights. The NHRC should achieve the discussion of its annual report by plenary session of the Parliament getting support from the Subcommittee on Human Rights and other interested human rights advocates;
5. The NHRC of Mongolia is the core and the most effective element of the national human rights mechanism. However it should cooperate effectively with other elements of the national mechanism: especially with the Parliament, parliament committees and Subcommittee on Human Rights, citizen's assemblies at all levels, the National Committee on implementation of the National Programme on Protection and Promotion of Human Rights and CSOs. The NHRC should develop a strategic plan for cooperation and collaboration with each of these elements to strengthen the national mechanism as a whole.

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Nepal: Adoption of an Enabling law and the Question of Effectiveness of a Constitutional Body

Informal Sector Service Centre (INSEC)

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

The year 2010 witnessed continued political deadlock, stagnant peace process and the extension of the Constituent Assembly (CA) in Nepal. The situation made the future of the country more uncertain by failing to strengthen peace and political cooperation. Despite frequent pressure, political parties did not take the deadline to accomplish their duty of writing the constitution, and taking the on-going peace process to a positive end. Even the UN Secretary General Ban Ki-moon observed at the beginning of 2010 that the months prior to the 28 May 2010, which was the original deadline for the new constitution, that “promulgation of a new constitution [was] critical for the successful conclusion of the peace process.”¹ Unfortunately as the deadline approached, the CA tenure was extended in the eleventh hour by a further one year, by amending the interim constitution. However, deadlock and uncertainty continued in country, coupled with rampant crime and abuses/violations of human rights.

The National Human Rights Commission (NHRC), a body under part 15 of the Interim Constitution, has the constitutional mandate to monitor the human rights situation in the country as the national watchdog. The year 2010 started on a positive note for

1 UN Security Council, Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process, (S/2010/17) 7 January 2010; para. 46

the NHRC with the opening of its sub-regional office in Butwal in the Rupandehi district. However in the same year, the commission itself was unable to control an internal rift, pending legislation and international criticism.

An internal feud among the commissioners was exposed, drawing national and international attention. As reflected in national dailies² two out of the five Commissioners, Hon. Dr. Leela Pathak and Hon. Dr. K. B. Rokaya boycotted several internal meetings of the commission for almost the whole year because of issues of financial irregularities in the commission. As per the NHRC regulation, no Commissioner can legitimately boycott the Commission's meetings.

The NHRC also faced the prospect of having its status³ downgraded by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC-NHRI). Under the review at their meeting in March 2010, the ICC-NHRI's Sub-Committee on Accreditation submitted that Nepal was at risk from being downgraded from a status A to status B, and was given time period of one year to prove its compliance with the Paris Principles. The main concern of the SCA is the poor quality of the NHRC Bill currently tabled in the Parliament. Inter alia, the Bill would strip the NHRC of its independence and autonomy; defines of human rights only in reference to domestic and not international law, thus creates a weak mandate; require foreign NGOs to seek permission from the NHRC to operate programs in Nepal; introduce a six month statute of limitation for lodging of the complaints; not require Government to consult with the NHRC regarding human rights policy or the signing of International Treaties; empower the executive to appoint the commissioners without independent discussion and consultation with civil society to ensure pluralism on membership; members are not pluralistic; is ambiguous as to whether the NHRC has the jurisdiction over the Nepalese Army.⁴

The SCA was not alone in voicing their concern over the Bill,

2 NHRC Split Open, The Kathmandu Post, 28 March 2010; Commissioners Seek Prez Intervention, The Himalayan Times, 29 September 2010

3 See ICC-SCA on Accreditation Report, March – April 2010

4 ICC-SCA on Accreditation, "International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights (ICC-NHRI). Report and Recommendations of the Session of the Sub-Committee on Accreditation", Geneva 29 March - 1 April 2010. Pg 12 - 13

the NHRC itself, during a meeting members of Parliament in February 2010, lobbied for a revised Bill. Similarly, the civil society of Nepal also advocated for a new and more appropriate legislation for the NHRC. The NHRC draft bill has been tabled at the House since August 2009, under review by a three-member sub-committee under the Parliament's legislative committee headed by lawmaker Radheshyam Adhikari. The committee is not sure when, if ever, the Bill will move forward.⁵ Without incorporating suggested reforms, passage of the Bill in 2011 would give it a short leash as the human rights watchdog and would conflict with many provisions of the Paris Principles and the Interim Constitution of Nepal. If the draft Bill will pass as it like will in 2011 with all the offending provisions intact. This will result in a B status of the NHRC, a poor reflection on the state of the peace process and the operation of the Government and the Commission.

In July 2010 the NHRC, together with the National Women Commission and the National Dalit Commission of Nepal, submitted a report⁶ to the Universal Periodic Review (UPR) of Nepal, which took place on 25 January 2011. The comprehensive report pointed out the failure of the Government to protect the human rights of its citizens. The report also reiterated dissatisfaction regarding the NHRC draft Bill, particularly its failure to comply with the Paris Principles. It further noted that the NHRC would continue to lobby for a Bill that would guarantee the independence of the commission.

II. Independence

The spirit of the Paris Principles provides that independence and autonomy are prerequisites to ensure the protection and promotion of human rights by a human rights institution. As mentioned above, the draft NHRC Bill will rob the NHRC of those qualities, going so far to even remove the actual words "independent" and "autonomous"⁷ from the mandate of the NHRC. The bill has made independence as the main challenge for the NHRC in 2010, and even more so if passed as it is in 2011.

5 "Annual Meeting: NHRC fate hangs in the balance", <http://www.ekantipur.com/2011/05/04/top-story/annual-meeting-nhrc-fate-hangs-in-the-balance/333476.html>

6 See http://www.nhrcnepal.org/publication/doc/reports/UPR_Report-2010.pdf

7 pg 12, ICC-SCA on Accreditation Report, March – April 2010

It is important to make amendments to the Bill in order to ensure full independence, autonomy and effectiveness of the NHRC.

In contrast, the financial resources of the Commission improved considerably during the year.. The NHRC was allocated 2 million US dollars (USD) to implement the “Strengthening the Capacity of National Human Rights Commissions” (SCHRC) program sponsored by donor countries such as the United Kingdom, Denmark, Finland and Norway.⁸ A further donation of USD 300,000 from the UNDP⁹ would add significantly to the protection and promotion of human rights capabilities of the NHRC, and enable it to extend its current ambit to include socio-economic rights.

The recruitment of staff has been a major bone of contention between the Commission and the Government. The Commission has been demanding the authority, based on the Paris Principles and Section 18 (1) of the NHRC Act-1997, to recruit its own staff.¹⁰ The Government, insists that the 1997 Act is now redundant because the Interim-Constitution made the Commission a constitutional body. As such it is subject to the same recruitment procedure as the other constitutional bodies. A government official insisted that “our stance is clear. NHRC itself cannot recruit its employees because it is against the recruitment norms. We don’t see the loss of autonomy when the Public Service Commission (PSC) recruits the NHRC staff.”¹¹ The Commission also had a run in with the Supreme Court in January 2010 over staffing issues,¹² when the Commission attempted to renew the contracts of 80 staff members, those on temporary contracts. This move was met with disapproval from the PSC and the Office of the Prime Minister and Council of Ministers, and resulted in the Supreme Court ruling against the Commission. The move was deemed unconstitutional and encroaching on the activities of the PSC. This would however make the Commission nearly defunct as 95% of its staff would be retired once their contracts would run out in 2010.¹³

In order for the Commission to act independently, a transpar-

8 \$2million project to enhance NHRC capacity, *The Rising Nepal*, 26 February 2010

9 see <http://www.undp.org.np/uploads/newsletter/201003090551371.pdf>

10 Govt, NHRC at odds over staff recruitment, *The Himalayan Times*, 12 November 2010

11 *Ibid*

12 SC scraps NHRC move on staff, *República*, Bimal Gautam, 21 January 2010

13 Ananta Raj Luitel, “Govt, NHRC at odds over staff recruitment”, *The Himalayan Times*, 12 November 2010.

ent, fair and anti-discriminatory recruitment process must be established as soon as possible, even if it includes a degree of compromise with the PSC. A transparent process should ensure the independence of staff hired for the NHRC, thereby ensuring the independence of work carried out by the Commission.

The pending Bill and staff recruitment issues impede the Commission's ability to act independently. However, the funding from sources other than the Government can be regarded as an achievement in maintaining or, at this stage, resurrecting the independence of the Commission.

III. Effectiveness

For the first time, the NHRC website started to issue e-bulletins, including Issue 6-1 (July 2010), listing the Commission's major achievements between July 2009 and June 2010, which may be an indication of effectiveness. The achievements include: the ratification of the UN Convention on Persons with Disabilities; tabling of draft bills on the Truth and Reconciliation Commission and the Commission on the Disappeared persons; allocating a 10 million Nepal Rupees (NPR) NHRC budget and 160 million NPR by the Ministry of Peace and Reconstruction for rehabilitation and reconstruction; and the issuance of written directives of the Office of the Prime Minister to the Ministry of Home Affairs and the Defence Ministry for the enforcement of the NHRC's recommendations.¹⁴

Yet, by its own accounting in its 10-year report (2000-2010), there has been limited success in the recommendations made by the Commission to the Government of Nepal. According to the report, out of a total of 10,507 complaints received by the Commission up to May 2010, 2,872 were settled while the remaining 7,635 were still under investigation.¹⁵ As for the status of the recommendations made to the Government of Nepal between May 2009 and May 2010, there were a total of 102 non-implemented recommendations, 5 partially implemented recommendations, and not a single recommendation was fully implemented. Of the recommendations, 107 were centred on extra-judicial killings, with 32 cases made against security forces

¹⁴ NHRC E-Bulletin, Volume 6-1, July 2010, at

¹⁵ NHRC, "Summary Report of NHRC Recommendations upon Complaints in a Decade (2000-2010), NHRC, Haribhawan, Lalitpur, Nepal; at nhrcnepal.org//publication/doc/reports/Sum-Report-NHRC-Recommendation.pdf (accessed 12 January 2011). Pg 8.

and 13 others against the Maoists. The second highest number of recommendations was on enforced disappearances, with a total of 20 recommendations. All these recommendations were made after receiving 343 complaints and suo moto.¹⁶

These numbers show that the NHRC has not been effective in getting its recommendations implemented by the Government. The Commission could place blame for this apparent ineffectiveness on the shoulders of the Government for failing to adequately implement the recommendations, thereby nurturing impunity in the country by not disciplining those accused of serious human rights violations.

Besides making recommendations to the Government on human rights violations and violators, the NHRC also implemented its 2008-2010 strategic plan, which contained seven strategic objectives (SO):

SO1: Strengthen the rule of law, culture of human rights and peace to end impunity and the violation of human rights.

SO2: Uphold and advocate for the creation of HR-friendly Constitution by promoting social inclusion and participatory process in making the new constitution of the country.

SO3: Advocate for the collective rights including the rights of women, children, persons with disability, senior citizen and other disadvantaged groups focusing on gender and caste equality and empowerment of these deprived and denied groups by eliminating all forms of inequalities, exploitation and discrimination in society.

SO4: Promote human rights awareness and education programs in society by developing and disseminating community-friendly information, education and communication (IEC) materials

SO5: Monitor and follow-up level of fulfillment of minimum state obligation on ESC rights by developing necessary indicators and benchmarks.

16 NHRC, "Summary Report of NHRC Recommendations upon Complaints in a Decade (2000-2010), NHRC, Haribhawan, Lalitpur, Nepal; at nhrcnepal.org///publication/doc/reports/Sum-Report-NHRC-Recommendation.pdf (accessed 12 January 2011). Pg 5-9.

SO6: Monitor and advocate that major international HR instruments are ratified or acceded, internalized and implemented in practice by GoN;

SO7: Enhance accessibility, credibility, efficiency and accountability of NHRC by strengthening and expanding the institutional capacity of the organization.¹⁷

The plan also contains provisions for how each of the strategic objectives was going to be met.

These strategic objectives were partly achieved, but were by no means totally successful. In coordination with the Office of the High Commissioner for Human Rights field office in Nepal (OHCHR-Nepal) and some NGOs, the NHRC was to come up with a list of indicators to measure and safeguard economic, social and cultural rights,¹⁸ which could be regarded as an implementation of SO5. They also held a human rights education meetings and workshop, as well as an orientation programme on the rights of senior citizens. Furthermore, the NHRC held a two-day interaction event called the “Human Rights-Friendly New Constitution: A Constructive Dialogue”, which was organised with the Constitutional Lawyers Forum.¹⁹ While these consultations were meant as a first step to fulfilling SO2, SO3 and SO4, the end results could not be secured by the end of 2010. It is also apparent that many of the objectives could not be achieved, even partially.

The effectiveness of the Commission was hindered by the decision of the Supreme Court on staff recruitment.²⁰

In 2009, the report from the Sub-Committee of Accreditation (SCA) of the ICC-NHRI raised a number of issues questioning the compliance of the NHRC with the Paris Principles, including: financial autonomy and adequate funding; the selection and

17 NHRC, “Strategic Plan – 2008 -2010” NHRC, Haribhawan, Pulchowk, Lalitpur, June 2008, at nhrcnepal.org///publication/doc/books/SP_2008-10.pdf (accessed 10 January 2011). Pg 9

18 Himalayan News Service, “NHRC to focus on economic, social rights”, The Himalayan Times, 8 November 2010.

19 THT Online, “Calls to make human rights friendly statute”, The Himalayan Times, 23 November 2010, at www.thehimalayantimes.com/fullNews.php?headline=Calls+to+make+human+rights+friendly|statute&NewsID=268208 (accessed 15 Jan 2010).

20 Himalayan News Service, “Rights body denied right to recruit on its own”, the Himalayan Times, 8 April 2010.

appointment of the governing body; the cooperation with other statutory bodies and civil society; and the adoption of the NHRC legislation by the Parliament.

IV. Thematic Focus

A. HRDs and WHRDs

Protection and monitoring division of the NHRC has been taking up the cases of HRDs and WHRDs, even as the Commission has not established a focal point to deal on the issues of human rights defenders. NHRC is planning to appoint a Rapporteur on HRDs with a mandate to draft and submit a report and make recommendations on the situation of .²¹

A January 2011 joint observation of the NHRC with OHCHR-Nepal on the draft bill on the NHRC—which provides a list of recommendations for the effective functioning of the Commission—did not list a proposed mandate for the protection of HRDs, and neither has it demanded government for a protection mechanism for HRDs. Being a defender itself, the NHRC has a major responsibility for the protection of rights of the HRDs. However, the comments submitted by NHRC on the draft state report on ICCPR demands that the government provided information on security situation of the HRDs in Nepal.²²

Informal Sector Service Centre (INSEC) proposed a draft legislation on human rights defenders in 2009. The draft was prepared on the basis of the UN Declaration on Human Rights Defenders which includes the definition of defenders, their activities, duties and rights, as well as the duty of the state to protect defenders. Meanwhile, a group of human rights NGOs are demanding for a separate unit in the NHRC for the protection and promotion of the rights of the HRDs, until a the special HRD law is enacted. Their demands also include appointing a a national rapporteur under the NHRC with a broad mandate to seek information, investigate, act upon the findings. and make recommends for action.

21 Interview with Bishal Khanal, Secretary of NHRC, 6 May 2011

22 Suggestion of NHRC on second, third and fourth periodic report on International Covenant on Civil and Political Rights (ICCPR)

B. Interaction of NHRIs with the International Human Rights Mechanism

Article 132 (g) of the Interim Constitution 2007, ensures the mandate of NHRC to recommend with reasons to the Government of Nepal to become a party to any international treaties and instruments on human rights, if it is required to do so, and to monitor the implementation of the international treaties and instruments of human rights to which Nepal is a Party and if found not being implemented, forward recommendations to the Government of Nepal for effective implementation of such instruments. This year, NHRC provided its observations on the government draft report on ICERD, ICCPR, CRC Optional Protocol on Children and Armed Conflict, and ILO Convention No. 169. In July, the Commission held a two day dialogue on introducing human rights into the school curriculum. In August they held consultations about a draft report for the ICCPR.²³ NHRC has not had any formal and direct engagement with treaty bodies, special procedures and the UN Human Rights Council.²⁴

NHRC held a consultative seminar as a part of preparation for the Universal Periodic Review (UPR), at regional and national level which led to the joint submission of three national institutions (NIs) covering the major human rights issues of the country. Members of three commissions took part in the review in January 2011, which has suggested a number of recommendations to the government for strengthening NIs, implementation of the recommendations by the NIs, providing adequate funds, and ensuring autonomy and independence of NIs.

C. Follow-up or Implementation of NHRIs and ACJ References

Torture

In Nepal, there is almost total impunity for those who commit acts of torture. Perpetrators are almost never adequately punished, and a victim's right to remedy and reparation is rarely fulfilled. The UN Committee against Torture said in its most recent conclusions and recommendations that it is imperative for the Government

23 NHRC E-Bulletin, Volume 6-2, August 2010, at

24 Interview with Bishal Khanal, Secretary of NHRC, 6 May 2011

to adopt legislation making torture a crime punishable in accordance with the gravity of the offence. Nepal's legal system does not criminalize torture, and there is also no provision for effective redress to victims. Torture is still systematically practiced by the police during criminal investigations.

NHRC conducted a research study on insurgency-related torture and disability perpetrated in 2003. In 2008, from 28 July to 6 August, NHRC, jointly with OHCHR-Nepal and the Association for the Prevention of Torture (APT), conducted a series of detention monitoring workshops in Kathmandu and Nepalgunj. In June 2009, to mark the International Day in Support of Victims of Torture, NHRC, jointly with NGOs, organised a program on the state of torture in Nepal, which issued a joint statement expressing commitment to fight against torture and demanding immediate criminalization of torture.

Although the NHRC has been conducting various events on torture, it has not been effective in the matter of advocating for the implementation of its recommendations regarding torture. For instance, over the period of 10 years, the NHRC made 30 recommendations relating to torture. Out of which 26 recommendations are not implemented, only three partially implemented and only one recommendation fully implemented.

Trafficking

Human trafficking is notoriously rampant in Nepal. Men, women, and children are trafficked either for the purpose of commercial sexual exploitation or for involuntary servitude. Children are trafficked within the country and to India and the Middle East for commercial sexual exploitation or forced marriage, as well for involuntary servitude as domestic servants, circus entertainers, factory workers, or beggars. Women and girls are also trafficked to other Asian destinations, including Malaysia, Hong Kong, and South Korea for commercial sexual exploitation and forced labour.²⁵

NGOs working on trafficking issues report an increase in both transnational and domestic trafficking during the reporting period, although a lack of reliable statistics makes it difficult to quan-

25 Human Trafficking: Nepal Official Complicity Serious: US Report, http://www.nepal-monitor.com/2009/06/human_trafficking_in.html

tify. NGOs estimate that 10,000 to 15,000 Nepali women and girls are trafficked to India annually, while 7,500 children are trafficked domestically for commercial sexual exploitation. In many cases, relatives or acquaintances facilitate the trafficking of women and young girls into sexual exploitation.

The Government of Nepal does not fully comply with the minimum standards for the elimination of trafficking. However, it is making significant efforts to do so. The government continued modest efforts to prosecute traffickers and raise public awareness of trafficking during the reporting period, though its efforts to adequately punish labour trafficking could not be improved. Through its 2007 Trafficking in Persons and Transportation (Control) Act (TPTA), Nepali law prohibits all forms of trafficking and prescribes penalties ranging from 10 to 20 years of imprisonment, which are sufficiently stringent, and with punishments commensurate for those prescribed for other grave crimes, such as rape.

The NHRC has been dealing with the problem of trafficking in persons especially women and children from the very beginning. As recommended by Beijing+5 Outcome Document 2000, the Office of the National Rapporteur on Trafficking in Women and Children (ONRTWC) was established through a Memorandum of Understanding between Ministry of Women, Children and Social Welfare (MWCSW) and NHRC which started functioning from 10 January 2003. The objective of ONRTWC is to bring about conceptual clarity on trafficking and related vulnerability, to monitor the incidence of trafficking, to coordinate national regional and international efforts to combat the incidence of trafficking, and to generate the high level commitment to improve the human rights situation of women and children.

The ONRTWC is positioned within the structure of the National Human Right Commission with the aim to effectively influence national, regional and international policies and programmes in favor of the rights of women and children for sustainable human development. The major responsibilities of the National Rapporteur are to develop national and international linkage and coordination with respective stakeholders in advocating the rights of trafficked women and children, and also to facilitate the rescue, repatriation and reintegration of trafficked women and children. S/he is also responsible for the collection and dissemination of in-

formation, monitoring legal framework to meet the international legal obligations and trans-border anti-trafficking initiatives of government agencies and NGOs. As the Rapporteur, s/he has to promote and sustain effective working relations between NHRC of Nepal and its counterparts in South Asia and other countries, especially the Indian Human Right Commission. In addition s/he has to liaise with international investigatory and supervisory mechanisms such as the United Nation's Special Rapporteur on violence against women, the United Nation's Committee on the Elimination of Discrimination against Women and United Nation's Committee on the Rights of the Child to enhance the relevance, accuracy and effectiveness of the international scrutiny.

The strategic plans of NHRC 2004-2008 and also 2008-2010 consist of combating trafficking in persons, and regulating the immigration of populations as strategic objectives of the Plan. The Report on Trafficking in Persons especially on women and children was published first in 2005 and the Second Report was published in 2006-2007. The Report 2008-2009 is the third in its efforts. Along with presenting the situation of trafficking of women and children, the first Report also focused the impact of conflict on trafficking as its theme. Some of the activities undertaken by ONRTWC includes: co-work with Indian National Human Rights Commission, interactions/workshops/seminars for combating Trafficking in women and girls, discussions with victims, development of awareness materials, and researches on Girls and Young Women Employed in Entertainment Sector in Nepal and Assessment of Human Rights Mechanism in Women Police Cell.

Child Pornography

Nepal does not yet have any specific legislation against child pornography. The "cyber law" in Nepal exists in the form of Electronic Transaction Act 2006 but it is not all-encompassing and existing. In the meantime, the Nepali Children's Act also does not specifically mention protection of children from online abuse.

NHRC provided its comments on state's initial report on Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography in 2008. There are a few NGOs working in the area of child rights.

V. Consultation and Cooperation with National and International Organizations

A. Consultation and Cooperation with National NGOs

In 2010, the NHRC cooperated with various national and international bodies, yet this cooperation was limited and could be made stronger. In December 2010, the NHRC, with other NIs and the Nepal NGO Coalition for UPR, jointly developed an advocacy paper highlighting the key issues and needs to be addressed by the government. The document was used by the lobby team members during the UPR session in Geneva. Cooperation would have been more effective if the coalition and NIs had worked together in drafting the report from the very start. Insufficient coordination between civil society organisations and the NIs to conduct consultations resulted in duplicate consultations in the same region, and some areas being left out. The NHRC did not initiate any discussion with NGOs for the follow-up of the outcome of the UPR despite several requests by the representatives of Nepal NGO Coalition for the UPR.

In December, the NHRC held an interaction meeting with Dalit groups, including the Female Dalit Organisation (FEDO).²⁶

Despite these instances of cooperation and collaboration of the NHRC with NGOs, the OHCHR-Nepal has stated in their Annual Report 2010 that the Commission has not yet established full cooperation with other human rights bodies and neither have they been able to adopt a clear strategy of engagement.²⁷

B. Consultation and Cooperation with other Commissions.

In March 2010, the NHRC issued a joint press release with the National Dalit Commission (NDC), the Government of Nepal and OHCHR-Nepal welcoming a judgment made by the Baitadi District Court on the guilty verdict on a caste-based discrimination case against a man who assaulted the father of a bride at a wedding, for performing rituals which have only been performed traditionally by high caste individuals.²⁸

26 NHRC E-Bulletin, Volume 6-6, December 2010, at

27 OHCHR-Nepal, "Report of the United Nations High Commissioner for Human Rights, on the Human Rights Situation and the activities of her office, including technical cooperation in Nepal", UN Doc A/HRC/13/73, 05/02/2010

28 NHRC Press Release (25.03.10), "NDC, NHRC and OHCHR welcome verdict on caste-

In April 2010, the leaders of the Women's and Dalit's Commissions held dialogues with the NHRC and discussed the killings by the Nepal Army of two women and a child in Bardiya National Park in March 2010.²⁹ In July, the NHRC, NDC and National Women's Commission (NWC) submitted a report for the Universal Periodic Review of Nepal.³⁰ A Memorandum of Understanding (MOU) was signed between the NHRC of Nepal and the South Korean NHRC on strengthening cooperation between the two organisations.³¹

C. Consultation and Cooperation with International Organisations including OHCHR- Nepal.

In September, the NHRC, along with national and international experts and representatives from the OHCHR-Nepal, began an exhumation of a suspected burial site of disappeared persons.³² In November, members of the NHRC met with UN Security Council Officials to discuss the issue of children in armed conflict.³³ Since September 2009, there has been a project called Strengthening of the Capacity of National Human Rights Commission (SCHRC), which involves the UNDP, the OHCHR and donor governments, such as Denmark, Finland, Switzerland, Norway and the UK, which provided the NHRC with 2 million USD, including a 300,000 USD from the the OHCHR.³⁴

In spite of the above examples of cooperation with international organisations, cooperation with the OHCHR was not congenial. In May 2010, the NHRC accused the OHCHR of lack of transparency in its operations, and requested that the government curtail the latter's mandate.³⁵ The Commission also blamed the OHCHR for the prospect of being downgraded from A to B status due to

based discrimination and urge swift implementation", at

29 NHRC, "Summary Report of NHRC Recommendations upon Complaints in a Decade (2000-2010)", NHRC, Haribhawan, Lalitpur, Nepal; at nhrcnepal.org/publication/doc/reports/Sum-Report-NHRC-Recommendation.pdf (accessed 12 January 2011). Pg 16

30 NHRC Press Release (05.07.10), "Report of the NHRI of "Nepal on the UPR", at

31 NHRC E-Bulletin, Volume 6-5, November 2010, at

32 NHRC Press Release (05/09/10), "Exhumation Team Proceeds to Janakpur, Kamala River", at

33 NHRC Press Release (26/11/10), "Discussions Held with the UN Security Council Working Group", at

34 "\$2 million project to enhance NHRC capacity", at www.gorkhapatra.org.np/detail.php?article_id=31360&cat_id=4 (accessed 10 January 2011).

35 Ananta Raj Luitel, "Opacity slur on OHCHR, The Himalayan Times, 19 May 2010

a biased report submitted to the ICC-SCA.³⁶ The ICC-SCA report on the NHRC's compliance with the Paris Principles, the ICC-SCA mentioned the existing tension between NHRC and OHCHR, and that there was limited cooperation between the two organizations.³⁷ In addition, the ICC-SCA raised concerns over the draft Bill and its possible impact on the cooperation between the NHRC and international organisations. The Bill states that any foreign institution which is wishing to conduct human rights work in Nepal must first seek NHRC permission which was seen as inappropriate with the Paris Principles.³⁸ Moreover, in 2009, OHCHR and NHRC signed guidelines on cooperation, including a commitment to refer cases to the NHRC. OHCHR in their annual report, however, stated that the NHRC had only started investigations into 25% of those referrals.³⁹

Furthermore, in August 2010, the NHRC met with European ambassadors, who urged the Commission to initiate the interaction and work with international bodies.⁴⁰ A member of the Commission also stated that the NHRC needed direct involvement from foreign countries and donor agencies in their work on statute drafting and the peace process.⁴¹

VI. Conclusion

As a public institution, the NHRC should always be alert, effective and accountable to the people. It can more effectively perform its work of promoting and protecting human rights only through transparency, cooperation and collaboration with NGOs, civil so-

36 Kamal Raj Siegel, "NHRC may go bust to B status", The Kathmandu Post, 31 December 2010

37 HRI, "Special Review of the Nepal Human Rights Commission of the International Coordinating Committee of National Human Rights Institutions", November 2009, at www.nhri.net/2010/SUMMARY_NEPAL.pdf (accessed 13 January 2011). Pg 4

38 ICC-SCA on Accreditation, "International Coordination 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 29 March - 1 April 2010. Pg 13

39 OHCHR-Nepal, "Report of the United Nations High Commissioner for Human Rights, on the Human Rights situation and the activities of her office, including technical cooperation in Nepal", UN Doc A/HRC/13/73, 05/02/2010

40 Himalayan News Service, "NHRC interacts with envoys", The Himalayan Times, 10 August 2010.

41 Ananta Raj Luitel, "International help sought for statute drafting", The Himalayan Times, 16 May 2010

cities and other national institutions. Achieving this can best be achieved through an NHRC law consistent with the Paris Principles, ensuring sufficient resources to the all NIs including National Human Rights Commission, National Women Commission and National Dalit Commission to effectively realize their mandate.

Recommendations to government:

- Ensure independence and autonomy of the NHRC in new constitution;
- Ensure adequate funding and independence to all NIs;
- Urge parliament to address the flaws of the current NHRC bill and approve it without further delay;
- 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 to guarantee independence and autonomy in new constitution and the draft NHRC Bill;
- Lobby to ensure sufficient resources for the National Dalit Commission and the National Women's Commission to effectively realize their mandate;
- Lobby for the adoption of a strong NHRC law that would guarantee its independence and effective functioning;
- Lobby 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 enhance 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.

Philippines: A Time of Vigilance and Hope

Striving for a Better Commission on Human Rights

The Lawyers League for Liberty (LIBERTAS)¹

I. General overview

In many respects, 2010 was a year of transition for the Philippines. The country began the new decade with a new president after almost 10 years of rule under Gloria Macapagal Arroyo. The country's new leader, Benigno Simeon "Noy" C. Aquino III—son of former President Corazon Aquino and martyred freedom fighter Benigno Aquino Jr.²—enjoyed a high level of popular support and public confidence, with various polls indicating a spike in the level of optimism among Filipinos.³

Part of this transition was the appointment of a new chairperson for the Commission on Human Rights (CHR) after its former chairperson, Leila De Lima was appointed to head the Department of Justice.⁴ President Aquino appointed Ms Loretta Ann P. Rosales

1 . Prepared by Ms Sylvia Angeliqne Umbac with the support and assistance of Philippines Alliance of Human Rights Advocates (PAHRA) and researchers Reighben Earl Wysten M. Labilles, Artkario Bian Villanueva, and Paolo Miguel Consignado

2 The Second Quarter 2010 Social Weather Survey found 88% of people placed much trust in the new president. See: Second Quarter 2010 Social Weather Survey, viewed 18 May 2011, <<http://www.sws.org.ph/pr20100712.htm>>.

3 The Second Quarter 2010 Social Weather Survey determined a rating of +36, the highest since 1987. See: Second Quarter 2010 Social Weather Survey, viewed 18 May 2011, <<http://www.sws.org.ph/pr20100825.htm>>.

4 For more information, see: Inquirer.net, Rights chief to head DoJ, viewed 18 May 2011, <<http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100623-277073/Rights-chief-to-head-DoJ>>.

to take the reins at the CHR, an appointment that met with mixed reactions from civil society.⁵ Some groups branded Rosales a “red-baiter” and claimed her appointment represented nothing more than political patronage.

Rosales was a former party-list representative of Akbayan, an organisation that had historically distanced itself from other progressive groups accused to have close ties with the Communist Party of the Philippines. It is worth noting that before she entered office as Chairperson in September 2010, Rosales sat down and met with civil society organizations, expressing willingness to work together, and requesting for help and partnership—a gesture that was appreciated as a strong message on the directions of the CHR.

Despite the general atmosphere of hope, there have been growing concerns over a lack of a concrete human rights agenda of the Aquino administration. President Aquino’s governmental platform, the “Social Contract”⁶ instead focuses on the economy and the promotion of good governance, with a clause dedicated to restoring peace in Mindanao. There has been a generally muted stance in relation to human rights violations, occasionally punctuated with strongly worded responses only on select high-profile cases, contributing to an atmosphere of uncertainty.

Key Issues

Extra-judicial killings were reported within the first few weeks of the Aquino’s presidency.⁷ The nature of the killings, with the first victims being members of the media and activists,⁸ and their timing prompted the President to take a strong initial stance in his first State of the Nation Address (26 July 2010), stating that half of the

5 For more information, see: Inquirer.net, *Finally, Etta Rosales takes CHR helm*, viewed 18 May 2011, <<http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100904-290425/Finally-Etta-Rosales-takes-CHR-helm>>.

6 For more information, see: Official Gazette, *A Social Contract with the Filipino People*, viewed 18 May 2011, <<http://www.gov.ph/the-republic/the-president/benigno-simeon-cojuangco-aquino-iii/platform-of-government/>>.

7 For more information, see: PhilSTAR.com, *AFP welcomes creation of ‘super body’ on killings*, viewed 18 May 2011, <<http://www.philstar.com/Article.aspx?articleId=593394&publicationSubCategoryId=63>>.

8 For more information, see: Philippine Online Chronicles, *Activist, journalist first extrajudicial killing vics in Aquino admin term*, viewed 8 June 2011, <<http://www.thepoc.net/breaking-news/local/8397-first-activist-journalist-killed-under-aquino-admin.html>>.

cases under investigation were moving towards resolution.⁹

One significant issue is a case involving the “Morong 43,” a group of 43 health workers arrested on 6 February 2010 in Morong town, east of Manila on the suspicion of being members of the Communist Party of the Philippines and its armed wing, the New Peoples’ Army (CPP-NPA). They were charged with illegal possession of firearms and explosives, and detained. Some of the detainees claimed they were harassed and tortured during the first 36 hours of their detention.¹⁰

Conflicting reports over the status of the detainees and the circumstances surrounding their arrest and detention later surfaced. Three negated the statements of their fellow detainees and refused to sign an affidavit prepared by the group’s counsel, and requested a change of representation from the armed forces.¹¹ Five who had claimed they were communist guerrillas defected to the military; and on 20 March 2011, Jenilyn Pizarro, the youngest of the five at only 19 years of age, married a soldier she met in the military camp.¹²

The detainees went on hunger strike to protest government inaction on their claims of illegal detention. President Aquino III ordered their release on International Human Rights Day, citing his strong commitment to justice and the rule of law.¹³ However, not all the detainees were released. Eight people who had allegedly admitted to membership in the CPP-NPA while under interrogation remained incarcerated in different camps, with three held in a high-security facility usually reserved for alleged terrorists.¹⁴

9 The full text of the address can be seen at: Official Gazette, Benigno S. Aquino III, State of the Nation Address July 26, 2010 (English), viewed 18 May 2011, <<http://www.gov.ph/2010/07/26/state-of-the-nation-address-2010-en/>>.

10 For more information, see: Philippines Today, Morong 43 tortured, viewed 18 May 2011, <<http://www.philippinestoday.net/index.php?module=article&view=2341>>.

11 For more information, see: Inquirer.net, 3 of Morong 43 detainees belie torture claims, viewed 18 May 2011, <<http://newsinfo.inquirer.net/breakingnews/nation/view/20100303-256470/3-of-Morong-43-detainees-belie-torture-claims>>.

12 For more information, see: Inquirer.net, ‘Morong 43’ defector marries soldier in camp, viewed on 8 June 2011, <<http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20110413-330853/Morong-43-defector-marries-soldier-in-camp-ceremony>>.

13 For more information, see: Inquirer.net, Aquino: Free ‘Morong 43’, viewed 18 May 2011, <<http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20101211-308278/Aquino-Free-Morong-43>>.

14 For more information, see: Inquirer.net, Last 8 of ‘Morong 43’ detainees still in jail, viewed 18 May 2011, <<http://newsinfo.inquirer.net/breakingnews/nation/view/20110207-318910/Last-8-of-Morong-43-detainees-still-in-jail>>.

Another high-profile case in 2010 came to light when video footage surfaced of a police officer torturing a suspect inside a police precinct. The police officer concerned and his former colleagues were investigated under the Anti-Torture Law.¹⁵

The killing of renowned botanist Leonard Co¹⁶, a professor at the University of the Philippines, in an alleged firefight between the Armed Forces of the Philippines (AFP) and the CPP-NPA was also a high-profile human rights-related incident. According to initial reports from the military, the research team was caught in a crossfire. However, subsequent investigations conducted by different groups supported the conclusion that Co's group, who were on a flora inventory expedition in a forest, may have been mistaken for insurgents.

Investigation of the Ampatuan Massacre also slowed down due to the resignation of government prosecutors who suffered from the stress of handling the case,¹⁷ and the climate of fear that surrounded the issue.¹⁸ The massacre occurred in Maguindanao province on 26 November 2009, when 57 persons were killed by members and militia groups belonging to the Ampatuan clan. The victims—mostly members of the media and including women of the rival Mangudadatu clan—were on the way to filing a certificate of candidacy. In 2010, witnesses who have surfaced were subjected to harassment, threats, and in some cases, their homes burned down. A key witness was also killed.

Another key issue in 2010 is the AFP's extension of its counter-insurgency program *Oplan Bantay Laya II* (Operation Plan Freedom

15 For more information, see: GMA News Online, Tondo 'torture cop' dismissed from police service – PNP, viewed 18 May 2011, <<http://www.gmanews.tv/story/210528/tondo-torture-cop-dismissed-from-police-service-pnp>>.

16 For more information, see: GMA News Online, Scientists: Army's bullets killed top Filipino botanist Leonard Co, viewed 18 May 2011, <<http://www.gmanews.tv/story/207819/scientists-army39s-bullets-killed-top-filipino-botanist-leonard-co>>.

17 For more information, see: Inquirer.net, Another prosecutor in Maguindanao massacre trial resigns, viewed 18 May 2011, <<http://newsinfo.inquirer.net/breakingnews/nation/view/20110330-328402/Another-prosecutor-in-Maguindanao-massacre-trial-resigns>>.

18 Several witnesses were killed before the trial began, with many of the residents of the province living in fear. For more information, see: Inquirer.net, Maguindanao massacre witness killed, viewed 18 May 2011, <<http://newsinfo.inquirer.net/breakingnews/nation/view/20100624-277293/Maguindanao-massacre-witness-killedprosecutor>>; and Inquirer.net, Locals live in fear of accused Maguindanao massacre clan, viewed 18 May 2011, <<http://newsinfo.inquirer.net/breakingnews/regions/view/20101122-304667/Locals-live-in-fear-of-accused-Maguindanao-massacre-clan>>.

Watch). While emphasis was allegedly placed on the upholding of human rights, this move was regarded suspiciously by human rights advocates.¹⁹ This purported “paradigm shift” was accompanied by the establishment of the AFP Human Rights Office designed to promote respect for human rights within the military, and to address human rights violations. However, reports of violations have persisted.²⁰

II. Independence

A. Law

The CHR came into being as a Presidential Committee²¹ in 1986, under the Executive Branch. Later, it was institutionalized as an independent constitutional body under the 1987 Philippine Constitution. Thereafter, Executive Order No. 163 was issued, also in 1987, and serves as the CHR’s charter up to the present, despite criticism of the order as sketchy and lacking in details.

Since its establishment, the capacity and independence of the CHR to uphold and fulfill its mandated duties have become more defined through various means, mainly through its own practice but also through jurisprudence, not all of them favorable. Several bills have been submitted to Congress seeking to strengthen the CHR, including House Bill Nos. 55²² and 1141²³, which are now be-

19 Oplan Bantay Laya II was the Armed Forces of the Philippines’ counter-insurgency strategy aimed at confronting both the CPP-NPA and the Abu Sayyaf Group. (Its current Internal Security Plan is dubbed “Oplan Bayanihan”.) It has long been criticised for being the source of many human rights violations. For more information on the extension of Oplan Bantay Laya II, see: GMA News Online, AFP extends battle plan linked to extra-judicial killings, viewed 18 May 2011, <<http://www.gmanews.tv/story/198625/afp-extends-battle-plan-linked-to-extra-judicial-killings>>. An assessment by UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Philip Alston found the strategy to be the primary reason for the surge in human rights violations in the Philippines. The full report can be downloaded at <<http://www.scribd.com/doc/19010725/Philip-Alston-Report-November-2007>>.

20 For more information, see: Karapatan 2010 Year-End Report on the Human Rights Situation in the Philippines, Viewed 18 May 2011, <<http://www.derechos.org/nizkor/filipinas/doc/karapatan1.html#Table 1> accessed May 18, 2011>.

21 The Presidential Committee on Human Rights (PCHR) was created under Executive Order No. 8 issued on March 18, 1986.

22 This is the same bill Rep. Lorenzo R. Tañada introduced in the 14th Congress, entitled “An Act Strengthening the Commission on Human Rights, and for Other Purposes”.

23 Introduced by Rep. Karlo B. Nograles, the Bill is presented in its simple form as the “Commission on Human Rights Act of 2010.”

ing examined by a technical working group in the House of Representatives. A similar bill was filed in the Senate, authored by Senator Francis Escudero, Chairman of the Senate Committee on Justice and Human Rights. Among the aims of the bills are the granting of full fiscal autonomy to the CHR;²⁴ the provision of “standby” prosecutorial powers;²⁵ and the appointment of Human Rights Attaches to Philippine embassies and consulates to protect and promote the human rights of Filipinos living abroad.²⁶ The bills were not approved before the end of the 14th Congress at the end of June 2010, but they have been refiled with the start of the 15th Congress thereafter.

B. Relationship with Executive, Legislative, Judiciary and other specialised institutions in the Philippines

Despite being branded a “toothless tiger”, the CHR has steadily built alliances both with government and non-government organizations, as well as international institutions.

In November 2010, it spearheaded the Persons Deprived of Liberty Summit with several government offices, civil society and international partners to institute reforms in the judicial system though a shift from punitive to restorative justice.

From November to December 2010, under the auspices of the United Nations Development Program, it conducted a series of trainings and workshops with planners of all government agencies to introduce for the first time, a human rights-based approach to development as framework for the Medium Term Philippine Development Plan.

The year 2010 also saw the signing of the Implementing Rules and Regulations of Republic Act 9745 or the Anti-Torture Act of 2009, and those of Republic Act 9775 or the Anti-Child Pornography Act of 2009. According to CHR’s Resolution No. A2010-208, signed by the collegial body on 23 December 2010, the Commission will continue its legislative advocacy into the 15th Congress (July 2010 – 2013). They have prioritized support and lobby for the following key laws (categorized under their corresponding international human rights instrument):

24 HB No. 6822, Section. 15.

25 Ibid., Section 22.

26 Ibid., Sections 19-20.

On the International Covenant on Civil and Political Rights (ICCPR):

1. Commission on Human Rights Charter;
2. Internal Displacement;
3. Anti-Enforced Disappearance;
4. Law on Extra-Judicial Killings;
5. Compensation to the Victims of Human Rights Violations during the Marcos Regime;
6. Rights of the Accused;
7. Law on Lesbians, Gays, Bisexuals and Transgenders (LGBTs); and
8. Law on “Curative Filing of Cases” in Habeas Corpus Proceedings

On the International Covenant of Economic, Social, and Cultural Rights (ICESCR):

1. CHR Charter’s expansion of mandate to include economic, social, and cultural rights

On the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT):

1. CHR Charter to empower the Commission to conduct un-hampered, unrestrained access to jails, prisons or detention facilities;
2. Adequate Compensation for Victims of Unjust Imprisonment or Detention;
3. National Preventive Mechanism (NPM) as mandated by the Optional Protocol to the Convention Against Torture (OP-CAT) with CHR as lead institution; and
4. Strengthening the Witness Protection Program

On the Convention on the Elimination of All Forms of

Discrimination Against Women (CEDAW):

1. Repeal of the Marital Infidelity Provisions in the RPC Amendment of Article 96 and 124 of the Family Code;
2. Night Work Prohibition under Article 130 of the Labor Code;
3. Decriminalization of Prostitution; and
4. Improvement of the Reproductive Health Rights for Women

On the Convention on the Rights of the Child (CRC):

1. CHRP Charter to increased resources for the Child Rights Center;
2. An Act to Increase the Age of Statutory Rape (from 12 years old to 16 years old); and
3. Anti-Corporal Punishment

On the Convention on the Rights of Persons with Disabilities (CRPD):

1. Amendment of Sec. 5 Chapter 1 of RA 7277 (Magna Carta for Persons with Disabilities) and other provisions in accordance with CRPD

On the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW):

1. Passage of the Magna Carta of Migrant Workers

On the Right to Suffrage:

1. Right to Suffrage of Detained Persons; and
2. Amendments to the Party List Law

The CHR will also advocate for the signing and/or ratification of the following international human rights instruments:

1. International Convention for the Protection of All Persons Against Enforced Disappearance;

2. Rome Statute of the International Criminal Court;
3. Optional Protocol II to the ICCPR;
4. Optional Protocol to the Convention Against Torture;
5. Ratification of ILO Convention No. 169 (Employment Policy Recommendations);
6. Ratification of the Amendments to Article 8, paragraph 6 of CERD;
7. Optional Declaration provided for in the CAT and CERD on Individual Communications Procedure; and
8. Signing of the Optional Protocol to the ICESCR

In a speech delivered on 10 December 2010 at the presidential palace, Chairperson Rosales presented the CHR's five-year roadmap (2011-2015).

In the roadmap, she called for comprehensive monitoring of government compliance with human rights treaties, efficient case management system, establishment of Quick-Reaction Teams to respond to human rights violations, establishment of a dedicated regional human rights office in all autonomous regions, strengthening of the CHR's women's and children's centers especially on its role as Gender and Development Ombudsman. For 2011-2012, the CHR aims to attain a critical mass of forensic investigators able to operate a fully-functional Forensic Center.

She pushed for passage of the CHR Charter that will enhance the Commission's powers, functions, and mandates in investigating, resolving, and monitoring human rights violations. It will also provide fiscal autonomy, and it would give them the capacity to update the skills of its officers and staff to comply with international human rights investigation and monitoring standards, and enhanced access to resources.

Another important element of the expanded charter is that it would make transparency part of the process that determines nominees for Chairperson and Commissioners, in compliance with the United Nations' General Assembly Resolution 48/134 of 1993 (Paris Principles). The draft charter proposes that broad consultations be

conducted throughout the selection and appointment process, any vacancy will be broadly advertised, and the number of potential candidates from a wide range of social groups will be maximized.

C. Membership and Selection

Eligibility for membership in the CHR as stipulated in the Constitution is as follows: The Chairperson and four members of the CHR must be citizens of the Philippines and the majority should be members of the Bar.²⁷ Additional requirements as stipulated under Executive Order No. 163, “Declaring the Effectivity of the Creation of the Commission on Human Rights as Provided for in the 1987 Constitution, Providing Guidelines for the Operation Thereof,” state that members should be at least 35 years of age at the time of their appointment and must not have been candidates for any elective position immediately preceding their appointment.²⁸

The Chairperson and the members of the CHR are also prohibited from holding any other office or employment during their tenure; engaging in any other profession or in the active management or control of a business; , or having any direct or indirect financial interest in contracts, franchises or privileges granted by the government or any of its subdivisions, agencies or instruments, including government-owned or controlled corporations and their subsidiaries.²⁹

The President appoints members for a single term of seven years without reappointment. This includes appointments to any positions that apply only for the unexpired term of the predecessor.³⁰ The system highlights the lack of transparency inherent in nominating and appointing commissioners, which is done at the discretion of the President without any requirement for public consultation or civil society participation. There is also no provision requiring the publication of the names of shortlisted candidates.

The CHR is currently headed by Chairperson Loretta Ann P. Rosales; serving as Commissioners are Cecilia Rachel V. Quisumbing, Norberto Dela Cruz, Ma. Victoria V. Cardona, and Jose Manuel

27 1987 Philippine Constitution, Article XIII, Section 17 (2).

28 Executive Order No. 163, Section 2.

29 *Ibid.*

30 *Ibid.*

S. Mamauag. Although both the Constitution and Executive Order No. 163 do not explicitly stipulate any demonstration of pluralism or gender balance in selection and membership, the CHR at present has a higher representation of women.

The CHR's functions primarily revolve around policymaking.³¹ Commissioners sitting *en banc* issue resolutions that serve as policy directives for the entire institution, while the Executive Director, the Regional Directors and the rest of the CHR personnel are responsible for implementation. In accordance with Resolution CHR (IV) No. A2010-029 of 7 February 2010, Commissioners are tasked with facilitating and managing foreign-funded projects as assigned among themselves.

D. Resourcing

The CHR has 680 permanent staff in its central office, 15 regional offices, six sub-regional offices, and one desk office. To augment its human resources, staff are hired on a temporary basis in order to support offices with heavy workloads. The State funds CHR operations through annual appropriations approved by Congress. The CHR budget represents about 0.021% of the country's total appropriations. In 2010, the CHR's budget was marginally increased to approximately 286 million Philippine pesos (PHP, equivalent to about 6.60 million USD) from 255 million PHP (about 5.673 million USD) the previous year.³²

A total of 282.564 million pesos (about 6.52 million USD), representing 98.8% of the CHR's current budget, is earmarked for Programs (General Administration and Support, Support to Operations, and Operations) and can be used only for the activities indicated. The budget allocation for operations can only be used for the following core CHR functions:

1. Investigation of all forms of human rights violations involving civil and political rights, particularly extrajudicial killings and enforced disappearances;

31 Yambao, Pepito 2010, 'Philippines: A Time of Great Irony', in Asian Forum for Human Rights and Development 2010, *2010 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, Bangkok, page 176.

32 Rep. Act No. 9970, The General Appropriations Act of 2010. This can be downloaded from <<http://www.dbm.gov.ph/GAA2010/CONGRESS/CONGRESS.pdf>>.

2. Provision for appropriate legal measures for the protection of human rights of all Filipinos, including recommendations to Congress for preventive and protective measures, as well as legal services for the underprivileged and vulnerable groups; and visitorial services in prisons and detention facilities;
3. The development of continuing programs of research, education and information in collaboration with special institutions such as schools, non-governmental organisations and people's organizations to enhance respect for the primacy of human rights, including providing recommendations to Congress on measures for its promotion, and human rights training programs for the Executive, Legislative and Judicial branches of government, as well as the police and military;
4. Assistance to victims of human rights violations.

The remaining 1.2% (3.325 million pesos or USD \$0.077 million) is allocated for locally funded projects. All allocations, including those for regional and sub-regional offices, pass through the CHR Central Office. While the Constitution stipulates that approved annual appropriations to the CHR are automatically and regularly released,³³ the release of funds is hindered by its having only limited fiscal autonomy.³⁴

The CHR can appoint its own personnel, subject to Civil Service Rules. However it has no authority to reclassify, upgrade or create positions without approval of the DBM.³⁵

E. Direct and Indirect Donor-Assisted Projects

The CHR occasionally receives supplemental funding for program-specific activities, and other special projects are sustained through funding assistance from international organisations, including both government and non-government sources.

There are several ongoing and just completed direct donor-assisted projects of the Commission. These include projects under the Strengthening the Human Rights Infrastructure in the Philip-

33 1987 Philippine Constitution, Article XIII, Section. 17 (4).

34 CHREA v. CHR, G.R. No. 155336, 21 July 2006 and CHR-AOM-013-2008-101, 25 September 2008.

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

piners programme of the UNDP (2009 to 2011), enhancing the role of NHRIs in the establishment of an ASEAN Regional Mechanism, with support from the European Commission (2007 to 2011), protecting indigenous peoples, with support from NZ Aid and NZHRC (2007 to 2010), assistance in addressing extrajudicial killings and enforced disappearances by EPJUST (recently ended), enhancing the role of forensic investigation training with AusAid (from 2010 to 2012), using the Martus system for documentation of human rights violations with the Asia Foundation (ongoing), formulation of the Implementing Rules and Regulations of the Anti-Torture Law, with support from the Asia Foundation (2010), and IEC materials on LGBT rights with Asia Pacific Forum on National Human Rights Institutions.

Significant indirect donor-assisted projects include partnering with civil society organizations at the Asian Consortium on the Human Rights-Based Access to Justice, enhancing the institutional capacity of the Commission to monitor human rights compliance with a network that includes, Ateneo School of Government, CBCP-Episcopal Commission on Prison Pastoral Care, and community-based dialogues on human rights with the Alternative Law Groups.³⁶

III. Effectiveness

A. Mandates and powers

The CHR has a broad mandate to promote and protect human rights. It has the power to provide legal measures for the protection of human rights, and to provide for preventive measures and legal aid services for the underprivileged whose human rights have been violated and/or need protection.

It can investigate on its own, or on complaint by any party, all forms of human rights violations involving civil and political rights. CHR exercised this investigative jurisdiction over the Morong 43 case,³⁷ on the violent dispersal by the police of a rally

³⁶ Based on data from CHR Strategic and Development Planning Office, obtained in May 2011

³⁷ For more information, see: ABS CBN News.com, CA OKs CHR probe of 'Morong 43', viewed 8 June 2011, <<http://www.abs-cbnnews.com/nation/04/29/11/ca-oks-chr-probe-morong-43>>.

organized by kuliglig (motorized pedicab) drivers in the City of Manila,³⁸ and also on the violent and inhuman treatment of some 600 inmates who staged a protest at the Bataan jail.³⁹

The CHR can also grant immunity to a witness or to any person in possession of evidence deemed important. In exercising its investigative power, the CHR is entitled to adopt its own operational guidelines and rules of procedure, and may cite for contempt anyone who refuses to comply with orders pursuant to those guidelines and procedures.

The Commission has come up with and is presently updating its internal manual on methodologies for investigating, monitoring, and resolving cases of human rights violations. The manual details the functions of the CHR, its role in the investigation and monitoring of human rights violations, the specific role of case investigators, the entire case management process, and the post-investigation activities which include drafting and passage of resolutions, monitoring of resolved cases, and provision of protection and assistance to victims, their immediate family, and witnesses to human rights violations. An important aspect of this manual is that it specifically instructs investigators and all CHR personnel involved in the resolution and monitoring of each case to indicate the appropriate international human rights instrument or human rights convention which was violated.

Templates for all required documents in all stages of the investigation and post-investigation process (final investigation report, resolution, monitoring, protection and assistance to victims) are included in the manual. This ensures uniformity as well as continuity in case handling for all CHR offices. Each case would also be provided the means to create adequate documentation in every step of the way, allowing any investigator to analyze all stages that were completed. These documents would serve as a thorough physical paper trail that will also be entered in the centralized digital database.

38 For more information, see: Inquirer.net, Kuliglig drivers may file cases against Manila police, viewed 8 August 2011, < <http://newsinfo.inquirer.net/breakingnews/metro/view/20101205-307156/Kuliglig-drivers-may-file-cases-vs-Manila-police>>

39 For more information, see: Speech of Chairperson Rosales, On the Occasion of the Celebration of International Human Rights Day, 10 December 2010.<http://www.chr.gov.ph/MAIN%20PAGES/speeches/lapr_spch10Dec2010_IHRD.htm>

Data on hand for 2010 reveals that a total of 2,729 human rights violation (HRV) complaints were filed through the regional offices (RO), Investigative Monitoring, the Barangay Human Rights Action Center (BHRAC), NGO partners, and *motu proprio* by the Commission.

The CHR has completed the evaluation of 1,699 complaints, with 1,413 complainants provided legal counseling, and 248 complaints resolved at the regional office level. None of the cases for 2010 has reached the level of the Commission *en banc* for a resolution. A majority of the cases are still in the investigation stages.

The charts below are the summary statistics for all complaints on human rights violations filed and processed for 2010 sourced from the Commission’s centralized digital database.

Number of Human Rights Violations Complaints Filed in the CHR for 2010, by region and by source of complaint

Region	Source of Complaint					Total
	Regional Office	Investigative Monitoring	BHRAC	NGO Partner	Motu Proprio	
CAR	35	1	0	0	1	37
CARAGA	210	0	1	0	26	237
NCR	57	0	0	0	4	61
R-I	98	4	6	0	10	118
R-II	35	0	1	0	1	37
R-III	201	1	3	0	23	228
R-IV	66	3	1	0	3	73
R-V	118	2	0	0	17	137
R-VI	129	0	0	0	25	154
R-VII	92	0	0	0	6	98
R-VIII	381	0	2	0	22	405
R-IX	756	0	0	0	22	778
R-X	58	0	0	0	9	67
R-XI	78	1	1	0	53	133
R-XII	135	6	2	0	23	166
Total:	2449	18	17	0	245	2729

Breakdown of Result of Evaluation, by region

Region	Result of Evaluation					
	Et Cetera	Consolidation	No Human Rights Violation/ Referred	Legal Counseling	For Investigation	Total
CAR	5	0	0	21	2	28
CARAGA	0	0	0	4	10	14
NCR	1	0	0	0	3	4
R-I	0	0	0	41	18	59
R-II	0	0	0	0	1	1
R-III	1	0	1	86	49	137
R-IV	22	0	0	30	3	55
R-V	5	0	1	44	4	54
R-VI	0	0	0	53	34	87
R-VII	0	0	6	62	3	71
R-VIII	12	1	32	282	0	327
R-IX	0	0	0	636	40	676
R-X	0	0	0	35	1	36
R-XI	1	0	0	43	2	46
R-XII	0	0	2	76	26	104
Total:	47	1	42	1413	196	1699

Breakdown of Status of Investigation, by region

Region	Complaint Received	Evaluation Completed	Investigation Report	Final Investigation Report	Status of Investigation						Total	
					RO Draft Resolution	RO Resolved	En Banc Draft Resolution	En Banc Resolved	Case Monitoring			
CAR	8	28	0	1	0	0	0	0	0	0	0	37
CARAGA	198	14	23	2	0	0	0	0	0	0	0	237
NCR	57	4	0	0	0	0	0	0	0	0	0	61
R-I	52	59	6	1	0	0	0	0	0	0	0	118
R-II	15	1	1	19	1	0	0	0	0	0	0	37
R-III	87	137	2	2	0	0	0	0	0	0	0	228
R-IV	17	55	1	0	0	0	0	0	0	0	0	73
R-V	3	54	1	1	0	78	0	0	0	0	0	137
R-VI	20	87	5	42	0	0	0	0	0	0	0	154
R-VII	1	71	0	3	9	14	0	0	0	0	0	98
R-VIII	3	327	0	10	0	65	0	0	0	0	0	405
R-IX	2	676	1	4	3	81	0	0	0	11	0	778
R-X	31	36	0	0	0	0	0	0	0	0	0	67
R-XI	16	46	7	37	17	10	0	0	0	0	0	133
R-XII	39	104	1	22	0	0	0	0	0	0	0	166
Total:	549	1699	48	144	30	248	0	0	0	11	0	2729

Breakdown of Resolved Cases by region

Region	Resolution Method					Total
	Revert for further investigation	For Filing and Monitoring	Archived	Dismissed/ Closed/ Terminated	Alternative Dispute Resolution	
CAR	0	0	0	0	0	0
CARAGA	0	0	0	0	0	0
NCR	0	0	0	0	0	0
R-I	0	0	0	0	0	0
R-II	0	0	0	0	0	0
R-III	0	0	0	0	0	0
R-IV	0	0	0	0	0	0
R-V	0	36	5	34	3	78
R-VI	0	0	0	0	0	0
R-VII	0	6	0	8	0	14
R-VIII	2	25	8	30	0	65
R-IX	0	33	5	43	0	81
R-X	0	0	0	0	0	0
R-XI	0	6	2	2	0	10
R-XII	0	0	0	0	0	0
Total:	2	106	20	117	3	248

IV. Thematic Focus

Death Penalty

The Advisory Council of Jurists met at its Inaugural Session in 2000, and considered the issue of the death penalty which was referred to it by the Asia Pacific Forum.

In its Report, the Council expresses concern at the reintroduction by the Philippines of the death penalty in 1993, and the later expansion of categories of offences subject to the death penalty, but commended it for the moratorium declared in March 2000.⁴⁰

On 24 June 2006, six years after the APF recommendation, then-

40 The full text of the report can be seen at: 2000 Final Report (Reference on the Death Penalty), Inaugural Session of the Council of Jurists, viewed on June 14, 2011, < <http://www.asiapacificforum.net/acj/references/death-penalty>>.

President Arroyo signed Republic Act No. 9346, “An Act Prohibiting the Imposition of the Death Penalty in the Philippines.”

As a result of the abolition, existing penalties for death of more than 1,200 persons were reduced to *reclusion perpetua* (indeterminate sentence with a minimum of 30-years). The signing of the law took place two days before a meeting with Pope Benedict XVI at Vatican City, where the President handed him a copy of the law and a statue of Our Lady of Guidance as “two expressions of the faith of the Filipino people.”⁴¹

Torture

The Advisory Council of Jurists (ACJ) met at the [10th Annual Meeting](#) (2005) to consider a reference on torture. The reference also asked the ACJ to develop a set of minimum standards for interrogation.⁴²

The Philippines ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 18 June 1986.

In May 2009, the United Nations Committee Against Torture reviewed the Philippines’ State Report on its implementation of the CAT. One of the central issues raised by the UN Committee is the failure of government to enact a law translating the provisions of CAT into national legislation.

Twenty-two years after the Philippines’ ratification of the Convention, the Anti-Torture Act was finally passed into law. On November 10, 2009, two days before the arrival of US Secretary of State Hillary Clinton whose department previously expressed concerns over the state of human rights in the Philippines⁴³, President Arroyo signed Republic Act 9745 or the Anti-Torture Act of 2009, which criminalizes “torture and other cruel, inhuman and degrading treatment or punishment.”

41 For more information, see: Catholic Online, ‘Well done,’ pope tells Philippine prez on outlawing of death penalty, viewed on June 14, 2011, <http://www.catholic.org/prINTER_friendly.php?id=20328§ion=Cathcom>.

42 The full text of the report can be seen at: 2005 Final Report (Reference on Torture), Advisory Council of Jurists, viewed on June 14, 2011, <<http://www.asiapacificforum.net/acj/references/acj-references-torture>>.

43 For more information, see: PhilStar.com, Anti-torture law signed, viewed 14 June 2011, <<http://www.philstar.com/Article.aspx?articleId=523194&publicationSubCategoryId=63>>.

While the law was in force but before the implementing rules and regulations could be drafted, instances of torture continue to be reported. Task Force Detainees of the Philippines (TFDP) documented an alleged case of illegal arrest and torture of a member of the Mangyanindigenous people, in Oriental Mindoro allegedly by members of the Philippine Army to force him to disclose his alleged membership to the NPA . As of 15 June 2010, TFDP also documented 585 victims of torture in the Philippines during the term of President Arroyo. TFDP records also show that there are 271 political prisoners and political detainees.⁴⁴

On 3 August 2010, five men, who were arrested in San Fernando, Pampanga, claimed they were tortured while in police custody. Lenin Salas, one of the victims said that “police suffocated him, severely assaulted him, burnt his skin with a lit cigarette and threatened to harm his family.” They were arrested by police over their alleged involvement with the Marxist Leninist Party of the Philippines (MLPP), an illegal armed group.⁴⁵

On 18 August 2010, the Philippine National Police relieved all 11 officers in a police station in Manila after a television station aired a cell-phone video purportedly showing police torturing a naked detainee, allegedly a pickpocket. The footage shows him screaming on the floor in a fetal position with his genitals bound by a cord and a man tugging at the cord and whipping him. The victim is unidentified; his fate and when the video was taken were unclear.⁴⁶ This criminal case for violation of the Anti-Torture Act of 2009 is still pending the preliminary investigation by the Department of Justice.

This police station incident and the case of Lenin Salas and his companions in Pampanga are the first reports of torture under the new administration of President Benigno Aquino III, who assumed office in June 2010.

44 For more information, see: Task Force Detainees of the Philippines, Torture Update: March 12, 2010, viewed 14 June 2011, <http://tfdp.net/index.php?option=com_content&view=article&id=171:ra-9745-update&catid=9:on-torture&Itemid=21>

45 For more information, see: Asian Human Rights Commission, Police torture five men inside their headquarters, viewed 14 June 2011, <<http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-132-2010>> and Amnesty International, Philippine police responsible for torture must be prosecuted, <<http://www.amnesty.org/en/news-and-updates/philippine-police-responsible-torture-must-be-prosecuted-2010-08-18>>

46 For more information, see: Huffpost World, Philippine police ‘torture’ video: 11 cops suspended in probe, viewed 14 June 2011, <http://www.huffingtonpost.com/2010/08/19/philippines-police-tortur_n_687376.html>.

The Anti-Torture Act calls for the Department of Justice and the Commission on Human Rights to promulgate its implementing rules and regulations (IRR), “with the active participation of human rights nongovernmental organizations.” Civil society organizations under the United Against Torture Coalition (UATC) and Philippine Alliance of Human Rights Advocates (PAHRA) participated in several consultative meetings on the drafting of the IRR. .

President Aquino III witnessed the signing of the Implementing Rules and Regulations of the Anti-Torture Law by Justice Secretary Leila de Lima and CHR Chairperson Rosales during the celebration of the International Human Rights Day on 10 December 2010.

Human Trafficking

Cases of human trafficking are among the human rights violations filed in CHR regional offices. Complainants are provided the necessary assistance for investigation and to afford legal counseling. But beyond this aid, which is part of the CHR’s day-to-day functions, the Women’s Human Rights Center (WHRC) completed two important undertakings addressing the problem of human trafficking.

According to WHRC 2010 Accomplishment Report, it provided technical support and secretariat work in crafting the “Memorandum of Understanding for the Promotion and Protection of Human Rights of Migrants” between the CHR for the Philippines and its South Korean counterpart, the National Human Rights Commission of South Korea (NHRCK). The MOU aimed to strengthen partnerships between the two Commissions in areas of advocacy and capacity-building of respective personnel to tackle cases of violations of the rights of migrants.

Another undertaking was the “Memorandum of Understanding Against Trafficking of Women and Children,” signed on 30 March 2010 by the CHR, the National Human Rights Commission of Indonesia, Human Rights Commission of Malaysia, and the National Human Rights Commission of Thailand—all members of the Southeast Asia Forum of NHRIs.

The MOU aims to strengthen partnerships between all members in combating the problem of human trafficking. As part of their collective duties as signatories, each NHRI will conduct hu-

man rights discussions pertaining to human trafficking especially in the areas of each country where they are most prevalent. NHRIs would then be able to reach populations who are most at-risk to trafficking, educate them of their rights, and train them in measures to protect themselves.

Child Pornography

The CHR also has a Child Rights Center (CRC) that works alongside the WHRC. It developed a module on child rights violations through the support of UNICEF and the Asia Foundation. It covers problems relating to the trafficking of children such as child pornography, and other human rights violations that target children.

In its support for the Anti-Child Pornography Law of 2009, the CRC held orientations on the law for all the focal persons in all CHR regional offices. Regional offices were asked to submit proposals for anti-child pornography programs that are tailored to the situations and conditions in their locality.

V. Consultation and Cooperation with NGOs

The present leadership in CHR is keen on working with civil society organizations (CSO). In her 2010 International Human Rights Day speech, Chairperson Rosales thanked the human rights NGOs and civil society groups for their support and sacrifice as human rights defenders. She calls on them for continued partnership and vigilance, and she highlighted the imperative of institutionalizing the CHR-CSO relationship.

In 2010, the Asia Pacific Forum of National Human Rights Institutions secured financial support to assist five member institutions including the CHR to establish partnerships with activist groups, examine and assess existing national laws and policies, and develop human rights education modules to raise awareness and bolster protection for the rights of lesbian, gay, bisexual and transgender people. The projects were to take place in 2010 until April 2011. However, this was not done in 2010. Commissioner Cardona, gender focal commissioner, said that because of limited personnel (there are only two staff of the Women's Human Rights Center), partnerships will be formed in 2011 or in 2012.

VI. Conclusion and Recommendations

2010 has been a year of great challenges for President Aquino and the CHR. However, there remains a positive attitude within the Commission as it strives to stay on top of these human rights violations.

With that in mind, ANNI makes the following recommendations for the Commission to meet its goals:

- The CHR should establish and continue broad partnerships with NGOs and human rights defenders to launch community mobilizations and congressional lobbying activities in support of the CHR legislative agenda for the 15th Congress;
- The CHR should lobby for the CHR Charter in its most progressive form, which would include vulnerable sectors whose human rights and well-being must be promoted, protected, and fulfilled;
- The CHR must look into alternative funding sources so it can initiate capacity-building programs on international human rights instruments and standards for its officers and personnel;
- The CHR should partner with NGOs, human rights defenders, and academic institutions who can initiate studies on human rights violations in the country to build a basis for in-depth and national-scale researches in the future.
- The CHR should expedite the publication and distribution of the final version of the updated internal manual on the investigation, resolution, and monitoring of human rights violations;
- The CHR should strengthen its Women's Human Rights Center and Child Rights Center especially with its new and expanded role as Gender and Development Ombud;
- The CHR should veer away from hiring staff on a temporary basis to support offices with heavy workloads, and should give staff permanence and job security, to further professionalize the Commission.

Sri Lanka: Silent And Powerless

The Human Rights Commission Of Sri Lanka In 2010

Law & Society Trust¹

I. Overview of the Human Rights Context in Sri Lanka

The year 2010 was the first full year since Sri Lanka emerged from almost three decades of civil war, following the decisive military victory over the Liberation Tigers of Tamil Eelam (LTTE) in the preceding May. The island continued to be governed under an island-wide state of emergency, only partially modified² in the course of the year, while the Prevention of Terrorism Act that falls far short of international human rights standards was neither repealed nor amended.³

Meanwhile, two crucial elections for the presidency and parliament in January 2010 and April 2010 respectively – the outcomes and fall-out from which, will condition the political environment for human rights promotion and protection in the coming years – dominated the first quarter of 2010.

1 By B. Skanthakumar, Economic, Social and Cultural Rights programme, Law & Society Trust (LST), No. 3 Kynsey Terrace, Colombo 00800, Sri Lanka. The cooperation received in the course of field-investigation by the Human Rights Commission of Sri Lanka (HRCSL) and civil society activists, in Colombo and two selected provinces, is appreciated. Miyuru Gunasinghe's research assistance is gratefully acknowledged. Emerlynne Gil inspired the title and is thanked for her guidance and encouragement while ANNI coordinator. All matters of law and fact are as at 31 July 2011.

2 *Changes to Emergency Regulations: CRM examines recent amendments*, E 01/05/2010, Civil Rights Movement of Sri Lanka, Colombo, 15 May 2010.

3 Wasana Punyasena, "The Legacy of Emergency Rule", *dissenting dialogues*, No. 1, November 2010, pp. 9-12, http://www.srilankademocracy.org/files/dissenting_dialogues_Nov_2010.pdf.

As one analyst observed, “The defeat of the LTTE’s secessionist insurgency in 2009 provided the government an unprecedented opportunity to move in the direction of ethnic reconciliation, constitutional reform for greater democratization, and enhanced regional autonomy for ethnic minorities to help prevent future secessionist movements.” However, the government had chosen the path of “...regime consolidation instead. The dominant thinking within the regime appears to have been premised on the assumption that there were no minority issues that needed to be addressed on a politically urgent basis because the LTTE had been crushed”.⁴

There was a sharp decrease in the number of enforced disappearances and extra-judicial killings particularly in the conflict-zone of the Northern and Eastern provinces with the end of the war. Nevertheless, serious human rights violations persisted: for example, the disappearance on 24 January 2010 of the media-worker and political activist, Prageeth Eknaligoda⁵ who remains missing at time of writing; and that of the human rights defender and community leader, Pattani Razeek on 11 February 2010.⁶

There were a number of arbitrary killings of alleged criminals and suspects while in custody,⁷ with no reaction from the government or independent inquiries into these incidents, once again underlining the impunity enjoyed by state actors for serious crimes. Custodial torture remains entrenched and is routinely used by law enforcement agencies to extract confessions on fabricated charges.⁸

4 Jayadeva Uyangoda, “Sri Lanka in 2010: Regime Consolidation in a Post-Civil War Era”, *Asian Survey* (Berkeley, CA.), Vol. 51, No. 1 (January/February 2011): 131-137 at 134; on some issues of concern to ethnic minorities see, Minority Rights Group International, *No war, no peace: the denial of minority rights and justice in Sri Lanka*, London 2011, <http://www.minorityrights.org/10458/reports/no-war-no-peace-the-denial-of-minority-rights-and-justice-in-sri-lanka.html>.

5 Olindhi Jayasundere, “Eknaligoda’s wife files Habeas Corpus”, *Daily Mirror* (Colombo), 5 March 2010, <http://print.dailymirror.lk/news/news/5261-eknaligodas-wife-files-habeas-corpus-.html>.

6 Razeek’s death was subsequently established at the end of July 2011, see Hiran Priyankara Jayasinghe, “Missing NGO worker’s body found in partly built house”, *The Sunday Times* (Colombo), 31 July 2011, http://www.sundaytimes.lk/110731/News/nws_24.html. He was an Executive Committee member of the Asian Forum for Human Rights and Development (FORUM-ASIA) at time of abduction.

7 Bureau of Democracy, Human Rights and Labor, *2010 Country Reports on Human Rights Practices: Sri Lanka*, Department of State, Washington DC 2011, <http://www.state.gov/documents/organization/160476.pdf>, p. 2.

8 Basil Fernando (ed.), *Sri Lanka Torture Cases 1998-2011*, Asian Human Rights Commission, Hong Kong 2011, <http://www.humanrights.asia/countries/sri-lanka/countries/sri-lanka/resources/special-reports/AHRC-SPR-001-2011-SriLanka.pdf>; Asian Human

There continued to be threats to freedom of expression and opinion in 2010, including the temporary sealing of an opposition newspaper and detention of its editor,⁹ an arson attack on the *Siyatha* media organisation in July,¹⁰ dozens of media workers remained in self-exile abroad, and there was no progress in the investigation on the killing of a prominent newspaper editor in the preceding year. Self-censorship is widely prevalent in the print, radio and television media, while cyber-media sites critical of the government have experienced various forms of interference.

In addition to continuities of human rights violations from the recent past, there were also new issues arising from the conduct of the end of the war and its aftermath.

The warring sides are alleged to have behaved in ways that, if proven, would amount to “serious violations of international humanitarian and human rights law; many would amount to war crimes and crimes against humanity”¹¹, according to the Panel of Experts appointed by the United Nations Secretary-General, to advise him on an accountability process relevant to the nature and scope of alleged violations during the final stages of the war in Sri Lanka.

Thousands of Tamils suspected of being LTTE combatants or of involvement in acts of terrorism have been held in preventive

Rights Commission, *Sri Lanka: A report on 323 cases of police torture*, 24 June 2011: “There have been minor forms of criminal investigation into torture by the country’s National Human Rights Commission. However, rather than being thorough investigations in a criminal law sense, these investigations are more like mediation sessions similar to a labour tribunal”, <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-085-2011>.

9 “Sore Winners: How not to celebrate a victory”, *The Economist* (London), 4 February 2010, <http://www.economist.com/node/15452859>.

10 Damith Wickremasekera, “Siyatha slams Police, Fire Brigade”, *The Sunday Times* (Colombo), 1 August 2010, http://sundaytimes.lk/100801/News/nws_24.html.

11 Para 424, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, United Nations, New York, 31 March 2011, http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf, on p. 115. Para 422: “The credible allegations involving conduct by the Government of Sri Lanka [are]... (i) killing of civilians through widespread shelling; (ii) shelling of hospitals and humanitarian objects; (iii) denial of humanitarian assistance; (iv) human rights violations suffered by victims and survivors of the conflict, including both internally displaced persons (IDPs) and suspected LTTE cadres; and (v) human rights violations outside of the conflict zone, including against the media and other critics of the Government. The credible allegations involving conduct by the LTTE [are]... (i) using civilians as a human buffer; (ii) killing civilians attempting to flee LTTE control; (iii) using military equipment in the proximity of civilians; (iv) forced recruitment of children; (v) forced labour; and (vi) killing of civilians through suicide attacks”, on p. 115.

detention in both legal and extra-legal facilities ranging from 'rehabilitation camps', to the Boosa Detention Centre, to the Terrorist Investigation Division.¹² Among almost 12,000 persons who had been detained as they fled the war-zone, around half of that number were in the custody of state security agencies as at the end of 2010, with no charges framed against them. Some of those released after "rehabilitation" alleged they faced threats, harassments and restrictions over their freedom of movement.¹³

Over the course of 2010, hundreds of thousands of Tamils interned in closed camps until December 2009, returned or were resettled in their areas of origin. Issues that impeded return or affected those who were resettled included the prevalence of unexploded ordinances and landmines; access to food, health-services, sanitation, education, transport and especially lack of durable shelter and livelihood opportunities.¹⁴

The UN Committee on Economic, Social and Cultural Rights in its concluding observations and recommendations on Sri Lanka's implementation of its international obligations drew attention to issues of concern including the application of the Covenant in the domestic legal system; indigenous peoples' rights; social development of estate sector communities; rights of persons especially children with disabilities; gender-discriminatory provisions in the general and personal laws; discrimination against women in the labour-market; impacts of and alternatives to out-migration for women and their families; anti-union discrimination especially in export processing zones; lack of universal social security coverage; high incidence of domestic violence against women and children;

12 Amnesty International, *Forgotten Prisoners: Sri Lanka uses anti-terrorism laws to detain thousands*, ASA 37/001/2011, February 2011, <http://www.amnesty.org/en/library/asset/ASA37/001/2011/en/64530ad7-76a6-4fb1-8f46-996c8543daf8/asa370012011en.pdf>; International Commission of Jurists, *Beyond Lawful Constraints: Sri Lanka's Mass Detention of LTTE Suspects*, September 2010, <http://www.icj.org/dwn/database/BeyondLawfulConstraints-SLreport-Sept2010.pdf>; Human Rights Watch, *Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka*, February 2010, <http://www.hrw.org/en/reports/2010/02/02/legal-limbo-0>.

13 (Rev. Fr.) Jeyabalan Croos, Deanne Uyangoda and Ruki Fernando, *Threats, Harassment and Restrictions on Former Detainees and their Families in Vanni*, Law & Society Trust, Colombo, 11 May 2011, <http://www.lawandsocietytrust.org/web/images/PDF/note11may2011.pdf>.

14 Internal Displacement Monitoring Centre, *Sri Lanka: IDPs and returnees remain in need of protection and assistance*, 14 January 2011, [http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/03D15A8CBF11229DC12578180036CD93/\\$file/Sri+Lanka+-+January+2011.pdf](http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/03D15A8CBF11229DC12578180036CD93/$file/Sri+Lanka+-+January+2011.pdf).

prevalence of child labour; lack of adequate shelter and acceleration of forced evictions; overcrowded and inhuman prisons; prevalence of malnutrition among women and children; lack of basic sexual and reproductive health services; absence of a rights-oriented mental health law; low public investment in education and high rate of non-completion; non-introduction of human rights and peace education in the school curricula, among others.¹⁵

At time of writing, the HRCSL's Annual Reports for 2009 and 2010 have not been published, and therefore there is no official record of its programme of work, its public pronouncements (if any), nor its recommendations to the authorities and their execution. Therefore, the sources for this report are field-interviews with the HRCSL in Colombo and in two provinces in which it has regional offices, as well as civil society activists in those districts; partial responses to a structured questionnaire from the HRCSL head office and follow-up interview with a senior executive officer; media reports; personal observation and communications from human rights defenders.

The HRCSL's semi-autonomous National Protection and Durable Solutions (NPDS) for Internally Displaced Persons project ('IDP Project') released its 2010 annual report¹⁶ on time, albeit avoiding analysis and critical comments on protection concerns and the non-adherence of state actors to some of the UN's Guiding Principles on Internal Displacement. A point of satisfaction is that by the end of 2010, the English-language website of the Human Rights Commission had been revamped, and is now regularly updated with information on its public activities,¹⁷ although the Sinhala and Tamil-language mirror sites are non-functional. The NPDS project has also consistently maintained a good online information portal with relevant resources and information on its activities.

15 *Sri Lanka: Concluding observations of the Committee on Economic, Social and Cultural Rights*, E/C.12/LKA/CO/2-4, 9 December 2010, <http://www2.ohchr.org/english/bodies/cescr/cescrs45.htm>; reprinted along with a parallel report from civil society organisations, http://www2.ohchr.org/english/bodies/cescr/docs/ngos/IMADR_CESCR45_SriLanka.pdf, in *Law & Society Trust Review* (Colombo), Vol. 21 (Nos. 279 & 280), January & February 2011. Also translated and published by the Movement for National Land and Agricultural Reform (MONLAR) and the Law & Society Trust (LST) in Sinhala and Tamil.

16 *National Protection and Durable Solutions for Internally Displaced Persons Project*, Human Rights Commission of Sri Lanka, <http://www.idpsrilanka.lk/index.php>.

17 Human Rights Commission of Sri Lanka, <http://hrctl.lk/english/>.

This report critically reviews developments and issues impinging on the independence, accountability, effectiveness and transparency of the Human Rights Commission of Sri Lanka,¹⁸ between January and December of 2010, but with reference to one significant development within the first quarter of this year, that is, the reconstitution of the Commission in February 2011 through the appointment of new members.

II. Independence of the Human Rights Commission

For the entirety of 2010, no members were appointed to the Human Rights Commission. The three-year term of the previous Commission had ended in June 2009, and only the Chairman continued to be in office until the end of 2009 (as he had been appointed six months later than the other members). The ramifications of the absence of Commissioners for the effectiveness of the HRCSL will be discussed in the following section. One direct consequence was that there were no public pronouncements on human rights issues in 2010, as “policy decisions related to the Commission cannot be taken in the absence of a Chairman and Commissioners”.¹⁹

From mid-2009 onwards, there was no announcement of the government’s intentions as to when new members would be appointed to the HRCSL among other statutory institutions. Presumably, the government’s attention into the first half of 2010 was on winning two key elections, as well as fending off international pressure regarding its prosecution of the final phase of the war through the establishment of the ‘home-grown’, Lessons Learned and Reconciliation Commission (LLRC).

After the 2010 parliamentary elections, it transpired that the government was dragging its feet until it could enact a constitutional amendment that would pave the way for direct appointments by the Executive to bodies that were created for the purpose

18 For an overview of the HRCSL see Mario Gomez, “Sri Lanka’s New Human Rights Commission”, *Human Rights Quarterly* (Baltimore, MD), Vol. 20, No. 2 [1998], pp. 281-302; and B. Skanthakumar, “‘Window-Dressing’? The National Human Rights Commission of Sri Lanka”, *Law & Society Trust Review* (Colombo), Vol. 20 (No. 262), August 2009, pp. 5-26, <http://www.lawandsocietytrust.org/web/images/PDF/HRCSL%20Report%202009.pdf>,

19 Mandana Ismail Abeywickrema, “HRC unable to make Recommendations on Current Investigations”, *The Sunday Leader* (Colombo), 2 May 2010, <http://www.thesundayleader.lk/2010/05/02/HRC-unable-to-make-recommendations-on-current-investigations/>.

of oversight and control over the practices and policies of state actors including the Executive.

Suddenly, in September 2010, the *Eighteenth Amendment* to the Constitution was rushed through parliament as an “urgent bill”, where the government’s massive majority assured it smooth passage. Legal challenges from civil society organisations before the Supreme Court that centred on the process by which it was enacted in haste, as well as concerns over the substance of the bill especially, the undermining of people’s sovereignty through the further concentration of power in the Executive, failed to sway the apex bench and the amendment entered into law on the ninth of that month.²⁰

The *Eighteenth Amendment* abolishes the Constitutional Council, created through the *Seventeenth Amendment* to the Constitution in 2001 for the purpose of broad-basing the selection and appointment of members to the Human Rights Commission, alongside statutory institutions such as the Judicial Services Commission, the National Police Commission, the Election Commission, the Public Service Commission, the Commission to investigate allegations of Bribery and Corruption, the Finance Commission, the Delimitation Commission, and some high offices of state.

Henceforth, members of these bodies can lawfully be appointed at the sole discretion of the President, who is only obliged to receive non-binding “observations” from a newly created ‘Parliamentary Council’ that replaces the Constitutional Council. The Parliamentary Council comprises five persons, namely the Prime Minister, the Speaker, the Leader of the Opposition, a nominee of the Prime Minister who shall be a member of parliament, and a nominee of the Leader of the Opposition who shall be a member of parliament.²¹ Therefore, of the five individuals, there is an automatic majority of three in favour of the government.

Among other obnoxious clauses, the *Eighteenth Amendment* removes term limits on the Executive Presidency allowing the incumbent to contest indefinitely beyond a second term and there-

20 See generally, Rohan Edrisinha and Aruni Jayakody (eds.), *The Eighteenth Amendment to the Constitution: Substance and Process*, Centre for Policy Alternatives, Colombo 2011.

21 Article 41A, *Constitution of the Democratic Socialist Republic of Sri Lanka*, as amended by section 5 of the Eighteenth Amendment to the Constitution, <http://www.lawnet.lk/downloads/18thAmendmenAct-E.pdf>.

fore also entrenching his authority over government and the State. These sweeping constitutional reforms have enhanced further the powers of the incumbent President, and formalised the national human rights institution's subordination to government.

Since the calculated paralysis of the Constitutional Council after March 2005, the Executive has in fact made direct appointments to several Commissions including the HRCSL. Thus, the previous batch of members of the Human Rights Commission, were appointed in 2006 in violation of the constitutional provision then in force (the Seventeenth Amendment of 2001 as un-amended²²) and contrary to the selection and appointment norms stipulated in the 'Paris Principles'.

There was no transparency in the selection process nor were the members who were handpicked in 2006 associated with the defence of human rights. Their subsequent actions and omissions, as well as the rapid deterioration in the HRCSL's relations with human rights organisations and defenders, only justified the apprehension that greeted their appointment.

Arguably therefore, the Constitution has now simply been 'corrected' by the *Eighteenth Amendment*; through adjustment of the supreme law of the land, to suit the reality of its repeated and ongoing abuse and manipulation by government.

For several months thereafter, there was no word on the reconstitution of statutory commissions. Suddenly, in February 2011 – and a few weeks before the government was to despatch a high-level delegation to the 16th Session of the United Nations Human Rights Council later that month – an announcement was made of fresh appointments to the Human Rights Commission.²³ The timing of the revival of the national human rights institution was perceived as an attempt by the government to parry criticism of the country's human rights record²⁴ ahead of a rumoured critical resolution at the Human Rights Council.²⁵

22 *Seventeenth Amendment* to the Constitution of the Democratic Socialist Republic of Sri Lanka 2001 (as unamended by the Eighteenth Amendment in 2010), <http://www.priu.gov.lk/Cons/1978Constitution/SeventeenthAmendment.html>.

23 Wilson Gnanadass, "Independence' of HRC under scrutiny", *The Nation* (Colombo), 20 February 2011, <http://www.nation.lk/2011/02/20/newsfe1.htm>.

24 Political Editor, "Lanka faces multi-pronged attack on human rights", *The Sunday Times* (Colombo), 27 February 2011, <http://sundaytimes.lk/110227/Columns/political.html>.

25 Wilson Gnanadass, "No resolution against Lanka as feared", *The Nation* (Colombo), 6

The new members of the Human Rights Commission are the former Inspector-General of Police, Mr T. E. Anandarajah; a former educationalist associated with civil society organisations, Mrs. Jezima Ismail; the former Government Analyst, Dr. M. A. J. Mendis; and a private medical practitioner, Dr. Bernard de Zoysa. The fifth member, who was also appointed by the President to chair the new Commission, is retired Supreme Court Justice Priyantha Perera.²⁶

The enabling legislation of the HRCSL provides that, “The Commission shall consist of five members, chosen from among persons having knowledge of, or practical experience in, matters relating to human rights”.²⁷ There is no stipulation as to the representation of women, only of “minorities”, which in the Sri Lankan context is equated with ethnic minorities. There is also no requirement as to a transparent and participatory selection process and the plural representation of civil society in the composition of the Commission, as recommended by the ‘Paris Principles’²⁸ and in the ‘General Observations’²⁹ of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) Sub-Committee on Accreditation.

March 2011, <http://www.nation.lk/2011/03/06/news1.htm>.

26 Ranjith Ananda Jayasinghe, “Five members for the Human Rights Commission”, *Lankadeepa* (Colombo), 16 February 2011 (in Sinhala); for their official profile and bio-data see Human Rights Commission of Sri Lanka, ‘Members of the Commission’ at http://hrctl.lk/english/?page_id=475.

27 S. 3(1), *Human Rights Commission of Sri Lanka, Act No. 21 of 1996*, <http://hrctl.lk/english/ACT/english.pdf>.

28 *Paris Principles: Composition and guarantees of independence and pluralism*, Para 1: “The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights”, UN General Assembly Resolution A/RES/48/134, 4 March 1994, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/116/24/PDF/N9411624.pdf?OpenElement>.

29 *ICC Sub-Committee on Accreditation General Observations*, Sec. 2.2: “The Sub-Committee notes the critical importance of the selection and appointment process of the governing body in ensuring the pluralism and independence of the National Institution. In particular, the Sub-Committee emphasizes the following factors: a) A transparent process; b) Broad consultation throughout the selection and appointment process; c) Advertising vacancies broadly; d) Maximizing the number of potential candidates from a wide range of societal groups; e) Selecting members to serve in their own individual capacity rather than on behalf of the organization they represent”, June 2009, http://www.asiapacificforum.net/services/international-regional/icc/sub-committee-on-accreditation/downloads/general-observations/General_Observations_June_2009.pdf.

The statutory requirement for representation of “minorities” has been followed in the recent appointments too, through selection of one Tamil and one Muslim (who is also the only woman member). Since 2006, the government has favoured the appointment of retired senior judicial officers to chair the Human Rights Commission.

A statement by a group of concerned citizens articulated the reaction of critical civil society actors to the reconstitution of the Human Rights Commission, when it drew attention to the process by which the appointments to its governing body had been made, as well as the suitability of some appointees to the role of leadership of the national human rights institution.³⁰

“There is no transparency regarding the process by which the appointees were selected...as long as the present arbitrary process of appointments to independent institutions is in operation, public faith in those bodies will be minimal”.³¹ The statement went on to observe, “We seriously question the suitability of those who have served in the police or the armed forces to serve as members of the Human Rights Commission. A large proportion of complaints received by the HRCSL are against excesses by the police or the armed forces. Victims of such excesses may be reluctant to come before the HRCSL for fear of breach of confidentiality and reprisals and, more importantly, of lack of impartiality.”

In media interviews shortly after the reconstitution of the Commission, its new Chairman responded indirectly to some of these criticisms and misgivings by insisting that that he would safeguard the independence of the HRCSL and would enhance its effectiveness through proposing amendment of its parent act enabling its recommendations to be self-enforcing.³² “I want to ensure the whole HRCSL is reactivated. It won’t be a dormant commission”, asserted (Ret.) Justice Priyantha Perera.³³

30 On this latter issue, see the polemic by Colombo University law academic Prathiba Mahanamahewa, “Should the 18th Amendment be tainted by appointments?” *Lanka-deepa* (Colombo), 6 March 2011 (in Sinhala).

31 “Friday Forum statement on Recent Appointments to the Human Rights Commission of Sri Lanka”, *Daily FT* (Colombo), 25 March 2011, <http://www.ft.lk/2011/03/25/friday-forum-issues-statement-on-recent-appointments-to-the-human-rights-commission-of-sri-lanka/>.

32 Wilson Gnanadass, “I will ensure impartiality, says SLHRC chief”, *The Nation* (Colombo), 6 March 2011, <http://www.nation.lk/2011/03/06/newsfe2.htm>.

33 Wilson Gnanadass, “Commissioners move to amend Human Rights Act”, *The Nation* (Colombo), 27 February 2011, <http://www.nation.lk/2011/02/27/news1.htm>.

III. Effectiveness of the Human Rights Commission

In 2010, despite the absence of members, the HRCSL continued its routine activities such as receiving complaints, conducting inquiries, visits to police stations, prisons and detention centres and camps for internally displaced-persons, and human rights awareness programmes for state officials.

The government finally acceded to repeated requests by the HRCSL for expansion of its permanent staff cadre from 167 (since it began operating in 1997) to 195 persons, which is a modest increase of 28.³⁴ However, the HRCSL's IDP project had to manage with only 27 persons, although its approved staff cadre is 72.³⁵ Some regional offices especially in conflict-affected districts do not have the full complement of staff especially legal and investigations officers. Also, the approved staff cadre (of seven) is the same for each regional office and does not reflect the size of the population, geographical nature of the region, nor the scale of violations experienced in those areas. There is scarcity of staff with specialised skills especially in communicating the role and work of the Commission through media advocacy both at head and regional offices.³⁶

Some regional offices in majority Sinhala-speaking areas are unable to receive and inquire into complaints lodged in Tamil but unfortunately do not treat this with seriousness because Tamil-speakers may be bilingual or are assisted by Sinhala-speakers. Since 1987, Tamil is an official language in Sri Lanka, and the violation of the rights of Tamil-speakers is an infringement of their fundamental rights.³⁷

34 Human Rights Commission of Sri Lanka, *Report to the 15th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions*, Bali, Indonesia 3-6 August 2010, p. 6, <http://www.asiapacificforum.net/about/annual-meetings/15th-indonesia-2010>.

35 *National Protection and Durable Solutions for Internally Displaced Persons Project*, Human Rights Commission of Sri Lanka, Annual Report 2010, <http://www.idpsrilanka.lk/html/Project%20Reports/ProjectProposal/Reports/Annual%20Reports/2010%20Annual%20Report,%20NPDS%20for%20IDPs%20Project,%20HRCSL.pdf>, p. 10.

36 Interview with HRCSL Director of Inquiries and Investigations, in Colombo, on 25 May 2011.

37 For further discussion see B. Skanthakumar, 'Official Languages Policy and Minority Rights' in Elizabeth Nisan (ed.), *Sri Lanka: State of Human Rights 2007*, Law & Society Trust, Colombo 2008, pp. 330-375; and Minority Rights Group International, *No war, no peace: the denial of minority rights and justice in Sri Lanka*, London 2011, <http://www.minorityrights.org/10458/reports/no-war-no-peace-the-denial-of-minority-rights-and-justice-in-sri-lanka.html>, pp. 26-28.

The HRCSL is also financially under-resourced by government. Its budgetary allocation of around LKR118 million (under USD1.1 million) in 2011, is only slightly higher than in the previous year. The Commission has blamed its financial constraints for the backlog in processing of complaints, staff shortages at its regional offices in particular, and difficulty in relocating its head office from its current cramped rented premises.³⁸ Regional offices report the lack of suitable vehicles to conduct inspections and investigate complaints, and shortfalls in allocations from the head office to meet the costs of fuel, vehicle-repairs and maintenance, and in renting premises that are more centrally located and therefore more accessible and visible to the public.

The HRCSL received 9,901 complaints in 2010.³⁹ This was a reduction of 21 percent from the previous year. The head office in Colombo which also receives complaints from the adjacent districts of Gampaha and Kalutara accounted for 4,205 complaints, whereas the 10 regional offices accounted for 5,696 complaints. This represented a reduction of 21 percent in comparison to the previous year.

There is no analysis available from the Commission as to whether this reduction is a reflection of an improved human rights situation on the island, or the lack of public confidence in the institution because of its dysfunction in the absence of appointed members, or some other reason. However, regional coordinators claimed that their handling of complaints was not impeded by the absence of Commissioners, as around 90 percent are resolved through conciliation at the local level.

Of the complaints, more than 14 percent were employment-related issues, that is, allegations by public servants of unfairness in promotions, increments, transfers and the like. Other significant complaints included issues of torture, arrest, detentions, harassment and school admissions. In the post-war context, regional offices confirm that there are fewer complaints of missing persons and custodial torture in conflict-affected areas, and an increase in the number of complaints relating to domestic violence, child abuse, and inter-

38 Indika Sri Aravinda, "HRC cash strapped", *The Sunday Leader* (Colombo), 17 July 2011, <http://www.thesundayleader.lk/2011/07/17/hrc-cash-strapped/>.

39 Human Rights Commission of Sri Lanka, "HRCSL received 9901 complaints in the year 2010", 3 March 2011, <http://hrctl.lk/english/?p=1543>.

personal land disputes, which are referred to other agencies as these are deemed not to fall within the competence of the HRCSL.

Some 17 percent of complaints received by the head office were ruled to be outside of the HRCSL's mandate. No information is available on the nature of those complaints, nor specific grounds for their exclusion. This is a matter for concern because it is alleged that the HRCSL has excluded a complaint as serious as abduction, by persons identifying themselves as police officers, on the basis that it fell outside of their mandate.⁴⁰

The highest number of complaints recorded outside of the head office, were in its regional office in Vavuniya in the Northern Province, which is nearest to the districts most affected in the last phase of the war in late 2008 and early-to-mid 2009; and where around 270,000 Tamils internally displaced during that period were detained in so-called 'welfare centres' and denied freedom of movement until December 2009.

There is no breakdown of complaints available but the majority of the 2,642 complaints recorded in Vavuniya appear to relate to "missing persons",⁴¹ presumably, individuals who were separated from their families during flight from the war zone, or individuals who were detained in temporary camps, or individuals who may have been removed for questioning by security agencies either during screening at a checkpoint or from one of the camps and whose whereabouts are unknown.

Therefore, as detailed above, the HRCSL continued to receive complaints and conduct inquiries into those deemed to fall within its mandate. However, where the complaints could not be settled through conciliation, the "[HRCSL] can't make any recommendations without the Commissioners. We are not empowered to issue recommendations",⁴² admitted its then senior-most executive offi-

40 Asian Human Rights Commission, *Sri Lanka: Abductions and unfair advantage held as matters falling outside Sri Lanka's Human Rights Commission (HRCSL)*, 21 March 2011, <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-044-2011>. This instance is reminiscent of the HRC's initial reluctance to record a complaint on the disappearance of Prageeth Eknaligoda in 2010, discussed in B. Skanthakumar, 'Sri Lanka: Atrophy and Subversion of the Human Rights Commission' in *2010 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, FORUM-ASIA, Bangkok 2010, at pp. 215-217, http://forum-asia.org/2010/ANNI2010_TEXTONLY.pdf;

41 Interview with HRCSL Director of Inquiries and Investigations, in Colombo, on 25 May 2011.

42 BM Murshideen, "SLHRC Overloaded with Unresolved Cases", *Daily Mirror* (Colom-

cer. Consequently, of nearly 7,500 complaints received since January 2010, as of August of that year some 5,500 remained unresolved.

One regional non-governmental organisation protested: “Impeding avenues of complaint making and the subsequent inquiries is, quite blatantly, part of the state policy of guaranteeing impunity to the perpetrators, who, in the vast majority of cases are agents of the state itself. The dysfunctionality of the Sri Lankan Human Rights Commission by the State is nothing less than deliberate.”⁴³

Within the first quarter of 2011, the Human Rights Commission has recorded 1,295 complaints; one in four of which it determined fell outside of its mandate and were therefore rejected for inquiry and investigation.⁴⁴ Once again, the main categories of complaint were employment, torture, harassment, arrest and detention, school admissions, and police inaction as presented below.

CATEGORY	PERCENTAGE
Employment	15.8
Torture	7.8
Harassment	7.5
Arrest and Detention	7.3

In the absence of duly-appointed members, the already limited authority of the Human Rights Commission (HRCSL) vis-à-vis government institutions was seriously undermined. Numerous complainants who had received orders in their favour even in 2009, when at least its previous Chairman was still in office, found that the respondent institution chose to simply disregard the HRCSL.

Thus, the state-owned Sri Lanka Broadcasting Corporation breached its written undertaking to the HRCSL not to make a permanent senior staff appointment until appropriate guidelines for recruitment were in place.⁴⁵ In another instance, the HRCSL had recommended that the State Engineering Corporation revoke politically-motivated transfers of its employees and to formulate fair and

bo), 27 August 2010, <http://print.dailymirror.lk/news/news/19733.html>.

43 Asian Human Rights Commission, “No action on 12,000 complaints registered at the Human Rights Commission of Sri Lanka”, 27 August 2010, <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-186-2010>.

44 Human Rights Commission of Sri Lanka, “Commission records 1295 complaints in the first four months of 2011”, 24 June 2011, <http://hrctl.lk/english/?p=1643>.

45 Neranji Kohona, “SLBC has breached the agreement with the HRC”, *Ravaya* (Colombo), 9 January 2011 (in Sinhala).

transparent procedures instead; but five months later, no action had been taken to reinstate those victimised for their political allegiances.⁴⁶

The public education sector is another where there has been ongoing obstruction of recommendations of the HRCSL especially in the North-Central province regarding the non-appointment of Directors of Education.⁴⁷ According to one teachers' trade union, the HRCSL has not been pursuing the non-implementation of its recommendations vigorously. In another instance, the HRCSL is alleged to have referred a complaint regarding the appointment procedure for a school principal for the attention of the Secretary of the Education Department who is himself named in the complaint!

Further, the same trade unionist claims that the HRCSL staff are often been unreceptive to representations and communications from his union; and have objected, on occasion, to the presence of union officials in inquiries concerning one of their members.⁴⁸ He believes that many of the delays and sometimes even failure of investigations is because the HRCSL is not firm enough with state institutions in insisting that senior officials who are familiar with the matter at hand and have the authority to take remedial action are present in person at hearings. "What is the use of the Human Rights Commission", he asked, "if its recommendations are not implemented?"⁴⁹

The HRCSL claims it is hamstrung in the processing of complaints by delays on the part of the relevant state institution in responding to communications from the Commission; and that sometimes there is also "lack of interest"⁵⁰ on the part of the complainant in pursuing the complaint for example, in providing the Commission with the additional information or documentation required. However, it is accepted that education sector officials have been particularly resistant to the implementation of HRC recommendations; in contrast to

46 "The recommendations of the Human Rights Commission have been disregarded", *Ravaya* (Colombo), 31 October 2010 (in Sinhala).

47 Buddika Mahesh Wijesooriya, "The Commission focuses attention on the Secretary to the Ministry acting against its initial directions", *Lakbima* (Colombo), 29 April 2011 (in Sinhala).

48 Personal communication from Joseph Stalin, General Secretary of the Ceylon Teachers' Union, in Colombo, on 4 July 2011.

49 Nabeela Hussain, "HRC recommendations not implemented – Teachers' Union", *Daily Mirror* (Colombo), 7 May 2010, <http://print.dailymirror.lk/news/news/9983.html>; Prasad Nirosha Bandara, "Human rights orders are not implemented – Ceylon Teachers' Union", *Ravaya* (Colombo), 6 March 2011 (in Sinhala).

50 Interview with HRCSL Director of Inquiries and Investigations, in Colombo, on 25 May 2011.

the greater cooperation received from district and divisional secretariat officers as well as the elections department in 2010.

While the re-constitution of the Human Rights Commission after February 2011 holds out the promise of greater effectiveness, the historical record of the institution – irrespective of the personality and human rights credentials of its members – is sobering. As one legal commentator observed in a close analysis of the HRCSL’s past performance: “At its very best and when unwillingly prodded to some action in particularly egregious cases of human rights violations, its orders have been routinely ignored by officials and government bodies.”⁵¹

IV. Engagement with the International Human Rights System

National human rights institutions (NHRIs) are required in the Paris Principles to engage with the international human rights system in furtherance of their mandate to promote and protect human rights. The forms of engagement that are explicitly enumerated are:⁵²

- Promoting and ensuring the harmonisation and implementation of national laws, regulations and practices with international human rights instruments ratified or acceded to by the State;
- Encouraging ratification or accession and implementation of those international human rights instruments to which the State is not yet a party;
- Contributing to State Reports to international and regional human rights bodies from an independent perspective, and;
- Cooperating with the United Nations, its affiliated organisations, regional institutions and national human rights institutions in other countries.

51 Kishali Pinto-Jayawardena, “Focus on Rights: Pressing for improved democracy in Sri Lanka”, *The Sunday Times* (Colombo), 6 March 2011, <http://www.sundaytimes.lk/110306/Columns/focus.html>. Disclosure: Ms Pinto-Jayawardena is also Deputy Director of the Law & Society Trust.

52 *Paris Principles: Competence and Responsibilities*: Para 3 (b–e) respectively, UN General Assembly Resolution A/RES/48/134, 4 March 1994, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/116/24/PDF/N9411624.pdf?OpenElement>.

The International Coordinating Committee's Sub-Committee on Accreditation (ICC-SCA) in its authoritative commentary on the Paris Principles ('General Observations') has emphasised the "importance for NHRIs to engage with the international human rights system, in particular 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."⁵³ The ICC-SCA has underlined that, a "key function" of an NHRI is "encouraging ratification or accession to international human rights instruments".⁵⁴

The enabling legislation that created the Sri Lankan Human Rights Commission in 1996 partially reflects these expectations when it provides that the functions of the Commission shall be to *inter alia*:

"[Make] recommendations to the Government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards" and;

"[Make] recommendations to the Government on the need to subscribe or accede to treaties and other international instruments in the field of human rights".⁵⁵

Recently, including the year under review, there has been minimal contact by the HRCSL with the international human rights system. In 2010, the HRCSL apparently contributed some information requested by the Government of Sri Lanka in compiling its response to the List of Issues raised by the UN Committee on Economic, Social and Cultural Rights towards its review of the State Report in November. It is unclear what information was submitted

53 Sec 1.4, *ICC Sub-Committee on Accreditation General Observations*, June 2009, http://www.asiapacificforum.net/services/international-regional/icc/sub-committee-on-accreditation/downloads/general-observations/General_Observations_June_2009.pdf.

54 Sec 1.3, *ICC Sub-Committee on Accreditation General Observations*, June 2009, http://www.asiapacificforum.net/services/international-regional/icc/sub-committee-on-accreditation/downloads/general-observations/General_Observations_June_2009.pdf.

55 S. 10 (d) and (e) respectively, *Human Rights Commission of Sri Lanka Act*, No. 21 of 1996, <http://hrctl.lk/english/ACT/english.pdf>.

but one can surmise it was statistical or updates on its own programme of work, rather than analytical or critical in nature.

In any case, the HRCSL has not submitted reports to UN treaty-bodies and Special Procedures. According to senior staff of the HRCSL, while aware of their responsibilities in this regard, the institution has been hampered by its lack of capacity, specifically human resources, to undertake this work. It is, they affirm, the HRCSL's intention to attend to this shortcoming in future.⁵⁶

There are of course other means by which the HRCSL could already play a part in the international human rights system aside from say the clearly laborious and specialised task of preparing parallel reports to the expert committees created in the core international human rights treaties ratified or acceded by Sri Lanka. These could include simple communications of information to relevant UN Special Procedures Mandate Holders on human rights violations or imminent violations transmitted by email or fax. However, none are known to have been sent in 2010 or in the preceding few years.

Further, UN Special Rapporteurs (SR) have asked, and on several occasions, for an official invitation from government to visit the island for the purpose of fact-finding, but to no avail. Most recently, in 2010, the SR on Human Rights Defenders made such a request,⁵⁷ as did the Independent Expert on Minority Issues,⁵⁸ but in both cases neither received a positive response from the government.

The HRCSL should publicly encourage the government to be forthcoming when requests such as these are received in the interests of ensuring full implementation of Sri Lanka's international obligations as well as for greater understanding between the UN human rights system and one of its state parties. While in the absence of members in 2010, the HRCSL may have been constrained in raising these issues with government; it is to be hoped that it will be more vigorous on this score in the future.

56 Interview with the Chairman, Additional Secretary (Legal) and Director of Inquiries and Investigations, in Colombo, on 6 May 2011.

57 Para 7, *Report of the Special Rapporteur on the Rights of Human Rights Defenders, Margaret Sekaggya*, A/HRC/16/44, 20 December 2010, <http://www2.ohchr.org/english/bodies/HRCouncil/docs/16session/A-HRC-16-44.pdf>.

58 Para 5, *Report of the Independent Expert on Minority Issues, Gay McDougall*, A/HRC/16/45, 16 December 2010, <http://www2.ohchr.org/english/bodies/HRCouncil/docs/16session/A-HRC-16-45.pdf>.

V. Promotion and Protection of Human Rights Defenders

In 2010, the UN Secretary-General (UNSG) reported on intimidation and reprisals against individuals and groups who co-operate or seek to co-operate with the United Nations, its representatives and mechanisms on human rights promotion and protection. Sri Lanka is explicitly cited as an example of a country in which there is de-legitimation of the activities of human rights organisations, human rights defenders and independent journalists.⁵⁹ Concern is expressed in the report over the physical and psychological integrity of dozens of human rights defenders in Sri Lanka who have been subject to media hate campaigns, threats, harassment and intimidation in relation to legitimate activities in defence of human rights including international advocacy. The UNSG has called upon states to ensure that “all acts of intimidation and reprisal are promptly and effectively prosecuted and addressed in an appropriate manner in order to combat impunity...and victims provided with appropriate remedies”.⁶⁰

In response to a proposal from human rights defenders (HRDs) in 2009, the Human Rights Commission identified its Director of Inquiries and Investigations as the focal point for HRDs and civil society. However, this mechanism has not succeeded in addressing the broader problem of the promotion and protection of the rights of human rights defenders and women human rights defenders as a group, rather than being confined to inquiries into specific complaints from individual human rights defenders. In 2010, there was only one complaint logged: concerning police inaction following intimidation and threat of violence against an opposition politician.⁶¹

At regional offices there are no focal points for human rights defenders, and worse still, there appears to be no familiarity with

59 Para 40-43, *Report of the Secretary-General on cooperation with the United Nations, its representatives and mechanisms in the field of human rights*, A/HRC/14/19, 7 May 2010, http://www2.ohchr.org/english/bodies/HRCouncil/docs/14session/A.HRC.14.19_en.pdf.

60 Para 56, *Report of the Secretary-General on cooperation with the United Nations, its representatives and mechanisms in the field of human rights*, A/HRC/14/19, 7 May 2010, http://www2.ohchr.org/english/bodies/HRCouncil/docs/14session/A.HRC.14.19_en.pdf.

61 Nabeela Hussain, “Bahu goes to HRC”, *Daily Mirror* (Colombo), 28 December 2010, <http://www.dailymirror.lk/news/8648-hr-filed-against-airport-attack.html>.

the UN Declaration on Human Rights Defenders.⁶² The rationale for such a mechanism was also not evident to regional coordinators who point to the existing process for inquiries and investigations as adequate to handle complaints from local human rights defenders. There is an urgent need for the education and training of HRCSL staff on the scope of state obligations towards human rights defenders.⁶³ It is also necessary to clear the confusion both conceptually and institutionally between focal points for human rights defenders as distinct from focal points for civil society organisations and activists in general.

The Human Rights Commission of Sri Lanka could play an important role through public denunciations of all acts of intimidation and reprisal; conducting investigations on its own initiative, which are then made public; and in making public its communication of information concerning such acts, and the findings of its inquiries, to international human rights mechanisms including relevant UN special procedures. It could also upload the UN Declaration on Human Rights Defenders on its website and disseminate the Sinhala and Tamil translations. These are but a few examples of the public acts of solidarity that national human rights institutions can manifest towards human rights defenders.⁶⁴

Also in 2010, the UN Special Rapporteur on Human Rights Defenders recommended that national human rights institutions “integrate a gender dimension in the planning and implementation of all programmes and other interventions related to human rights defenders including through consultation with relevant organi-

62 *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/RES/53/144, 8 March 1999, <http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.res.53.144.en>.

63 See further, UN Special Rapporteur on the situation of human rights defenders, *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, <http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>.

64 See also, Asian Forum for Human Rights and Development (FORUM-ASIA) and Asia Pacific Forum on Women, Law and Development (APWLD), *Defending the Defenders: Role of National Human Rights Institutions in protecting and supporting human rights defenders in Asia*, Joint submission to the 11th Annual Meeting of the Asia-Pacific Forum of National Human Rights Institutions in Suva, Fiji, 31 July–3 August 2006, http://www.forum-asia.org/news/in_the_news/pdfs/Asian%20NGO%20position%20paper%20on%20HRDs%20for%20the%20APF-%20final.pdf; Reprinted in Law & Society Trust Review (Colombo), Vol. 16 (No. 225), July 2006, pp. 6-15.

zations” and “support the documentation of cases on violations against women defenders and those working on women’s rights or gender issues”.⁶⁵ It is to be hoped that the HRCSL will positively act on this advice in the course of its strategic planning in 2011.

VI. Implementation of References of the Advisory Council of Jurists

The Advisory Council of Jurists (ACJ) was established by the Asia-Pacific Forum of National Human Rights Institutions (APF) to advise it on the interpretation and application of international human rights law and to develop a regional jurisprudence in that area.⁶⁶

The Council comprises individuals of eminence drawn from the higher judiciary, senior academics and human rights experts, nominated by member institutions. When the Sri Lankan Human Rights Commission lost its full membership of the APF in 2009 – following a sequence of events that began with downgrading to ‘B’ status by the ICC-SCA in 2007⁶⁷ – the opportunity for Sri Lanka to be represented on the ACJ was forfeited.

Since 1999, the ACJ has been requested by the APF to provide its opinion on nine issues or references of relevance to national human rights institutions in the discharge of their roles and functions in human rights promotion and protection in the region – most recently on Sexual Orientation and Gender Identity (2010). However, the Opinions that it presents are advisory, that is, in the form of recommendations and suggestions, and therefore are non-binding on APF member-institutions.

Nevertheless, in view of the institutional relationship between the APF and the ACJ, the longevity of the ACJ, the rigour and judiciousness of its opinions, and the considerable investment of time, human and financial resources on this body, one would anticipate

65 Para 110, *Report of the Special Rapporteur on the Rights of Human Rights Defenders*, Margaret Sekaggya, A/HRC/16/44, 20 December 2010, <http://www2.ohchr.org/english/bodies/HRCouncil/docs/16session/A-HRC-16-44.pdf>.

66 Advisory Council of Jurists, Terms of Reference (as amended), <http://www.asiapacificforum.net/acj>.

67 See B. Skanthakumar, ‘Sri Lanka: Atrophy and Subversion of the Human Rights Commission’ in *2010 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, FORUM-ASIA, Bangkok 2010, at p. 210, http://forum-asia.org/2010/ANNI2010_TEXTONLY.pdf

that its analyses and at least some of its recommendations have informed and influenced APF members. Helpfully, some of its recommendations are even country-specific.

This report assesses the HRCSL's responsiveness to the first three ACJ Advisory Opinions: on Child Pornography on the Internet (2000); on the Death Penalty (2000); and on Trafficking (2002).

Child Pornography on the Internet: The ACJ noted the competing rights of freedoms of expression, privacy and freedom of information and those which protect and promote the best interests of the child but concluded that given the proven physical and emotional harm inflicted on the child by pornography, it is the child's best interests that are paramount.

The ACJ recommended that Asia-Pacific states should strengthen their regulatory controls in this area through ratification of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000). It also proposed the establishment of a Standing Commission of the APF to develop a "model law in consultation with internet service providers and monitor its operation", in addition to education, research and regulatory roles.⁶⁸

The HRCSL has conducted awareness programmes on children's rights for public officials especially police officers, probation officers, state children's homes officers, social services ministry officers, local government officers and many others, however there is no indication that it has integrated the specific perspectives of this ACJ Reference within these programmes.

Furthermore, while the Government of Sri Lanka did indeed ratify the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography in 2006, there is no information available to confirm that the HRCSL publicly advocated and lobbied for this significant measure.

Death Penalty: The ACJ concludes that the death penalty is ineffective as a deterrent to crime, and draws attention to the possi-

68 Advisory Council of Jurists, *Reference on Child Pornography on the Internet* (2000), <http://www.asiapacificforum.net/acj/references/child-pornography/downloads/child-pornography-on-the-internet/final.pdf>, p. 5.

bility of error in the conviction of the accused as well as its disproportionate application to poorer groups within society. In the view of the ACJ, the death penalty has the effect of dehumanising the community and morally legitimises the taking of life.

While commending Sri Lanka for its ratification of the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC), the Advisory Council of Jurists recommends ratification of the Second Optional Protocol to the ICCPR (aiming at the abolition of the death penalty).⁶⁹

The ACJ observed that not all crimes that currently attract the penalty of death in Sri Lanka should be classified as “most serious crimes” (Article 6 of the ICCPR) and recommends that the national law be changed accordingly.

It also counsels against the re-implementation of the death penalty (which has been suspended for several years) and observes that the “resumption of executions and expansion of offences punishable by death in Sri Lanka would be contrary to the principles underlying a just and civilized society and contrary to the terms and spirit of the ICCPR to which Sri Lanka is a party”.

Finally, the ACJ expressed its concern regarding the thousands of reported extra-judicial killings and disappearances since the late 1980s that are blamed on state security agencies, and observed that “Sri Lanka has an obligation to ensure that the rule of law is observed, that law enforcement agencies are accountable and that extrajudicial killings and disappearances not continue”.

The Human Rights Commission has most recently in July 2005, publicly expressed its opposition to the death penalty.⁷⁰ There is no information to hand, as to whether it has also advocated ratification of the Second Optional Protocol to the ICCPR.

The reintroduction of the death penalty is periodically canvassed by cabinet ministers and parliamentarians, and when ques-

69 Advisory Council of Jurists, *Reference on the Death Penalty* (2000), <http://www.asia-pacificforum.net/acj/references/death-penalty/related-files/reference-on-the-death-penalty/final.pdf>, pp. 14-15.

70 Sec. 3.4.5, Human Rights Commission of Sri Lanka, *2004-2005 Annual Report*, Colombo, 2006, pp. 58-59, http://hrctl.lk/english/?page_id=135.

tioned, there appeared to be some ambivalence within the Human Rights Commission on the issue.⁷¹ It is important that the new members of the Commission categorically re-affirm the HRCSL's original position and also work towards abolition of the death penalty and ratification of the ICCPR's Second Optional Protocol.

Trafficking: The ACJ Reference makes several recommendations including (i) ratification (of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children); (ii) implementation (legislative and administrative measures that accompany and even precede ratification); (iii) enforcement (co-operation between judicial, administrative and non-governmental agencies); (iv) victims' rights protection; (v) research and policy-making; (vi) education; and (vii) bilateral and multilateral cooperation including cross-border coordination and information-sharing.⁷²

Sri Lanka signed the UN Protocol in 2000 and ratified the instrument in 2006. It has also signed the SAARC Convention on Preventing and Combating Trafficking of Women and Children for Prostitution in 2002. The SAARC Convention has been domesticated in national law (through Act No. 30 of 2005) and the Penal Code has been amended to include the offence of trafficking (through Act No. 16 of 2006).

The Human Rights Commission conducted training and education programmes on the prevention of human trafficking for law enforcement and other state officials most recently in 2006-2007.⁷³ These programmes were funded by an international non-governmental organisation engaged in the promotion of labour rights. It is not clear whether this training programme integrated the recommendations of the ACJ Reference, or was entirely framed by the specific issues of concern to the donor.

There is also no record of any ongoing monitoring by the Human Rights Commission in this area, nor whether it has engaged

71 Interview with the Chairman, Additional Secretary (Legal) and Director of Inquiries and Investigations, in Colombo, on 6 May 2011.

72 Advisory Council of Jurists, *Reference on the issue of Trafficking* (2002), http://www.asiapacificforum.net/acj/references/trafficking/downloads/reference-on-trafficking/final_report.pdf.

73 Sec. 2.3.2, Human Rights Commission of Sri Lanka, *Annual Report 2006 & 2007*, Colombo, 2008, <http://hrsl.lk/PFF/2006%20&%202007%20%20HRCSL%20Annual%20Report.pdf>, p. 12.

in advocacy around the specific recommendation of the ACJ Reference. An otherwise important research publication by the HRCSL in 2005 on human trafficking⁷⁴ is silent on this aspect, as are its annual reports.

In short, an overall assessment of the implementation of the first three References of the Advisory Council of Jurists does not indicate that these have influenced the Human Rights Commission of Sri Lanka in any discernible way. More than 10 years after these References were adopted by the APF, there is limited awareness and understanding of the work of the ACJ; and limited support for the ACJ's analysis and recommendations.

VII. Consultation and Cooperation with Civil Society Organisations

The deterioration in relations between the Human Rights Commission and human rights defenders after the unconstitutional appointment of its members in 2006 has been an unhappy feature in previous ANNI reports. The Commissioners who served between 2006 and 2009 made no attempt to overcome the scepticism of critical civil society actors towards their commitment to human rights promotion and protection, and instead fed off, and into, the shrill anti-NGO rhetoric of the government.

Two national-level civil society forums were conducted in Colombo in 2010, on 26 March and on 24 September; within the framework of the 'Human Rights Joint Programme', which is funded by several UN agencies (primarily the United Nations Development Programme) until the end of 2011, and one of whose objectives is to strengthen the Human Rights Commission.

In the absence of members of the Commission, the staff appeared to be less inhibited in interactions with civil society actors. Understandably, they were occasionally defensive of the functioning and performance of the HRCSL under their watch. In their view, the carping by critics did not recognise the HRCSL's success in the resolution of most complaints through mediation; nor ap-

74 Human Rights Commission of Sri Lanka, *Human Trafficking and National Human Rights Institutions: Co-operating to end Impunity for Traffickers and to secure Justice for Trafficked People*, Colombo, 2005, <http://hrctl.lk/PFF/Human%20Trafficking%20and%20National%20Human%20Rights%20Institutions%20-%20.pdf>.

preciated the political and resource constraints under which the institution operates, especially in a context when it was without members and relied on its senior executive officers to keep it afloat in stormy waters.

The format of the forums was to begin with a keynote speech by an invited 'expert', followed by presentation of recent activities, and occasionally perspectives, of the HRCSL, and then open discussion led by civil society activists. The composition of civil society representatives has differed between forums; and for some it will be their first encounter with the HRCSL's head office. Thus, the expectations and participation differs between those who are looking for information on the HRCSL's powers and functions; to individuals who will raise local issues or even allegations concerning themselves; to others interested in the HRCSL's working methods and effectiveness, as well as acts and omissions concerning general issues, including of serious human rights violations. There is no report-back on concerns and proposals made by civil society organisations. The minutes of the forums is not publicly available, and is usually circulated at or shortly before the following forum.

It should be recalled that the Asia-Pacific Forum's own framework for partnership between national human rights institutions and human rights non-governmental organisations is for consultation processes that are "regular, transparent, inclusive and substantive"⁷⁵. In Sri Lanka, there have not been spaces and opportunities for structured, continuous and intensive dialogue between the Human Rights Commission and human rights defenders in particular. For instance, there is no NGO liaison committee that meets between the large national forums. Instead, the HRCSL appears to have selective relationships with civil society organisations and individuals regarded as non-confrontational or non-threatening.

At regional level, civil society forums have been organised where there is UNDP funding, and not conducted where there is none, raising concerns over the HRCSL's commitment to ensure that collective and structured interactions are not confined to Colombo; and the willingness of its regional coordinators to engage with the plurality of civil society organisations in their region.

75 Para 2.1, *Kandy Program of Action: Cooperation between national institutions and non-governmental organisations*, Kandy, Sri Lanka, 26-28 July 1999, <http://www.asia-pacificforum.net/support/training/regional-workshops/non-government-organisations>.

Some regional coordinators appear to view multi-stakeholder networks initiated by non-governmental organisations, for example on child protection, that include representatives of local and central governmental authorities and the HRCSL, as sufficient for interaction with civil society organisations.

The HRCSL also views its collaboration with non-governmental organisations – as resource persons for the latter’s training programmes – as an illustration of its cooperation with civil society organisations. These are also of benefit to the HRCSL itself, in the absence of adequate funding to conduct its own human rights awareness programmes for police personnel, administrators, teachers and others, in fulfilling its mandate on human rights promotion and education. Further, there is no recognition by the HRCSL that it has anything to learn from human rights defenders and rights-holders.

VIII. Conclusion and Recommendations

In the absence of members (between June 2009 and until February 2011), the intervening year was an *annus horribilis* for the Human Rights Commission of Sri Lanka (HRCSL). The senior staff sought to safeguard the institution, and its day-to-day functioning, to the best of their ability and exercising their own judgement. They did not have many allies, nor did they seek to find new ones.

Clearly, the HRCSL suffered a loss of authority in relation to state actors and agencies, and loss of credibility in its effectiveness as a national institution for the promotion and protection of human rights. Battered in the maelstrom of Sri Lanka’s continuing human rights crisis and deepening state authoritarianism, the HRCSL was perceived to be silent and powerless.

In these circumstances, despite the transparently flawed process of selection of members in 2011, the absence of public consultation on nominees, and grave concerns over the human rights competence and consciousness of some among those appointed, the reconstitution of the HRCSL may be regarded as a pre-condition for its rejuvenation.

Recommendations to the Government of Sri Lanka

1. Repeal the Eighteenth Amendment and ensure the principle of independence in the selection and appointment of members to the Human Rights Commission.
2. Amend the Human Rights Commission Act – in consultation with the Human Rights Commission, parliamentarians, public administrators, civil society organisations and the general public—to enable enforcement of the HRC’s recommendations.
3. Ensure parliamentary debate on the annual report of the Human Rights Commission.

Recommendations to the Human Rights Commission of Sri Lanka

1. Demonstrate independence of mind and spirit by raising and tackling controversial issues that violate or restrict human rights, including the continuance of the state of emergency, and being in solidarity with victims of human rights abuses and human rights defenders.
2. Nominate one among its members to be the focal point for human rights defenders within the Commission, and establish a systematic functioning mechanism for the HRCSL to relate to human rights defenders and women human rights defenders as a group.
3. Ensure that all members and staff are trained on the application of the Paris Principles, the ICC-SCA General Observations, and the References of the Advisory Council of Jurists, in addition to international human rights laws and standards, in the performance of their duties.

Taiwan: A Step Forward

Developments toward the establishment of an NHRI

Taiwan Association for Human Rights (TAHR)¹

I. General Overview of the Year

Taiwan adopted the International Convention on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) as domestic law on 10 December 2009, , 2009, despite the fact that it is not a member state of UN. Under this new legislation, Taiwan is committed to produce a country report on the current status of human rights within two years of its introduction. In early 2010, President Ma Ying-Jeou announced the establishment of a consultative commission on human rights. As a result, the Human Rights Committee was established under the Presidential Office on 10 December 2010, International Human Rights Day. There is progress of government to establish different levels of human rights mechanism, and to collaborate on the initial human rights country report. This report looks into some the newly established human rights mechanisms and their performance in 2010.

II. Development toward the Establishment of NHRI

A. Ministry human rights working groups

1 . Prepared by Liao Fort (Research Fellow, Institute of Law, Academia Sinica and Vice Chairperson of Taiwan Association for Human Rights)

Before Taiwan ratified the ICCPR and ICESCR, the Ministry of Education (MOE) was the first ministry to establish a working group on human rights education. After May 2010, in order to promote and guarantee the protection of human rights in Taiwan, many other human rights working groups have been jointly set up by several ministries and institutions, including the Ministry of the Interior (MOI), the Ministry of Foreign Affairs (MOFA), the Ministry of Defense (MOD), the Ministry of Education (MOE), the Ministry of Justice (MOJ), the Department of Health (DOH), the Environmental Protection Administration (EPA), the Council of Labor Affairs (CLA), the Aboriginal Peoples Council (APC), the Coast Guard Administration (CGA), and other 9 ministries. These groups also function as the contact point under the Executive Yuan. However, they are facing two problems

Firstly, the purpose of the establishment of these human rights working groups still remains ambiguous. The key efforts of their establishment should have focused on the implementation of the law on the two UN Conventions. However, in practice the work of these groups seems to be irrelevant to this goal. For instance, the human rights group established by the MOJ does not even mention the two Covenants or the implementing Acts in its mission and principles. The problem is similar with the EPA's human rights group, which is simply requested to act as the communication contact point between the ministries under the Executive Yuan (cabinet). The mandate of the group consists in dealing with generic human rights affairs without focusing, however, on any particular issue. Without any specific duty, these groups risk falling into conflicts, and could face serious obstacles.

Secondly, these groups do not meet regularly, which is a clear indication of the low commitment of government departments to human rights. According to the guidelines of the MOJ, its group should meet once every two months. However, it had only one meeting in 2010. The human rights working group of EPA just meets once every six months. In essence, the regularity of work of these groups seems pre-figured for failure, and raises questions on the depth of the government's commitment to establish regular human rights mechanisms

B. Executive Yuan Human Rights Group

In 2001, the Executive Yuan under former President Chen Shui-bian established a human rights group to promote and guarantee the protection of human rights, which has been continued under the Ma Ying-jeou administration.

The first draft of the official Human Rights Report (2007-2008) pointed out that the group received few criticisms. From an organizational structure perspective, the human rights group is a task force and not a permanent body of the Executive Yuan. In 2010, the group only met twice, despite difficulty to reach a consensus among government representatives, scholars and civil society during such a limited period of time. With a lack of clear organizational structure and legitimacy, the outcome of the resolution is very limited.

Moreover, the group has no independent budget and has to squeeze funding from other government agencies. Without adequate financial resources, the group could face difficulties in promoting its work. The human rights group established by the Executive Yuan is not able to fully grasp the dynamics of human rights policy, and develop a comprehensive plan for the future.

2.3 Re-establishing the Human Rights Consultative Commission

In 2010, the Human Rights Consultative Commission was re-established under the Presidential Office. Previously, during the rule of the Democratic Progressive Party (DPP), a “Human Rights Consultative Group” was firstly introduced in 2000, and in 2004 was reorganized as the “Human Rights Consultative Commission” under the Presidential Office. It was the most important human rights mechanism during the DPP’s administration. However, the Consultative Commission was disbanded in May 2006, due to the opposition from the Kuo Min Tang (KMT), the majority party in the Legislative Yuan. The KMT did not regard the commission as a statutory body and consequently cut its budget. This boycott led to the disbandment of the Consultative Commission.

When President Ma Ying-jeou revived the Human Rights Consultative Commission in 2010, his party, the KMT, justified its move on the basis of Article 28 of the Central Administrative Agencies Organizations Act, which states that “Authorities may set up

taskforce group". The mandate of the Human Rights Consultative Commission is to advise the President on human rights policies, and assist the State departments to draft the first national report on the two Covenants (ICCPR and ICESCR).

President Ma took office in May 2008. Why did it take more than two years to set up the human rights Consultative Commission? If human rights were so essential within President Ma Ying-jeou's policy, the establishment of a National Human Rights Institution (NHRI) should have been a priority. As the majority party in the Legislative Yuan, the KMT should have acted according to its party leader Ma Ying-jeou, and push the related bills in the parliament, even if the ruling party is in charge of both the executive and legislative power. However, the KMT is not truly committing to this goal because apparently it does not have a clear concept of an NHRI.

C. Lack of independence

Is the new face of the Human Rights Consultative Commission a positive move for human rights in Taiwan? It will mostly depend on the composition of its commissioners, and their understanding of human rights issues. Following the previous structure of the commission, the Vice-President also chairs the Commission. The current Vice President, Vincent Siew, has more experience in economic affairs, and poor knowledge of the human rights field. Siew, who also serves as the convener of the Finance Advisory Group, could be more oriented towards Taiwan's economic development rather than the improvement of the country's human rights situation.

Besides Vincent Siew, other government officials—including the Vice Premier of the Executive Yuan, the Vice President of Judicial Yuan and the Vice President of Control Yuan—are members of the Commission. According to the Constitution of the Republic of China, the Executive Yuan is the principal organ in charge of carrying out the President's policy objectives. Among its main duties is also providing the President with information and recommendations during the decision-making process. Other constitutional institutions, like the Judicial Yuan and Control Yuan, work independently from the President. Since the Vice Presidents of each Yuan are commissioners under the Presidential Office, independence becomes questionable. Other commissioners, which come

from the private sector, are just part-time advisors, and it is still uncertain how much the government will take their opinions into consideration. At this point, it is clear that the Taiwan government does not yet have a well-defined human rights policy. Therefore, the Human Rights Consultative Commission seems to be more a showcase body than an official mechanism through which the government could formulate a comprehensive human rights policy.

D. A National Human Rights Commission is irreplaceable

The Human Rights Consultative Commission should not be mistaken to be a national human rights institution (NHRI), as defined in the Paris Principles. When it was first introduced in 2004, one of its missions was to promote and establish an independent NHRI based on the Paris Principles. However, President Ma has yet to unveil his plan of such an establishment. It needs to be asked whether such a plan is in Ma's agenda, since over 120 such institutions have been established around the world, is an affirmation of the importance of NHRIs. The Taiwanese government should not regard the Human Rights Consultative Commission a replacement for the establishment of a truly independent NHRI .

III. Conclusion and Recommendation

In January 2012, Taiwan will hold the next presidential election, as well as a general election for the Legislative Yuan. Will the issue concerning the establishment of an NHRI be put in the campaign's agenda of all candidates? Although the establishment of a NHRI might not be the central issue of the election campaign, Taiwan NGOs will definitely make the most of this opportunity to make their voice louder.

Taiwan civil society is closely following the actions of the Human Rights Consultative Commission and the other human rights working groups set up by the ministries. Moreover, the very first Taiwan National Human Report is expected to be released by December 2011.

NGOs in Taiwan, who also work with international and regional networks to continuously lobby parliamentarians and administrators, suggest the following policy recommendations at every

available opportunity:

- Identifying the Human Rights Consultative Commission as an interim body mandated to establish the process by which Taiwan can establish an NHRI, recognizing Taiwan's urgent need to build human rights knowledge while maintaining the longer-term intention to mandate an independent institution with investigative powers;
- Inviting international experts to Taiwan to conduct lectures, training and dialogue sessions with high-level officials; and in particular to obtain the support from the Asia-Pacific Forum of National Human Rights Institutions (APF) programs to help Taiwan establish region without an NHRI to establish one;
- Issue a state 'human rights action plan' separate from the periodical reports demanded by the Implementation Law of the ICCPR and ICESCR, setting out clear goals as well as the stages and measures to be taken to reach those goals.

Report on the National Human Rights Commission of Thailand 2010¹

Justice for Peace Foundation (JPF)²

I. General Overview of Thailand's Human Rights Situation

National Human Rights Commissioners and staff and civil society representatives agree that the most serious human rights issues in 2010 were related to the political violence in April and May which resulted in 92 deaths including prima facie extrajudicial killings, approximately 2,000 injuries, and arson of commercial and government buildings. This occurred in a context of emergency powers (the Internal Security Act and the Emergency Decree for Public Administration in Emergency Situations) that allowed the government to suspend many rights, most importantly the right to freedom of expression through blanket censorship of publications, radio and TV stations and internet media and widespread use of the Computer-related Crime Act and Article 112 of the Criminal Code³. Ongoing investigations have since revealed cases of illegal and arbitrary detention, torture and other ill-treatment.

An investigation into the violence was set up by the NHRC in

1 The writers of the report would like to thank the Chairperson of the NHRC, Prof Amara Pongsapich, Commissioner Visa Benjmano, and Atchara Shayakul, Director of the International Human Rights Bureau of the Office of the NHRC, for graciously providing information in their personal capacity that made this report possible and the NHRC for valuable comments correcting errors in an earlier draft. The writers also would like to thank members of Thai civil society and NHRC staff for additional information, which was provided on condition of anonymity.

2 . The contact person for this report is Ms Angkhana Neelapaichit , President, Justice for Peace Foundation (JPF).

3 Dealing with lèse majesté.

June, with 10 panels looking at different aspects of the events⁴ with a report promised within four months⁵. This self-imposed deadline was later cancelled. At the time of writing, some 13 months later, no report has yet appeared⁶. The report-writing process has not been transparent and is reported to be the subject of disagreement within the Commission. Internal documents seen by the writers of this report have questioned the factual basis of certain conclusions of a draft report⁷. The points of discussion inside the NHRC appear to be consistent with a report that resembles a criminal investigation of actions by protestors, favoured by some Commissioners and senior NHRC staff, rather than an investigation of human rights abuses also involving state agents.⁸

The delay in the NHRC report on human rights aspects of the political violence has been particularly frustrating, since the ad hoc body established by the government to investigate the events, the Truth for Reconciliation Commission under the chair of Dr Kanit Na Nakorn, has, through its Truth-Seeking Sub-commission, repeatedly complained of a lack of cooperation from government agencies, in particular the military, and has no powers of subpoena to enforce compliance and no witness protection mechanism⁹. The NHRC does have powers of subpoena¹⁰. The delay in issuing a NHRC report and the inability of the Truth for Reconciliation Commission to collect evidence from official sources have con-

4 'NHRC to set up 10 panels to look into clashes', *The Nation*, 5 June 2010, accessed at <http://www.nationmultimedia.com/home/NHRC-to-set-up-10-panels-to-look-into-clashes-30130923.html>.

5 'NHRC expects probe to take four months', *The Nation*, 6 June 2010, accessed at <http://www.nationmultimedia.com/home/NHRC-expects-probe-to-take-four-months-30130949.html>.

6 'NHRC delays report on April-May clashes', Bangkok Post, 9 July 2011, accessed at <http://www.bangkokpost.com/news/local/246163/nhrc-delays-report-on-april-may-clashes>.

7 The writers of this report emphasize that they have not been able to access a copy of the draft report.

8 Pravit Rojanapruk 'NHRC report criticized and delayed', 12 July 2011, accessed at <http://www.prachatai3.info/english/node/2651>.

9 'Since ... the TRC does not have the authority to call agencies or individuals to provide information, in some cases this has caused an obstacle in seeking cooperation from government and private agencies and led to insufficient important information.' (unofficial translation) from *Rai-ngan khueb na khanakammakan isara truat sob lae khon ha khwam jing phuea kan prongdong haeng chat khranh thi nueng* (First Interim Report of the National Truth for Reconciliation Commission), April 2011, Truth for Reconciliation Commission of Thailand, p 19.

10 Section 32 (1) of the National Human Rights Commission Act 1999, available at <http://www.nhrc.or.th/webdoc/NHRA1999.pdf>

tributed to a situation where the military and other government agents have been able to enjoy impunity.

Other important human rights issues in 2010 mentioned by NHRC and civil society members included violations related to the ongoing violence in the three southernmost provinces. In addition, the NHRC mentioned community rights and some civil society members also listed retention of the death penalty¹¹.

Civil society members noted that the NHRC commissioners spent some of their time on apparently trivial issues. One Commissioner gave comments on a film star's sensationalized allegations about the paternity of her baby¹². The same Commissioner lodged a petition with the Administrative Court in support of an applicant to medical school whose application had been rejected because of a missing photograph¹³ (the petition was eventually rejected by the court¹⁴). The NHRC also addressed issues with no direct human rights relevance (such as the dispute with Cambodia over the World Heritage Council listing of the Preah Vihear temple).

II. Independence

A. Law or Act

The 1999 National Human Rights Commission Act was enacted in line with the roles and responsibilities of the NHRC as stated in the 1997 Constitution.¹⁵ When this was replaced by the 2007 Constitution, stipulating a different composition, selection procedure and powers, the 1999 Act required revision. This was undertaken by the former NHRC Commission. None of the civil society members

11 Although no executions took place in 2010, 53 prisoners were sentenced to death ('Submission for UPR of Royal Thai Government – October 2011', Union for Civil Liberty, n.d., citing figures supplied by the Department of Corrections).

12 'The saga 'hurting the baby'', *The Nation*, 30 September 2010, accessed at <http://www.nationmultimedia.com/home/The-saga-hurting-the-baby--30139013.html>

13 'Medical school aspirant's fate to be decided by court', *The Nation*, 29 October 2010, accessed at <http://www.nationmultimedia.com/home/Medical-school-aspirant-s-fate-to-be-decided-by-co-30141073.html>; 'Court: students have right to sit medical exam', *The Nation*, 25 November 2010, accessed at <http://www.nationmultimedia.com/home/Court-students-have-right-to-sit-medical-exam-30143107.html>.

14 'Court backs exam bar on students', *Bangkok Post*, 5 March 2011, accessed at <http://www.bangkokpost.com/news/local/224890/court-backs-exam-bar-on-students>

15 A certified English translation of the Act is available at <http://www.nhrc.or.th/web-doc/NHRA1999.pdf>

consulted for this report were asked for their input into the draft revision. It is understood that a draft bill has been approved by the Cabinet and is awaiting submission to Parliament for enactment.

Concerns have been raised both within and outside the NHRC about certain articles of the draft bill.¹⁶ Section 43 reads¹⁷: ‘Commissioners, sub-commissioners, and staff are prohibited from disclosing facts that they learn or obtain in the course of their work under the authority of this Act, except for the dissemination of reports of investigations in accordance with a resolution of the Commission, or disclosure during court proceedings’. Section 51 reads: ‘Anyone who violates section 43 will be sentenced to imprisonment for no more than 6 months or a fine of no more than 10,000 baht or both.’

The 1999 Act contains no such ‘gagging’ provisions and of course no penalties. While there is an obvious need for confidentiality in dealing with allegations of human rights violations (in order to protect victims and witnesses from further abuses, for example), it is not clear why such broad provisions should be thought necessary for the amended Act¹⁸. The effect will be to restrict public access to all information on human rights violations reported to the Commission, unless a majority of Commissioners approve after a case is finalized, or the facts are revealed in the course of judicial proceedings. The Director of the International Human Rights Bureau of the Office of the NHRC argues against this provision on the

16 Access to the text of this draft proved problematic. The English-language website of the NHRC (<http://www.nhrc.or.th/index.php?lang=EN>) fails to mention the bill at all (although it is not normal for English-language versions of laws to appear before enactment). The Thai-language website (http://www.nhrc.or.th/menu_content.php?doc_id=54) lists the draft bill but provides no link to a text. The writers of this report were provided with a text from an independent source.

17 The following two quotations are unofficial translations by the writers of this report. No official translation is available.

18 These provisions were added to the draft bill when it was sent by the Cabinet to the Council of State for prior vetting, at which stage representatives of the NHRC were invited to give opinions and objected to these provisions, particularly for the reason that they limit the powers of the NHRC to fulfil its constitutional mandate. The Council of State acts as a legal advisory body to the government and has the responsibility to ensure that legislation is properly drafted and in line with the constitution, international agreements that the state has signed, existing laws, etc. The Council of State, however, has a history of exceeding these responsibilities. In the drafting of the 1999 Act, for example, the Council proposed that the NHRC, despite its constitutional status as an independent organization, be put under the supervision of the Ministry of Justice or the Office of the Prime Minister. Civil society protests were able at that time to ensure the Commission was made answerable to parliament, rather than to any branch of the executive.

grounds that they limit the power of the Commission to give information to raise public awareness or initiate any social movement based on complaints which are still in the investigation process

Given that the Commission is already suspected of failing the constitutional requirement of being ‘persons having apparent knowledge and experiences in the protection of rights and liberties of the people’, and of having been selected so as to compromise the independence of the Commission, these legal provisions threaten to remove any opportunity for public scrutiny to hold the Commissioners to account for any shortcomings in their performance. The insertion of these provisions only serves to strengthen the suspicions that deliberate efforts are being made to ensure that the Commission simply does not function.

NHRC Chair Prof Amara Pongsapich also expressed dissatisfaction with Section 10 (1) of the bill, which, repeating the provisions of Articles 202 and 236, specifies the composition of the Selection Committee. She proposes that the two members selected by general assemblies of the Supreme Court and Supreme Administrative Court should not themselves be from the judiciary, thus reducing the preponderance of current and former judges on the Selection Committee.

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

Civil society members were well aware of the unwillingness or refusal of government agents to testify before any tribunal on their actions during the political violence in 2010. However, it was not felt that this lack of cooperation was directed specifically at the NHRC, which reports cooperation from the military, but not the police.

Civil society members in general felt that the selection process of the current Commissioners already crippled the independence of the NHRC, so that there would be no cause for the executive or judiciary to take further action in influencing the NHRC.

Civil society members noted that the NHRC had taken some positions that challenged the government, mostly with respect to pollution concerns and in support of community rights. Howev-

er, when the NHRC did make recommendations to government agencies, they appear to be largely ignored. For example, one civil society member pointed to NHRC recommendations to the government related to cases of torture in the three southern provinces, in which the NHRC urged the authorities to investigate and bring responsible people to justice, but which had been ignored by the government..

It was however noted that the NHRC sometimes seemed to invite neglect by not behaving forcefully.¹⁹

The NHRC reports annually to parliament. However within the NHRC there is feeling that the exercise is largely meaningless since the opposition uses the report to attack the government and the government uses it to praise itself.

The NHRC coordinates with the Office of the Parliamentary Ombudsman, to avoid duplication of work.

C. Membership and Selection

The problematic selection process and membership of the NHRC was recounted in the 2010 ANNI Report. Further information has since come to light in the form of an internal NHRC account of the selection process²⁰. The Selection Committee, comprising five active or retired judges and the President of Parliament, voted on 133 candidates in a series of rounds. In each round, each Selection Committee member had a number of votes equal to the number of Commissioners still to be selected. Any candidate receiving votes from at least two-thirds of Selection Committee members (i.e. 4 or more votes) was selected; any candidate receiving no votes was eliminated from the selection process.

In the first round, Parinya Sirisarakan²¹ and Police General Wanchai Srinualnad were selected; in the second, Paiboon Vara-

19 One civil society member described the NHRC as 'tame'.

20 *Rai-ngan khong khanakammakan sanha kammakan sitthi manutsayachon haeng chat* (Report of the National Human Rights Commission Selection Committee), Office of the NHRC, no date.

21 The spelling of Thai names in English is problematic. The names of Commissioners are spelled here according to direct information from the NHRC. These spelling differ in some cases from those given on the NHRC's website at http://www.nhrc.or.th/kcontent.php?doc_id=committee2009.

hapaitoon; in the third, Visa Benjmano; in the fourth, Tairjing Siriphanich; in the sixth, Niran Pithakwatchara; and in the eighth, Prof Amara Pongsapich (in the 5th and 7th rounds, no candidate reached the minimum required number of votes). These candidates' names were then sent to the Senate for confirmation.

The notable feature of this voting pattern is that the order in which candidates were selected is almost exactly the inverse of their known background in and knowledge of human rights. Parinya Sirisarakan is a businessman whose only known previous connection with human rights was being named by the previous Commission as a violator of human rights. During his senate confirmation hearings he reportedly argued that the Falun Gong movement was a CIA plot to embarrass the government of the People's Republic of China, and that concern for human rights abuses by the military government of Burma was unwarranted interference in the internal affairs of another country. He also received the lowest number of confirming votes in the Senate²². It is not immediately clear why such a patently unqualified person should be the first choice of the Selection Committee.

The information revealed in this report is consistent with the view of many in civil society that the selection process was engineered to ensure a compliant Commission dominated by former government officials. It would thus not be necessary for external forces, with the judiciary playing a lead role, to find ways to tell the Commission what to do; it would already know its 'proper' role. This is in keeping with the alleged 'judicialization'²³ of Thai power structures, where conservative and authoritarian forces have come to rely on the judiciary to ensure that the privileges of the elite²⁴ are not threatened.²⁵

The dominance of the Commission by former government of-

22 Commissioner Parinya received 76 votes, as opposed to between 109 and 131 for the remaining six Commissioners. 74 members of the 150-member Senate were appointed by a committee.

23 This is a translation of the relatively new Thai word *tulakanphiwat*, composed of the elements *tulakan*- 'judge, justice', and *-phiwat*, '-ization'. It refers to the increasingly interventionist role of the judiciary with respect to other branches of government.

24 The term currently used in Thai to refer to this elite is *amat*, and refers to establishment elements of the Thai power structure: the monarchy, judiciary, military leadership, higher ranks of the bureaucracy, and leading capitalists.

25 See Chapter 10 of *Thai Democracy in Crisis: 27 Truths*, Chaturon Chaisaeng, Institute of Democratization Studies, Bangkok, 2009.

ficials also translates into a lack of understanding or awareness on the part of Commissioners of the motivations and viewpoint of the 'red shirt' demonstrators in April-May. The mainstream press attempted to create an image of ignorant, paid and violent protestors, propaganda that was helped by the government use of emergency powers to censor red-shirt media. One NHRC official reported that personal visits to the protest site to speak to protestors revealed genuine grievances, many with a human rights perspective; attempts were then made to relay this information to Commissioners, who, it seems, were not aware of this, had no other way of learning this, and, in some cases, had no apparent desire to know. The limited success of these efforts may be related to the reported disagreements within the NHRC over their report into the political violence.

In the highly polarized political situation in Thailand²⁶, many people have become associated with one side or the other. When people with a known or alleged allegiance are appointed to a given position, they may automatically forfeit cooperation from those belonging to the opposite side. A Commission dominated by former government officials assumed to be supportive of the *amat* and yellow-shirt sympathizers is viewed with suspicion by red-shirt supporters. So assistance from the NHRC to redress human rights violations is often not even sought by the red shirts, let alone obtained.

Any hopes that membership of the Commission would have spurred Commissioners to improve their knowledge of human rights so as to belatedly meet the constitutional requirement of being 'persons having apparent knowledge and experiences in the protection of rights and liberties of the people' have been disappointed so far. Commissioners have been reported to have claimed that drunk driving is a violation of human rights, rather than a criminal offence; and that demonstrators barring access to commercial properties were violating the 'right to shop'. Commissioner Parinya planned to petition the International Criminal Court over the conviction of two Thai members²⁷ of an ultra-nationalist group for illegally entering Cambodia, apparently unaware of the fact that this 'human rights violation' in no way constitutes war crimes, crimes against humanity, genocide or the crime of aggression.

26 See the 2009 and 2010 ANNI reports for more analysis.

27 One of the two convicts is Veera Somkwamkid, who was also appointed as a member of the NHRC Sub-committee on Civil and Political Rights.

Commissioner Pol Gen Wanchai and Commission Chair Prof Amara both encouraged the public to file human rights violations against the red shirt protestors for cases of arson and searches of belongings of people entering protest areas²⁸, while at the same time ignoring what Amnesty International termed the ‘reckless use of lethal force’²⁹ by the military against unarmed protestors, media personnel, medical staff and bystanders. Commissioner Pairoon also said that the sale of flip-flop sandals with the faces of Prime Minister Abhisit Vejjajiva and Deputy Prime Minister Suthetep Thaugsuban, for which a female vendor was prosecuted under the Emergency Decree, constituted a human rights violation. Amnesty International, by contrast, argued that it was the prosecution that was the human rights violation.³⁰

Each of the NHRC sub-committees is headed by a specific Commissioner. Cultural norms have made it the practice for Commissioners to appoint as members of these sub-committees persons with whom they have a pre-existing relationship. Since most previous Commissioners were already respected members of human rights circles, this meant that sub-committees had on them persons with appropriate knowledge and expertise. This is no longer the case. While some sub-committees inspire confidence, others do not. The Special Sub-committee to Investigate Laws and Regulations Relating to Incidents arising from the UDD Demonstrations, for example, includes nine members (out of 22) with police or military rank, presumably because the Sub-committee Chair is Commissioner Pol Gen Wanchai. Many sub-committees are dominated by state officials. Effectively, any lack of competence on the part of an individual Commissioner could be replicated in any Sub-committee for which that Commissioner is responsible.

NHRC staff are recruited from public announcements and, even if transferred from government agencies, are full-time NHRC employees with no formal allegiance to other bodies. Comments from both within and outside the NHRC note that NHRC staff often do not have any expertise or experience in human rights, although the NHRC has participated in the Capacity Assessment programme

28 ‘NHRC chair urges people to sue reds for rights violations’, *The Nation*, 26 April 2010.

29 ‘Thailand: Military Must Halt Reckless Use of Lethal Force’, Amnesty International, 17 May 2010, AI Index: PRE01/160/2010.

30 *2011 Annual Report: Thailand*, Amnesty International, May 2011

of the Asia Pacific Forum of National Human Rights Institutions (APF). The NHRC Chair conceded that human rights training for NHRC staff would be useful and some is provided.

The overall structure of the NHRC is troubling. Any shortcomings in the experience or expertise of a Commissioner are unlikely to be rectified by membership of the sub-committees for which that Commissioner is responsible, since sub-committee members are likely to share the same shortcomings. Nor can NHRC staff be relied on to make good these shortcomings.

D. Resourcing of the NHRI

NHRC considers that so far it has been adequately resourced but is not sure about future governments. Its independence in making budgetary decisions is guaranteed by the constitution and has been respected. While the NHRC is not legally prevented from accessing outside sources of funds, it is aware of the need to maintain its independence. Since current funding is regarded as adequate, the use or availability of external funding is not an important issue.

III. Effectiveness

The NHRC is now situated in the Government Complex Commemorating His Majesty the King's 80th Birthday Anniversary on the northern outskirts of Bangkok, which also houses government agencies such as the Immigration Bureau of the Royal Thai Police, the Ministry of Information and Communication Technology, and the Department of Special Investigation³¹. This location tends to obscure the NHRC's status as an independent organization³² and may discourage direct petitions by victims of abuse. There are no branch offices elsewhere in the country.

The division of work among Sub-committees is sometimes problematic. One civil society member reports that the Subcom-

31 These three agencies are chosen from about 30 agencies housed in the complex since they have been alleged to be involved in human rights abuses themselves.

32 The website for the Complex, for example, clearly lists the NHRC as a 'government agency'. See <http://www.governmentcomplex.com/index.php>. The same website also lists as 'government agencies' other legally independent organizations (the National Election Commission, the Office of the Parliamentary Ombudsman and King Prajadhipok's Institute).

mittee on Children, Women and Equity, which includes members with expertise on the rights of the child, does not carry out activities in the three southern provinces with a longstanding problem of unrest. This omission was said to be in deference to the Sub-committee on the Southern Border, which, however, lacks expertise in child rights. This is particularly troubling since the problem of child soldiers, which is being addressed by the Sub-committee on the Southern Border, is concentrated in these provinces.³³ It is also reported that the Sub-committee to Protect Labour and Occupational Rights was recently disbanded.

The composition of sub-committees (see above) may influence their effectiveness. It is reported that a female community leader from an area with long-standing conflicts between villagers and capitalists constructing polluting industries appealed to the Sub-committee on Rights in the Judicial Process on local police officers' having an interest in a power station that was polluting community water supplies. Villager protests had previously been met with violence (the area has a history of violence leading to death and injury). The woman human rights defender (WHRD) reported that she was told by the Sub-committee Chair to get pictures as evidence. For the villagers to attempt to gather such evidence would expose them to risks of retaliation from the capitalists and corrupt state officials. The CSO involved in this case felt that the unhelpful response from the Sub-committee may be related to the fact that the Chair and five other members (of 16) of the Sub-committee are active or retired members of the security forces.

One civil society member asked for the criteria for choosing members of the special sub-committees dealing with the April-May protests and was initially given no answer, then later, told by a sub-committee member that there had been attempts to achieve neutrality by appointing equal numbers of red-shirt and yellow-shirt supporters.

The NHRC has published procedures for filing cases, which can be done in a variety of ways according to the convenience of the petitioner, and for investigation³⁴. In 2010 the NHRC received 748

33 *Briefing Paper: Child Recruitment and Use in Southern Thailand*, Coalition to Stop the Use of Child Soldiers, December 2008.

34 A diagram of these procedures is available in the 2009 ANNI Report pp 250-1.

cases and accepted 512³⁵. Cases are analyzed in terms of rights violated, status of victim, and province.

IV. Thematic Focus

A. The specific activities on the promotion and protection of HRDs and WHRDs

The NHRC has no special mechanisms for Human Rights Defenders (HRDs) or Woman Human Rights Defenders (WHRDs), arguing that all have the equal rights to the same level of protection.³⁶ There is a procedure for emergency cases available to anyone.

B. Interaction of NHRIs with the international human rights mechanism (SCA General Observations 1.4);

The NHRC reports no contact with Special Mandate Holders, because in the recent past the Thai government has approved no invitations to Special Mandate Holders, but the NHRC reports that consultations with the Ministry of Foreign Affairs indicate this may change.

It claims to have worked closely with the Human Rights Council (HRC)³⁷ and with the International Coordinating Committee of National Institution for the Promotion and Protection of Human Rights (ICC-NHRI).

The NHRC has lobbied for NHRIs to have a bigger role in the UPR process; it claims success in having NHRIs' UPR reports in

35 To put this in context, there were 613 complaints in 2008 and 695 in 2009. By comparison, the Paveena Foundation, an NGO dealing with cases of domestic violence, trafficking and sexual violence, reported 7,855 cases in 2010. While many of these do not involve human rights violations, their breakdown of cases includes 588 cases of torture and illegal imprisonment. See Voranai Vanijaka 'Tortured by tradition: give our young more than we've received', *Bangkok Post*, 24 April 2011.

36 It should be noted that the term 'human rights defender' is not widely used in Thailand. Some civil society respondents whose working lives are spent in the protection and promotion of human rights said that they did not consider themselves HRDs. One civil society member jokingly observed that Thais known as 'community leaders', 'environmental activists' or similar in their work start being called 'HRDs' only after they have been killed.

37 The fact that Thailand's Ambassador to the United Nations in Geneva Sihasak Phuangketkeow served as President of the HRC from 2010 to 2011 facilitated this relationship.

the next cycle placed in a separate section in the 'Other Stakeholder' reports. The NHRC held a public consultation, described by one informant as 'perfunctory', in preparation for a UPR submission on Thailand to the HRC. However the NHRC draft report³⁸ was written before the consultation and the input received from civil society appears to be presented as an annex, rather than being incorporated into the main body of the submission. It seems clear that while some in civil society expect the NHRC to work as an ally, the NHRC sees itself as having a distinct status with separate privileges. The Secretary-General of the NHRC is also advisor to the commission drafting the government report; it is not clear whether he used this position to advance the views of the NHRC alone or civil society as a whole.

The Director of the International Human Rights Bureau reported that the NHRC had recommended to the government 'on request' that Thailand should sign the Convention for the Protection of All Persons from Enforced Disappearance (CED) but not ratify, pending changes to domestic law. The Director argues that in the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), immediate ratification did not lead to expected changes in Thai law to bring it into line with the Convention. She is unaware of the government's intentions with regard to the CED.

C. Follow-up or implementation of references by the ACJ

1. Torture

The NHRC reports no progress by the government on four of the ACJ recommendations with respect to torture from the 2005 APF meeting, namely (1) the need for Thailand to become a party to the First Optional Protocol of the ICCPR, CAT, OPCAT, the Refugee Convention, the Protocols to the Geneva Conventions, and the Rome Statute; (2) the Constitutional provision allowing for derogation from the rights recognised in the Constitution on the basis of 'necessity'; (3) the need to provide a legislative definition of torture; and (4) the decision of Thai courts not to recognise customary international law except to the extent that it is reflected in domestic laws.

38 Available from http://www.nhrc.or.th/kcontent.php?doc_id=upr2011&lang=EN

The NHRC is ‘working fully’ on the forcible return of persons located on the Thai border to their country of origin; reports of overcrowding and sub-standard conditions in Thai prisons; and the inconsistency of the recent emergency decree with human rights obligations and the Constitution, especially in connection with the political violence in 2010. It is also ‘pushing’ for the government to address the limitation on the extra-judicial jurisdiction of Thai courts to offences ‘affecting Thailand’; and the need to have set minimum standards of interrogation for police and other disciplinary forces except for those provided in the Constitution, particularly with respect to the situation in the south.

2. Death Penalty

The NHRC admits to not having worked on the death penalty until recently. It is now working on a Position Paper. One civil society member reported participating in a one-day general meeting on the death penalty hosted by the NHRC, but did not know what use the NHRC made of the opinions taken.

3. Trafficking

The Suppression of Human Trafficking Act was promulgated in 2008 (before the present Commission took office), and the NHRC cooperates closely on this issue with the OHCHR, with NHRIs in Indonesia Malaysia, the Philippines and Timor Leste and with civil society organizations in Thailand. Commissioner Visa sees implementation as the major problem, related to ignorance and malfeasance by officials, and to reluctance of victims to report abuses or provide testimony. The NHRC in 2010 produced a handbook to improve understanding of the issue³⁹.

V. Consultation and Cooperation with NGOs

Commissioners value the support and cooperation of civil society in recognition of the NHRC’s inability to do everything. The NHRC feels it is part of civil society networks.

However, the flawed selection and composition of the current

³⁹ *‘khu mue wa duai kanwinitchai to lakkan lae kanpatibat rueang sithi manutsyachon lae kankha manut’* (Policy and procedures handbook on human rights and trafficking)

NHRC have led many in Thai civil society to withdraw cooperation from the Commission⁴⁰. For this reason, the human rights NGO of longest establishment, the Union for Civil Liberty, has resolved to have no formal cooperation with the NHRC, although individual staff members of UCL can and do cooperate with selected activities and components of the NHRC. Because some NGOs have withdrawn cooperation, those that do cooperate appear to some civil society members as a group selected by the NHRC. Also, to some members of civil society, being able run projects in areas where they also hold NHRC sub-committee membership has the appearance of conflict of interest.

Most civil society respondents had cooperated with NHRC activities in 2010, both formal and informal, initiated by both sides. Civil society members however expressed dissatisfaction with the level of cooperation with the NHRC. Some saw the NHRC as a potential but unused conduit for access to government agencies. One NGO asked the NHRC to extend to government agencies invitations to a consultation on the death penalty, since direct requests from CSOs are often unanswered. The NHRC declined to do this on the grounds that 'the time is not right'.

Some pointed to the difficulty of knowing what the NHRC is doing. The most recent publicly available report is for 2008 (before the current Commission took office). The NHRC expects the 2009 report to be ready in September 2011.

One civil society member felt threatened when, at a consultation hosted by the NHRC, individual participants were photographed with no explanation.

VI. Conclusion and Recommendations;

It seems clear that the current selection procedures for the NHRC, which do not conform to the Paris Principles⁴¹, have not produced, and in all likelihood could not produce a Commission that will guarantee the protection and promotion of human rights in Thailand. It is therefore necessary to repeat the recommendation of the

40 It should be recalled that the political polarization in Thailand also affected human rights circles with organizations and individuals being labelled, rightly or wrongly, as yellow or red. For further details see the 2009 and 2010 ANNI reports.

41 See the 2010 ANNI Report for a detailed analysis of the shortcomings.

2010 ANNI report, that selection procedures be revised in line with those in the 1997 Constitution. When and if this can be achieved, the tenure of current Commissioners should be terminated, and they should be replaced with persons meeting the constitutional requirement of 'having apparent knowledge and experiences in the protection of rights and liberties of the people'.

In the absence of any change in the selection and composition of the NHRC, any further recommendations are as useful as replacing the light bulbs in a house with no electricity. But some obvious measures would include:

Parliament must remove Sections 43 and 51 of the draft NHRC Act. With appropriate measures to protect the safety and privacy of the victims and witnesses of human rights violations, the activities of the NHRC must be open to public scrutiny as one mechanism to ensure accountability.

The NHRC should relocate out of a government complex that also houses agencies alleged to be involved in human rights abuses.

Parliament must debate seriously the Annual Report of the NHRC rather than use them for political point-scoring.

In light of changes in the constitutional status of the NHRC, selection of a new set of Commissioners and the drafting of a new NHRC law, the Sub-Committee on Accreditation of the ICC-NHRI should reconsider the 'A' rating of the NHRCT and accelerate its re-accreditation procedure.

Timor-Leste: Bridging the Gap between Law and Practice

Judicial System Monitoring Programme (JSMP)¹

I. General Overview of the Human Rights Situation in Timor-Leste

The tabling in Parliament of several draft laws and the passage of the Law Against Domestic Violence indicated continuing progress on strengthening human rights within Timor-Leste in 2010. However, some continuing practices involving human rights violations, and economic and social human rights concerns, reflect a tension between State aspirations and reality as experienced by many Timorese citizens.

First, the Law Against Domestic Violence was approved in July 2010, and aims to prevent domestic violence, as well as protect and assist domestic violence victims. One of the important features of this law is that it changes the status of domestic violence from a semi-public crime to a public crime so that the Prosecutor, rather than the victim, determines whether the crime should be prosecuted. The State's exclusive discretion is expected to reduce the number of abandoned cases as a result of the victim's withdrawal due to fear of retaliation and abandonment. This law identifies four types of violence including physical, sexual, psychological and economic; and defines "family" broadly to include persons living in a situation of economic dependence within a household. However, to properly protect victims' rights, health, medical, police, legal and emergency services must be adequately resourced, personnel properly trained, and the network of services interconnected.

¹ Report prepared by Amrita Kapur, International Advisor, Women's Justice Unit and Casimiro Dos Santos, Deputy Director Judicial System Monitoring Programme (JSMP)

It is too early to tell whether the law is promoting these changes.

Several draft laws have been proposed and debated within civil society and in public. The draft Juvenile Justice Law and the Law on Special Criminal Procedures for those aged between 16 and 21 were circulated in April 2010. However, these two laws are inconsistent with international human rights standards as articulated in the UN Convention on the Rights of the Child (CRC), as they do not contain the principle that the best interests of the child as the primary consideration in all decisions relating to the child, and they do not state that detention should only be applied as a last resort. Human rights organizations have expressed significant concerns about the adequacy and effectiveness of both laws if they are passed in their current forms²

A draft law on Legal Aid was also developed to facilitate and provide legal aid to citizens who do lack the financial means for legal representation, define those who are eligible for legal aid, and establish the facilities necessary to access the courts. The ultimate content of this law and the extent to which it can ensure universal access to justice are yet to be determined. Civil society has called for the urgent refinement and approval of the law.³

The draft Civil Code, which will provide standards for other laws, and regulate diverse areas of law including family, contract and inheritance law, is currently being deliberated by a Parliamentary Committee. However, the draft does not reflect the reality in Timor-Leste because it regulates relationships in a way that is not adapted to Timorese culture, tradition or social and political practices. For example, *de facto* relationships, the practice of *'barlake'*, domestic violence, community and customary land, inheritance matters, and protection of children when they are part of a family living in impoverished conditions pose practical and legal challenges in Timor-Leste, but are not adequately addressed in the draft Civil Code. As a result, this law has the potential to severely

2 See for example, JSMP Bulletin on Parliamentary Activities, May 2010, <http://www.scribd.com/doc/32698732/JSMP-Bulletin-on-East-Timor-Parliamentary-Activities-May-2010-English> and IIMA, Vides International, Fransiscans International and FMSI, Joint Stakeholders' Submission on The Situation on the Rights of the Child in the Democratic Republic of Timor-Leste, October 2011.

3 See for example, Silas Everett, Legal Aid Moves from Donor to Public Financing in Timor-Leste, 31 March 2010, <http://asiafoundation.org/in-asia/2010/03/31/legal-aid-moves-from-donor-to-public-financing-in-timor-leste/>

infringe on individual rights unless it is amended to be appropriate to the Timorese context.

In February 2010 the Anti-Corruption Commission was established, assuming control of a number of pre-existing corruption allegations, and launching further investigations. Concurrently, several corruption cases were passed from the Ombudsman of Human Rights and Justice (PDHJ) to the Prosecutor General's office, which subsequently brought charges against four members of the National Parliament for theft from the 2008 Anti-Rebels Joint Operation fund.

There were a number of events in 2010 which raised significant civil and political, as well as economic and cultural rights issues. Disturbingly, there are increasing instances of police use of excessive force during arrest, arbitrary arrest and detention, police abuse of authority, and a perception of police impunity.⁴ For example on 22 January 2010, a joint operation of the Timor-Leste National Police (PNTL) and the Timor-Leste Defence Force (F-FDTL) was conducted in the two districts of Covalima and Bobonaro into alleged "ninja groups" who were alleged to have killed and decapitated two women. Twenty people are reported to have been arrested during this operation, but 18 were subsequently released due to insufficient evidence supporting the criminal charges. The remaining two suspects are more clearly involved in the deaths.⁵ However, NGO monitoring of the situation revealed consistent ill treatment by the police "such as ramming with rifle butts, kicking, beating with batons, cutting people's hair with a knives, threats to kill, and speaking sharply to people when during detention or interrogation of persons who do not reveal who is a "ninja".⁶

Subsequently, there are claims that the joint operation was merely a pretext to target members of the political group Popular Council for the Defence of Timor-Leste (CPD-RDTL) which has been accused by the government of creating political instability in the region.⁷ Local and district authorities were not informed of the operation, and witnesses claim the arrests targeted members of the CPD-RDTL,

4 US Department of State, 2010 Human Rights Reports: Timor Leste, 8 April 2011, <http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154404.htm>

5 HAK Association, Police Abuses continue in Timor-Leste, 17 February 2010, <http://easttimorlegal.blogspot.com/2010/02/police-abuses-continue-in-timor-leste.html>

6 US Department of State, *supra*, n.4.

7 Provedoria for Human Rights and Justice (PDHJ), APF 15:2009-10, 2: http://pdhj.org/wp/wp-content/uploads/2011/07/2010_-PDHJ-report-to-APF-15.pdf

and were deemed arbitrary.⁸ The operation was terminated in July 2010 but there have been no investigations into the conduct of the operation, despite the clear human rights violations committed by law enforcement authorities. Beyond this operation, Amnesty International reports there were at least 59 allegations of human rights violations by the national police and 13 by the military.⁹

The adequate respect for and protection of women's rights continues to be a challenge in Timor-Leste. Access to justice is often practically difficult because most wives are economically dependent on their husbands, live in a patriarchal community, and do not know what their rights are. Also, many families do not support women suffering from violence and lack gender sensitivity. State institutions including police, the prosecution service and court actors have a limited understanding of gender based violence. The specialized Vulnerable Persons Unit in the police were inconsistent in their handling of gender-based and domestic violence cases, and are severely under-resourced. This led to a number of recommendations for mediation or private resolution of domestic violence cases.¹⁰ The vast majority of clients of support services complain of being victims of domestic violence.¹¹ Similarly, the incidence of violence against children, child sexual assault and sexual exploitation remains a significant problem.

Failure to enforce accountability for past serious human rights violations continued to be obvious in State policies and announcements. The President rejected calls from national and international NGOs to establish an international tribunal for past crimes, and granted pardons to 26 prisoners convicted of crimes during the 11February 2008 attack. These pardons were perceived as a failure to reinforce the role of the courts, and to undermine the rule of law, particularly equality before the law.

Economic, cultural and social rights continue to be a concern, especially with regards to food security because the vast majority of the population survives on subsistence agriculture. Custom-

8 US Department of State, *supra*, n4.

9 Amnesty International, *Annual Report 2011: Timor-Leste*, <http://www.amnesty.org/en/region/timor-leste/report-2011>

10 US Department of State, *supra*, n4.

11 For example, JSMP's Victim Support Service (VSS) saw 154 domestic violence victims in 2010; the next most common type of case was sexual violence, but these numbered only 20 cases. For further information see JSMP, Overview of the Justice Sector, available at www.jsmp.minihub.org.

ary law practices that discriminate against women with respect to property rights, inheritance and labour continue to abrogate women's economic rights. Infant and under-five mortality rates are among the highest in Asia, with malnutrition causing around half the children to be either stunted in growth or underweight.¹² Forty percent live below the national poverty line of US\$0.55 per day; access to education remains restrictive; and half the East Timorese population cannot read or write.¹³ Accordingly, the PDHJ extended its monitoring activities in February 2010 to include economic, social and cultural rights.¹⁴

II. Independence

A. Law or Act

Article 27 of the Constitution of the Republic of Timor-Leste provides for a National Human Rights Institution (NHRI) in the following terms:

1. The Ombudsman shall be an independent organ in charge of examining and seeking to settle citizens' complaints against public bodies, certifying the conformity of the acts with the law, preventing and initiating the whole process to remedy injustice;
2. Citizens may present complaints concerning acts or omissions on the part of public bodies to the Ombudsman, who shall undertake a review, without power of decision, and shall forward recommendations to the competent organs as deemed necessary;
3. The Ombudsman shall be appointed by the National Parliament through absolute majority votes of its members for a term of office of four years;
4. The activity the Ombudsman shall be independent from any means of grace and legal remedies as laid down in the Constitution and the law;

12 Australian Volunteers International, <http://www.australianvolunteers.com/where-we-work/timor-leste.aspx>

13 AusAID, Timor Leste, <http://www.aisaid.gov.au/country/country.cfm?CountryId=911>

14 PDHJ, *supra*, n7, 6.

5. Administrative organs and public servants shall have the duty to collaborate with the Ombudsman.

However, it was not until 2004 that the Office of the Ombudsman for Human Rights and Justice (PDHJ) was established by Law No. 7/2004, *Approving the Statute of the Office of the Ombudsman for Human Rights and Justice* (“the enabling law”). This law entered into force on 26 May 2004, following a period of consultation by a specifically established commission. The first *Provedor* (the Timorese title for the Ombudsman) was appointed on 16 June 2005, and in March 2006 the Office of the Provedor began operating.¹⁵ In early July 2005, the Provedor appointed two Deputy Ombudsmen, pursuant to Article 9 of the enabling law which states the office shall be composed of the PDHJ, Deputy Ombudsmen, a Chief of Staff, officers and other staff members as deemed necessary. The PDHJ is mandated to monitor, investigate and educate the public in the areas of promotion and protection of human rights and good governance.

The independence of the PDHJ is guaranteed both by article 27.1 of the Constitution, as above, and also by the enabling law which describes the nature of the office:

The Office shall operate as an independent statutory body and shall not be subject to the direction, control or influence of any person or authority.¹⁶

While the PDHJ is empowered to review the constitutionality of legislative measures in accordance with Sections 150 and 151 of the Constitution,¹⁷ as well as recommend the adoption or amendment of legislation or administrative measures¹⁸, there is no specific power to recommend changes to enhance the PDHJ’s fulfilment of its mandate. However, Article 24(e) is broad enough that the PDHJ’s powers can be interpreted to include recommendations that relate specifically to PDHJ activities.

There is no specific provision regarding the suspension of the PDHJ’s operations in times of emergency or other exceptional con-

15 Unless otherwise stated, articles referred to in this report are articles in the enabling law.

16 Article 5

17 Pursuant to Article 4.2

18 Article 24(e)

ditions. During the 2006 crisis, however, the PDHJ established the Human Rights Monitoring Network (RMDH) to investigate human rights violations, and negotiated access to military controlled areas in response to allegations of human rights violations by security forces.¹⁹ During the 2008 State of Emergency, the Provedor secured unhindered right of access, including to the military operation areas.²⁰

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

The PDHJ is to exercise its functions “within the scope of actions of public entities, notably the Government, the PNTL, the Prison Service, and the F-FDTL,”²¹ and “on the activities of public or private entities and agencies that, regardless of their origin, fulfil public functions and services or manage public funds or assets”.²²

However, the “activities of the National Parliament and the Courts performing their legislative and judicial functions shall not be subject to the investigative and supervising powers” except with respect to administrative activity.²³ Further, Article 29 states that the PDHJ is not empowered:

- (b) to set aside, revoke or modify the decisions of the agencies or entities affected, or make compensation orders;
- (c) to investigate the exercise of judicial functions or challenge a decision issued by a Court;
- (d) to investigate the exercise of legislative functions, except through the means of monitoring constitutionality under the Sections 150 and 151 of the Constitution of Timor -Leste.

Further, pursuant to Article 24.1, the PDHJ shall, within the scope of monitoring activities:

- Oversee the functioning of public authorities, notably the

19 Bárbara Oliveira and Valério Ximenes, The Provedor for Human Rights and Justice: first boosting years, arduous job ahead, 4: http://iilah.unimelb.edu.au/files/NHRI_Workshop_Paper_PDHJ_BOliveira_and_VXimenes.pdf

20 Ibid.

21 Article 3.1

22 Article 3.2

23 Article 4.1

Government, its agencies and private entities fulfilling public functions and services, and may conduct inquiries into systematic or widespread violations of human rights, maladministration or corruption;

- Request the Supreme Court to declare the unconstitutionality of legislative measures, including unconstitutionality through omission in accordance with Sections 150 and 151 of the Constitution of Timor-Leste;

The PDHJ is also empowered to “investigate all instances of corruption and the misappropriation of public assets by officials”.²⁴

The combined effect of these articles suggests that the PDHJ can investigate corruption and oversee public authorities’ activities without restriction, with the exception of National Parliament and the Courts in the performance of their responsibilities. Nor can the PDHJ interfere or change the outcomes flowing from the exercise of these institutions’ powers.

According to the enabling law there are duties assigned to other agencies with respect to the PDHJ which preclude unreasonable obstruction of the PDHJ’s work. For example, Article 43 states the “Courts shall not arbitrarily interfere with, nor delay ... an investigation.... unless there is prima facie evidence that the subject matter of the investigation is outside the jurisdiction... or if there is *mala fide* or conflict of interest.”

The PDHJ can require a person to appear before him or her, to disclose information within his or her knowledge, to produce any item or to allow the PDHJ complete access, inspection and examination of any premise, document, equipment or asset.²⁵ Article 44.1 imposes a duty on any person, including any civil servant, any administrative official or any incumbent of any organ both civil and military to “provide all information” to the PDHJ. Article 44.3 provides that non-compliance with this duty without any lawful excuse constitutes an offence, which, pursuant to Article 48.2 and 48.3, may attract fines. The PDHJ can request a Prosecutor to obtain search and seizure warrants, to search premises and seize items considered relevant to a PDHJ investigation.²⁶

24 Article 26.1(a)

25 Article 42.3

26 Article 42

The legal framework clearly requires cooperation and provision of information by public authorities in the course of the PDHJ's investigation. According to the PDHJ, recently public authorities "have cooperated really well with the Ombudsman"²⁷. However, in the past the PDHJ has stated "sometimes we face problems regarding our investigation when we want to get documents or information – sometimes they don't provide us with it."²⁸

The law as articulated above provides for the PDHJ's independence from the Executive in law. However, the funding for the PDHJ's office comes from the Ministry of Finance, and the PDHJ is required to send a proposal to the Ministry for the disbursement of funds for PDHJ activities. The PDHJ must not "receive funds from a source and in circumstances that could compromise its independence and integrity and any investigation."²⁹ So an issue could arise if the Ministry's decisions were to impact the PDHJ's independence because the bulk of the PDHJ's funds are disbursed by the Ministry.

Moreover, when the Provedor was elected by an absolute majority of National Parliament, the Revolutionary Front for an Independent East Timor (FRETILIN) party had secured 55 of the 88 seats in the national election. This prompted questions about whether the Provedor would be beholden to FRETILIN in the performance of his duties. The Provedor's investigation into the 2006 military intervention into protests, the subsequent election resulting in a coalition government, and the re-appointment of the Provedor, has substantially dispelled this concern. None of the behaviour of the PDHJ staff to date has compromised the independence of the institution.

The PDHJ has a duty to report annually to the National Parliament, pursuant to Article 34 of the enabling law. Article 46 articulates the requirements of this annual progress report, which should cover activities, initiatives, statistics on cases and results of the preceding year ending 31 December. The report shall make recommendations concerning reforms and other measures to achieve the PDHJ's objectives. In addition, the PDHJ may submit special

27 Transcript of interview with Mr Valerio Magno Ximenes, Director of Human Rights Section ("Transcript"), July 2011, p.1

28 Matt Crook, IPS, Timor-Leste: Slow Progress for Corruption Watchdog, 11 October 2009, <http://easttimorlegal.blogspot.com/search?q=ombudsman&updated-max=2010-04-26T20%3A18%3A00%2B10%3A00&max-results=20>

29 Article 11.4

reports to the National Parliament,³⁰ or publish reports on the exercise of functions or particular cases.³¹ Pursuant to Article 28(m) the PDHJ has the power to report to the National Parliament regarding findings of an investigation.

The PDH does not have regular consultation sessions with the National Parliament. In 2010, only once was the PDHJ was invited by Committee A to discuss a draft law.³² Otherwise, the PDHJ is permitted to comment on whether draft laws are in compliance with Timor-Leste's human rights obligations.³³ Despite this, the PDHJ does not have an explicit power to intervene during deliberations in the National Parliament on a draft law that will have human rights implications, nor legal guarantees of access to special sessions on human rights issues in National Parliament. Such activities are possible only with the invitation of the National Parliament.³⁴

In terms of the possible impact of staffing on the PDHJ's independence, there are different kinds of staff recruited through different avenues. Article 16 of the enabling law allows the Ombudsman to appoint two or more Deputies for a renewable period of four years, who are also required to take an oath before the Speaker of the National Parliament. The PDHJ also employs permanent full time civil servants and short term contractual staff according to the office's needs. Thus far, staffing arrangements have had no impact on the independence of the PDHJ.³⁵

The policy of the PDHJ is to maintain its position with respect to reports and recommendations, in the hope the government will follow up or respond. There is a plan for the PDHJ to establish a department with the specific responsibility of following up every recommendation made to the government.³⁶

Regarding the PDHJ's powers to compel attendance of officials and the disclosure of information, Article 28(d) assigns the PDHJ to "order a person to appear before him or her" and Article 28(e) grants the power to "have access to any facilities, premises, documents, equipment, goods or information for inspection and

30 Article 46.4

31 Article 46.5

32 Transcript, p.2

33 Article 24(d)

34 Transcript, p.2

35 Transcript, p.3

36 Transcript, p.3

interrogate any person to whom the complain relates somehow". Compliance is guaranteed by Article 48 which prescribes fines for non-compliance without a reasonable excuse, and Article 49 which discloses other offences, including hindering the Office "in the fulfilment or execution of its obligations, powers and duties under the present law", and threatening, intimidating or improperly influencing involved parties to a complaint or employees of the office. Offences under Article 49 carry fines up to 3,000 USD, and imprisonment of up to one year, unless heavier penalties apply pursuant to other provisions. There is clearly a robust legal framework to promote compliance with the PDHJ.

In reality, PDHJ usually uses the formal notification procedure to summon State officials, and summoned officials have complied and provided the information requested. For example, during the 2006 Crisis, the PDHJ summoned the Prime Minister, F-FDTL Commander and his men, the PNTL Commander and his men, as well as members of parliament. Everyone complied with the summons to provide information to the PDHJ.³⁷ The state has not prevented or obstructed PDHJ investigations to date.³⁸

The independence of the PDHJ is regarded as critical to its role. The office itself recalls that during the 2008 state of emergency, the PDHJ formed a team to monitor human rights abuses. The subsequent report was criticized by the Alliance with a Parliamentary Majority (AMP), but supported by members of the Opposition.³⁹

The PDHJ also enjoys cooperation from the courts and prosecution service. The prosecution service is responsive to PDHJ recommendations.⁴⁰ However, the PDHJ has also noted "[f]rom the side of the prosecutor general's office, the problem is not that they are unwilling, but that they are unable," "[t]here is no manpower and no special prosecutors to deal with corruption cases."⁴¹

The PDHJ cannot investigate the exercise of judicial functions, challenge a decision issued by a Court,⁴² or investigate a matter already before the court which has not yet been decided.⁴³ Notwith-

37 Transcript, p.3

38 Transcript, p.3

39 Transcript, p.3-4

40 Transcript, p.4

41 Crook, *supra*, n 29.

42 Article 29(c)

43 Article 29(e) and 42.2(a)

standing this, the PDHJ may seek leave of the Court to intervene in legal proceedings in cases involving matters under the PDHJ's competence, through the expression of opinions.⁴⁴

The PDHJ can request the Supreme Court of Timor-Leste to review the constitutionality of legislative measures pursuant to Section 152 of the Constitution and Article 24(c) of the enabling law. However, since the Supreme Court is yet to be established, this function would be exercised by the Court of Appeals. Otherwise, there is no legally articulated process regarding the transition of cases. Generally the PDHJ has referred cases to the Prosecutor-General, which has led to prosecutions in only some cases, and not consistently. For example, the PDHJ did not make any recommendations to the Court of Appeal to review the government's decision to release Marternus Bere, a convicted Indonesia who led a notorious militia, from prison in 2009.

The PDHJ has publicly challenged the government domestically. For example, the PDHJ recommended that abortion should not be criminalized universally; arguing that women who fell pregnant from rape should be entitled to legally obtain an abortion. This position was in direct contrast to the government's position regarding the inclusion of abortion as a crime in the Penal Code.⁴⁵

The PDHJ works with both government and civil society across the country through a network established for the monitoring of human rights. The PDHJ enjoys a cooperative relationship with the Secretary of State for the Promotion of Equality (SEPI),⁴⁶ and is working with the Ministry of State Affairs to provide training on human rights to village chiefs in several districts.⁴⁷

C. Membership and Selection

The selection process to appoint the PDHJ is transparent to the extent that Article 12.3 of the enabling law stipulates the National Parliament shall publicly call for candidacies. The eligibility requirements require the PDHJ to have:

44 Article 25.3

45 East Timor and Indonesia Action Network (ETAN), Church weighs into abortion debate in Catholic East Timor, 11 November 2008, <http://www.etan.org/et2008/11november/02/31church.htm>

46 Transcript, p.4

47 Transcript, p.4-5

- (a) sufficient experience and qualifications in order to investigate and report on human rights violations, corruption, influence peddling, and malpractice in the administration;
- (b) proven integrity;
- (c) a sound knowledge of the principles of human rights, good governance and public administration.⁴⁸

The PDHJ must also be recognized for his or her standing in community, as well as his or her high level of independence and impartiality.⁴⁹ The criteria area also understood to include Timorese citizenship, good knowledge about the law and human rights, no criminal records such as corruption or domestic violence, and a commitment to advance human rights and good governance.⁵⁰

Beyond the legal framework however, the PDHJ is ultimately 'elected' by an absolute majority of the Parliament. In practice, each party selects a candidate, and their candidate applies as a candidate.⁵¹ Parties approached candidates, and after the person agrees to be nominated, the party presents the name to the secretariat of the National Parliament, which informs the President who, in turn informs all members of parliament.⁵² Accordingly, to date there has not been an open call for nominations, nor a 'shortlisting' process, nor public hearings, nor an interview procedure to determine the expertise and appropriateness of the candidate. There has not been a question of the process consequent on vacancy of the PDHJ position, as the first PDHJ, Dr Sebastiao Dias Ximenes was re-appointed in 2010 for a second term as PDHJ.⁵³

The PDHJ is empowered to appoint staff in the Office in accordance with the Civil Service Act.⁵⁴ Personnel are appointed on the basis of their qualifications, and 'taking into consideration the gender balance and ethnic and religious representativeness within the Office'.⁵⁵ The law prescribes that the Deputy Ombudsmen

48 Article 13.1

49 Article 13.2

50 Transcript, p.5

51 Transcript, p.5

52 Transcript, p.5

53 *East Timor Law and Justice Bulletin*, "Parliament re-elects Sebastiao Dias Ximenes as Human Rights and Justice Ombudsman," 12 March 2010, <http://easttimorlegal.blogspot.com/2010/03/parliament-re-elects-sebastiao-dias.htm>

54 Article 10.1

55 Article 10.2

“shall be appointed on the basis of transparent and objective criteria, giving consideration, notably, to their integrity, independence, impartiality and qualifications”⁵⁶ for a renewable four year term which will end coinciding with the PDHJ term.⁵⁷ Despite the legal framework, the current Provedor and Deputy Provedors are all men, and only 23 of the 66 staff are women.⁵⁸ Further, since the actual selection process involves nominations originating from political parties, where women are under-represented, gender balance cannot be systematically ensured in the future. Article 10 does however describe the conduct expected of employees of the Office, including loyalty, confidentiality and independence.

As described above, the enabling law does provide for a fixed term of office of four years with one reelection,⁵⁹ and the Deputies complete their term at the same time as the PDHJ. There is a clear process for expiration,⁶⁰ vacation,⁶¹ removal,⁶² and suspension from office.⁶³

Article 18 outlines the privileges and immunities enjoyed by the PDHJ, which may be suspended by the National Parliament in the case of a commission of an offence.⁶⁴ There is no apparent specific effect of immunities on the PDHJ’s independence. The only potential issue that could arise is with respect to immunity from liability for any act or omission performed in good faith in the course of the PDHJ’s work,⁶⁵ but this has not been experienced. As mentioned above, there is a duty imposed on the PDHJ Office to perform its functions independently. To date, there are no instances where members of the PDHJ Office have compromised the independence of the institution.

There are two main provisions regarding the PDHJ’s interests and activities. Article 14 requires the PDHJ to disclose to the National Parliament all assets and any other income before taking up the position. Article 17 declares as incompatible the holding of a

56 Article 16.2

57 Article 16.3 and 16.4

58 PDHJ, *supra*, n7, 11

59 Article 19.1

60 Article 19.5

61 Article 20

62 Article 21

63 Article 22

64 Article 18.4

65 Article 18.2

representative office or exercise of any other constitutional organ, political activities, any other paid position, the management or control of a profit-making body, leadership or employment in any association, trade union, foundation or religious organization, and the performance of public judicial or prosecutorial duties.

The Ombudsman and the Deputies are eligible to attend a number of programs tailored for PDHJ staff and general training programs⁶⁶ The current PDHJ and Deputies all have backgrounds in law: the Provedor was previously a university lecturer; the deputy on Human Rights was a former human rights activist, and the deputy for Good Governance used to be a judge in the Dili District Court.

D. Resourcing of the NHRI

While Article 11 stipulates the annual budget is to be sufficient to ensure independence, impartiality and efficiency of the Office, the PDHJ's draft budget submitted to the government is bigger than the budget ultimately approved by the government because of resource constraints.⁶⁷ For example, since there is no budget allocation for the construction of permanent offices, there is only one permanent PDHJ district office in Oecusse, while the three other district offices in Same, Baucau and Bobonaro are.

However, the PDHJ is also sponsored by the UNHCHR, UNDP, New Zealand, AusAID, IrishAid, UNHCR, and the Asia Pacific Forum of National Human Rights Institutions (APF). Some of these funds, particularly those received from UN organs, are sent to the UNDP in Timor-Leste, and then disbursed to the PDHJ according to current needs to fund capacity and other programs⁶⁸ Funds from independent donors are according to agreements and therefore protected from interference from other parties. There are no restrictions in the enabling law regarding how foreign or other non-governmental funding is to be spent.

Transparency and accountability in the use of these resources is provided for in Article 11, including the requirement to keep proper records, and to submit statements of accounts to the Na-

66 Transcript, p.6

67 Transcript, p.6

68 Transcript p.6

tional Parliament, which may be audited either by the High Administrative, Tax and Audit court (if it exists) or an independent external auditor. Further details about financing the PDHJ can be found above in Section I (B).

In terms of expertise and technical capacity: there are some acknowledged areas that are lacking, but PDHJ staff participate in training offered by a number of other countries, United Nations Integrated Mission in Timor-Leste (UNMIT) and other UN agencies.⁶⁹

III. Effectiveness

The PDHJ has an explicit complaints-handling mechanism which is relatively straightforward: any natural or legal person may make a complaint orally (later transcribed into written form) or in writing, including the complainant's identity, contact address and signature or fingerprint, free of any charges. Article 37 requires the PDHJ to notify the complainant in writing of receipt of the complaint within 10 days of lodgement. Within 30 days the PDHJ is to make a preliminary assessment as to whether to take action or not. Article 27.3 outlines the justifications for dismissing the complaint, without prejudicing whether the PDHJ decides to investigate the complaint.⁷⁰ Within 45 days of the complaint lodgement, the PDHJ is to notify the complainant in writing about whether the complaint will be investigated, not acted on, or dismissed.⁷¹

The implementing law states that the investigation is to be conducted in private and may include the PDHJ hearing from relevant parties, and the person/s subject of the complaint, but the PDHJ but is not bound by the rules of civil and criminal procedure and evidence.⁷² After completing the investigation, the PDHJ provides the complainant and the subject of the complaint with a draft report of the findings, conclusions and recommendations, to which the parties may respond within 15 days.⁷³ Any organ to which a recommendation is addressed must inform the PDHJ of the extent to which the recommendation has been followed within 60 days.⁷⁴

69 Transcript p.7

70 Article 37.6

71 Article 37

72 Article 41

73 Article 45

74 Article 47.3

During the course of the investigation, if the PDHJ Office forms the ‘belief that a crime has been committed or the commission of a crime is imminent’⁷⁵ it may refer the case to the Office of the Prosecutor-General and share any information or documents.

This process requires a speedy response from the PDHJ on whether a complaint will be investigated or not. However, there are no time limits on the conduct and conclusion of an investigation, nor on the completion of a draft report or circulation of a final report. The length of processes in practice depends on the nature of each case. If the case is more serious, completion may take two to three years. For example, the 2006 investigation and report took much longer because it involved high profile leaders and serious allegations.

The PDHJ’s main office is in Dili, with four regional offices recently opened in Oecussie, Baucau, Maliana and Same. Accordingly, in some districts it is much easier to access the PDHJ office than others since eight districts still do not have a PDHJ office. Victims from districts without an office are required to travel to another district to visit a PDHJ office.

Reasons for archiving or discontinuing an investigation include the case being in the courts including police violations of individual human rights; the victim not following up with the PDHJ because he or she has reached an agreement with the subject of the complaint; and the PDHJ investigators not being able to confirm the address of the victim and subject of the complaint and were therefore prevented from continuing the investigation.⁷⁶ In 2010, 39 complaints were refused because they did not fall within the mandate of the Ombudsman, and 57 cases were referred.⁷⁷ Accordingly, the rejection rate was 39 of 241 cases, or 16.2%. This ratio does not indicate how many were not pursued on a discretionary basis.

IV. Thematic Focus

A. Specific activities on the protection of HRDs and WHRDs

There is no specific focal point within the PDHJ for human rights defenders (HRDs) and women human rights defenders (WHRDs),

75 Article 33

76 Transcript, p.10

77 Transcript p.10

and no explicit mechanism within the legal framework to respond to requests from HRDs or WHRDs. Such a case would be treated, for all practical purposes, in the same manner as any other case. This should be considered in the specific Timorese context, where civil society organizations are quite vocal in their analysis, and the culture permits the critique of government policy and behaviour without significant fear of intimidation or retaliation. This may be partly why the PDHJ has not lobbied the government to incorporate international standards for the protection of HRDs and WHRDs into domestic law. Similarly, the PDHJ has not yet facilitated a dialogue between the government and the UN Special Rapporteur on HRDs.

B. Interaction of the PDHJ with international human rights mechanisms

During the 2006 crisis, the PDHJ worked with the UN Commission set up at the time.⁷⁸ Also, the PDHJ presented a report to the CEDAW Committee in New York in 2009, and worked with 55 national NGOs to prepare and write a UPR report which was delivered to the Human Rights Council in 2010.⁷⁹ In Timor-Leste, the PDHJ works with the Human Rights Unit in UNMIT on a regular basis.⁸⁰

The PDHJ was granted accreditation to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC-NHRI) in 2008, is a full member, and has been given an “A” rating.⁸¹

Follow-up/implementation of NHRIs of references by the ACJ on torture, death penalty, trafficking, and child pornography.

Section 29 of the Constitution provides that Timor-Leste does not have the death penalty.

In contrast, child pornography as a specific issue has recurred on several occasions, notably in 1999, 2003 and 2008. Pornography

78 Transcript, p.8

79 Transcript, p.8

80 Ibid.

81 OHCHR, Chart of the Status of National Institutions Accredited by the ICC of NHRIS, Status as at December 2010, available at http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf

in general is acknowledged to be an issue attracting more and more attention such that the National Parliament is considering drafting a law on this matter.⁸²

Despite the prohibition of torture, in accordance with Timor-Leste's obligations under the Convention Against Torture, there were instances of torture in 2010. The PDHJ received complaints about excessive use of force by security forces, including beatings, use of excessive force during incident response or arrest, threats made at gunpoint, and intimidation.⁸³ However, PDHJ has prioritised monitoring prison facilities and human rights training to PNTL to reduce the likelihood of recurring instances of torture or inhumane treatment.⁸⁴

A comprehensive study on trafficking found "Timor-Leste was not a country of origin or transit for trafficking, but was a country of destination for a relatively small number of persons for sexual exploitation."⁸⁵ Consistent with this, a 2008 article described Timor as a destination for trafficking of women from Thailand for the purpose of sexual exploitation.⁸⁶ The PDHJ has worked with the Ministry of Foreign Affairs to form a group to look into the issues of trafficking and pornography.⁸⁷

V. Consultation and Cooperation with Civil Society

Formal Relationships with Civil Society in General

As described above, Article 33 of the enabling law requires close liaison and close contact with other organizations in Timor-Leste, but this is the only legal direction regarding the relationship between the PDHJ and civil society. In practice, the PDHJ does have extensive cooperation with civil society, meeting with them every three months, and working collaboratively on a broad range of human rights issues.

82 Transcript p.8-9.

83 See generally, PDHJ, *supra*, n7.

84 PDHJ, *supra*, n7, 8.

85 Alola Foundation, *Trafficking Report*, http://www.humantrafficking.org/uploads/publications/ALOLA_20TRAFFICKING_20REPORT_20_English_.pdf

86 ETAN, Claim UN officers customers in East Timor sex slave brothels, 4 July 2008, <http://www.etan.org/et2003/july/04-10/08claim.htm>

87 Transcript p.9

VI. Conclusion and Recommendations

The existence of the PDHJ has been crucial to the promotion and protection of human rights in Timor-Leste, however it can only function effectively if it receives sufficient resources. The PDHJ needs to be more proactive in responding to human rights violations and regularly communicating the process and results of cases to the community through printed and electronic media. Below are the several recommendations for the PDHJ and relevant institutions to be considered for future improvements:

Recommendations to relevant institutions (the government, courts, National Parliament and donors):

1. In the short-term, the government needs to allocate a sufficient budget, to support the PDHJ's work and the establishment of branch offices in all the districts of the country. However, in the long-term it is preferable that the PDHJ budget is allocated through a permanent mechanism that is not influenced by political pressures exerted on the Ministry of Finance.
2. All organs of the state must continue to respect and fully comply with PDHJ requests for information and cooperation, and also make every effort to better follow up PDHJ recommendations and communicate this to the public and specifically to the PDHJ.
3. Institutions should also take advantage of the PDHJ's specialized expertise, and invite the PDHJ more regularly to participate in government sessions, make submissions to courts and review government practices. This is a clear method to continuously ensure state practices comply with human rights standards.
4. Financial support from donors needs to continue in order to ensure that the PDHJ continues to increase its capacity, expertise and professionalism in dealing with urgent human rights issues quickly and effectively.

Recommendations for PDHJ

1. Additional staff with proper qualifications need to be recruited in order to support PDHJ's branch offices, and improve its

capacity to respond to urgent human rights issues.

2. The capacity and knowledge of staff on relevant issues such as international law and human rights investigation mechanisms should continue to be a focus for improvement. This will facilitate improved relationships with international organizations, which can in turn better influence government practices.
3. PDHJ should assign a focal point for both HRDs and WHRDs to provide prompt specialized and effective assistance.
4. Regular PDHJ training to HRDs about regional and international human rights mechanisms, combined with perceived human rights domestic priorities could enhance domestic NGO human rights initiatives.
5. PDHJ should consider and be particularly responsive to high profile and controversial claims of human rights abuses, as these cases are often the hardest and most important. The PDHJ has powers to compel state officials, and should use this capacity to ensure accountability in cases where HRDs and WHRDs cannot obtain the necessary information.