

ANNI
2012

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

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Foreword

The Asian Forum for Human Rights and Development (FORUM-ASIA), as the secretariat of the Asian NGOs Network on National Human Rights Institutions (ANNI), humbly presents the publication of the 2012 *ANNI Report on the Performance and Establishment of National Human Rights Institution in Asia*. Our sincere appreciation goes to all 30 ANNI member organizations from 17 countries, especially to those who contributed to the compilation of reports presenting the evaluation of National Human Rights Institutions (NHRIs). Similarly, we would also like to extend our sincere thanks to the NHRIs that contributed valuable inputs to the country reports concerned.

Reports submitted by organizations representing 13 countries consider the developments that took place in respective countries within the time frame from January to December 2011 as well as some urgent additional information of developments in 2012. As in previous years the country reports have been prepared following the guidelines formulated by ANNI network in December 2008 and additionally complemented by inclusion of thematic issues such as the role of NHRIs in protecting and promoting human rights defenders and women human rights defenders and NHRIs' interaction, collaboration and consultation with other human rights mechanisms. We believe that this annual report will continue to promote and strengthen the effectiveness and engagement of NHRI with all stakeholders, especially civil society organizations.

FORUM-ASIA would like to acknowledge the contribution of everyone who dedicated their time and commitment to production of this book, namely Sultana Kamal, Zakir Hossain, Khin Ohmar, YK Chong, Debbie Tsui, Maja Daruwala, Henri Tiphagne, Ikhana Indah Barnasaputri, Dr. Kyung Soo Jung, Ravin Karunanidhi, Fathimath Ibrahim Didi, Bijay Raj Gautam, Professor Liao Fort and Anna Mi-Young Yang for writing specific country chapter of the report. We would like to extend our gratitude to our sponsors, namely Swedish International Development Cooperation Agency (SIDA), Ford Foundation and HIVOS who provided the financial means for this publication.

In addition, we would like to thank the Steering Committee members of ANNI, Mr. Balasingham Skanthakumar (South Asia), Ms. Sylvia Angelique Umbac (South East Asia) and Shoko Fukui (North East Asia) for their leadership, guidance and assistance in producing this report. Appreciation also goes to the editors, lay-out designer, the staff in the Country Program of FORUM-ASIA as well as all other staff that have assisted in the process.

We hope that this publication will be beneficial for the readers and will contribute to the promotion of effective work of NHRIs and their fruitful collaboration with civil society.

Yap Swee Seng

Executive Director

Asian Forum for Human Rights and Development

Regional Summary: Independence and Effectiveness of NHRIs in Asia

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

The Year 2011 in Context

The past couple of years have seen an increasing international recognition of the role of NHRIs in the promotion and protection of human rights. A growing number of Asian countries have either recently established or are considering the establishment of NHRIs, including in Burma, where the Myanmar National Human Rights Commission (MNHRC) was set up in September 2011. Meanwhile the UN Human Rights Council on 16 June 2011 adopted a resolution on “National Institutions for the Promotion and Protection of Human Rights” – the first-ever Human Rights Council resolution to focus specifically on the work of NHRIs. The resolution acknowledges the significant role of NHRIs in the promotion and protection of human rights at national level, as well as their important role in the Human Rights Council, and calls for further cooperation with regional coordinating bodies of NHRIs.

These developments are set against the backdrop of a general deterioration in the situation of human rights in many countries in Asia. This can be seen, for example, in the adoption of various repressive laws such as national security laws, legislation and policies that infringe upon freedom of expression and restrict freedom of association and

peaceful assembly in several Asian countries, including in Malaysia, Indonesia, India and Bangladesh.

In addition, violence and human rights violations by state agencies and impunity are on the rise, as illustrated by the growing number of enforced disappearances, extrajudicial killings, arbitrary arrests and detentions, and intimidation of human rights defenders across the region.

While there appears to be some relative progress in the development of democracy in some Asian countries, most notably in the authoritarian Burma, which is undergoing an apparent democratic transition, other countries have witnessed further setbacks. In the Maldives, for example, the first democratically-elected president Mohammed Nasheed was ousted in a controversial manner despite the introduction of a multi-party democracy after 30 years of autocratic rule. In the ongoing trial against him, there are serious reservations about the independence of the judiciary and fair trial standards. In addition, elections are expected to be held in several Asian countries in the next two years, including in Malaysia, Cambodia, and South Korea which may result in political changes. As a consequence of the high political stakes during these elections, close attention needs to be paid to the possibility of increased human rights violations in these countries.

With the growing challenges in the area of human rights at the national level, NHRIs have a greater and more critical role to play. While some NHRIs are playing commendable roles, many have underperformed as well. In such a critical juncture, NHRIs in Asia are in a crucial position and will be expected to play their role as a public defender of human rights in their respective countries.

Establishment of New NHRIs

On 5 September 2011, the Burma Government established the Myanmar National Human Rights Commission (MNHRC). In addition, in Pakistan, the National Commission for Human Rights Bill was passed in May 2012, enabling the establishment of an NHRI in the country. Meanwhile, deliberations on the setting up of such institutions are also currently underway in Japan and Taiwan. However, the progress of setting NHRIs in Japan and Taiwan has been slow.

On the other hand, while ANNI and civil society groups in Burma generally welcome the establishment of the MNHRC, serious concerns have been raised over the Commission's non-compliance with the Paris Principles. The MNHRC was established by a presidential decree and "report[s] directly to the President on its conducts". Furthermore, Burma's 15-member body includes former military regime's ambassadors, as well as retired civil servants with little prior knowledge of human rights. There are no representatives of NGOs, trade unions or professional associations.

Independence of NHRIs Remain a Serious Concern

One of these long-standing issues of concern regarding NHRIs in Asia is the question of independence. ANNI's previous reports have noted the gravity of the problem of lack of independence of many NHRIs in the region. Most worrying has been the role of governments in actively undermining the independence of the NHRIs in their respective countries. Furthermore, in many Asian countries, NHRIs' independence has been severely hampered by enabling legislations that are inconsistent with international standards on NHRIs.

In Sri Lanka, the amendment of the constitution in 2010 has ended the role of the Parliament in the selection process of members of HRCSL. As the president can remove any member of the HRCSL, the bias of the Commission members became quite apparent, with the Commission increasingly and blatantly favouring government policies and positions in public. In February 2012, the most dynamic member of the Commission Dr. Ananda Mendis, resigned in frustration after having completed one year in office. He complained of the “inefficiency” in the workings of the Commission; of the Commission’s sub-standard crime scene investigations; and of “interference” by a senior executive officer.

In South Korea, the reappointment of the current National Human Rights Commission of Korea (NHRCK) Chair, Hyun Byung-Chul, for another term has drawn deep concerns of ANNI and its members. Among others, under Hyun’s leadership, the NHRCK has refused to take positions on human rights and act on violations committed by the government on numerous occasions, notably on “politically sensitive” issues. Concerns over the Hyun-led NHRCK’s failure to protect human rights in “politically sensitive” cases was also raised by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, in his report to the UN Human Rights Council on his mission to South Korea in 2010. The NHRCK’s failure to fulfill its mandate to protect human rights in such cases has seriously undermined the credibility of the Commission and led to perceptions of its lack of independence from the government. Further strengthening this perception was Hyun’s statement during a hearing at the National Assembly in September 2009 that the Commission belongs to the executive branch. The announcement of government on the appointment of Hyun was met with criticisms from human rights defenders, especially from South Korean civil society, due to the highly questionable track record of Hyun during his first

term. 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.

In addition, enabling legislations in other countries, such as Nepal, Bangladesh and Sri Lanka, have also compromised the independence of their respective NHRIs. In 2011, the International Coordinating Committee of National Human Rights Institutions (ICC-NHRI) continued to provide recommendations to NHRIs under review in its accreditation process, including the NHRC of India to improve on aspects of their independence by strengthening the selection process for their members. Meanwhile, the NHRC of Bangladesh was accredited with a “B-status” because of the executive dominance in the selection committee and the secondment of senior staff members. In Nepal, after a long impasse, the new NHRC Act was passed in January 2012. Many provisions in the Act run contrary to the spirit of the Constitution and in some cases directly constrain constitutionally-guaranteed freedoms. The NHRC’s independence and autonomy are not guaranteed under the new Act. Financial control of the Commission is in the hands of the government: all expenses must be approved by the government, all checks will be issued by the government, and the NHRC cannot alter budget headings without government approval. The NHRC’s organogram must be approved by the government, making it difficult to add staff if the situation requires. Even travels to the regions and associated expenses, for instance in case of an urgent assessment of human rights violations, may well require prior approval from government.

Nonetheless, there have indeed been relative improvements in some of the countries where ANNI has raised concerns in the past. In Malaysia, for example, SUHAKAM’s drastically revised process of selecting its Commissioners has ensured more inclusiveness and transparency, which consequently enhanced

its independence generally. In 2010, the Malaysian government amended SUHAKAM's enabling law, which among other things, provided for a selection committee that includes civil society representatives to shortlist and recommend nominated candidates for selection as Commissioners. Prior to that, Commissioners were appointed solely by the Prime Minister, which seriously undermined the independence of SUHAKAM. This change can be said to be a direct consequence of the threat of a possible downgrading by the ICC-NHRI faced by SUHAKAM in its accreditation review process in 2008 and the subsequent Special Reviews by the Sub-Committee on Accreditation (SCA) of the ICC-NHRI in 2009 and 2010. These accreditation processes have taken into serious consideration the concerns raised by ANNI through its parallel reports to the ICC-NHRI on SUHAKAM's independence. Notwithstanding these relative improvements, there remain concerns that SUHAKAM continues to be put under the purview of the Prime Minister's Department.

Looking forward, the terms of members of several NHRIs in the region will end in 2012. Thus, several NHRIs, including in Indonesia and Bangladesh, will undergo a fresh selection or appointment processes. Furthermore, with the impending tabling of the new enabling law of Burma's MNHRC, a new selection process is to be expected. Close attention needs to be given to these processes of NHRIs in the region in the coming year. Of particular concern are the appointment practices for NHRIs that are non-transparent and non-inclusive, which could result in a further undermining of NHRIs' independence. A worrying tendency in what appear to be attempts by current members to secure reappointment has been observed in Bangladesh, where members of the country's NHRC have publicly taken positions that are increasingly echoing those of the government. In addition, caution has to be exercised to ensure that the issue of independence – important as it is – while certainly crucial in contributing to an effective NHRI, does not on its own always guarantee this. This was the case of Indonesia's

KOMNAS HAM, where its members for the 2007-2012 term failed to make any substantial improvements in the Commission's work despite being dominated by civil society representatives.

Recommendations Ignored

Concern remains as many states continue to ignore the recommendations made by the NHRIs. In Bangladesh, the NHRC has time again raised this concern publicly. A similar situation has been observed in Nepal and Sri Lanka.

In Malaysia, the government has continued to ignore recommendations made by SUHAKAM. SUHAKAM's enabling Act requires it to prepare an annual report and make recommendations regarding its findings. Despite this, the parliament has never debated any annual report of the Commission since its inception in 2001, let alone act on major recommendations, despite repeated calls by civil society and Members of Parliament for the government to officially table reports that are submitted by SUHAKAM. Meanwhile, in Indonesia, the disregard for KOMNAS HAM's recommendations has resulted in the lack of improvement in the situation of human rights in Indonesia: violence, torture, agrarian conflicts, and violations of the rights to freedom of religion continue to persist in 2012.

Limited Mandate and Capacity Need to be Overcome

In Burma, the MNHRC's current mandate is severely limited. For example, while receiving complaints of human rights violations is a core function of all NHRIs, the MNHRC complaints handling process requires that each complaint is accompanied by a copy of the complainant's national registration card. This effectively excludes a significant number of victims of human rights violations, especially those from ethnic and religious minority groups.

In addition, even within its already limited mandate, the MNHRC appears to further set own restrictions to its work. For example, in a statement by the Chairperson U Win Mra, the MNHRC noted that it would not investigate human rights abuses in ethnic conflict areas. This is but one of many examples of the questionable will of the MNHRC to effectively promote and protect human rights and intervene in all cases of human rights violations in Burma, leading to the perception that the Commission is set up merely to appease the international community and to rehabilitate the Burma government's image on the international scene.

The issue of capacity of NHRIs to fulfill their mandates is also an issue of major concern to ANNI. In Indonesia, it has been observed that KOMNAS HAM members' lack of adequate skills to lobby, persuade, and influence may be one of the reasons behind the lack of progress in resolving past human rights abuses. Further exacerbating matters, KOMNAS HAM has faced a 10% budget cut, which may further affect its performance especially in aspects where it lacks capacity.

The recruitment of competent staff members is also a major area of concern, which has greatly impacted the effectiveness of NHRIs. In Bangladesh, most of the senior staff members are seconded from the Government, while in Sri Lanka, the selection of staff is not merits-based, seriously hampering the quality of work of the NHRIs.

However some examples of NHRIs in seeking to improve their effectiveness in fulfilling their mandate can be cited as good practices for other institutions to emulate. These include, among others, the case of the NHRC in Maldives, which introduced a toll free number through which complaints of human rights violations can be made free of cost, and the online complaint management system which has

been put in place in India and Bangladesh for the submission and tracking of complaints.

Protection of Human Rights Defenders (HRDs)

NHRIs are regarded as the ‘public defenders of human rights defenders’. The setting up of dedicated desks or mechanisms for the protection of HRDs has been a consistent recommendation by ANNI to NHRIs in the region for several years. In this regard, it is encouraging to note that several NHRIs have come up with such mechanisms, for instance, in India, Sri Lanka, Philippines, Malaysia, and Mongolia.

In India, for example, a focal point on HRDs has been appointed. The focal point is tasked to respond urgently to threats and complaints by individual HRDs – even if calls are made late at night. The focal point also travels across the country to meet with HRDs in different training sessions and workshops, and has made himself available through various mediums, including on Facebook. Since 2011, the NHRC of India has had a dedicated web space for HRDs which provides details of cases it receives from HRDs as well as its recommendations on these cases. However, concerns remain on conceptualizing the understanding of HRDs and the effective implementation of such mechanisms in many other countries. In Sri Lanka, for instance, no complaints in 2011 were classified as relating to human rights defenders, despite the fact that HRDs were increasingly attacked in the country in 2011. Many other NHRIs have yet to set up such a protection mechanism.

Interaction and Cooperation between NHRIs and Civil Society Organisations (CSOs)

The interaction and cooperation between NHRIs and CSOs in many countries in the region has varied and determined by the degree of independence and autonomy of the respective NHRIs. NHRIs which

are considered by CSOs as lacking independence were not able to establish strong and constructive relationships. The Universal Periodic Review (UPR) process has played a pivotal role in this regard as many NHRIs held consultations with CSOs in preparing their stakeholders report or in following up the recommendations.

A good practice can be cited in the case of Bangladesh, where the NHRC has provided its support to ASK – an ANNI member – to develop a “Practical Handbook for HRDs on submitting complaints to the NHRC”, and later reprinted the handbook for wider dissemination. The NHRC is also considering the establishment of an investigator and lawyer joint panel with CSOs. Better cooperation has also been observed in Malaysia, Nepal, and Timor-Leste in 2011.

However, such good practices have not been demonstrated in other countries. In Sri Lanka, for example, although the NHRC has highlighted the setting up a mechanism for regular consultation, such consultative meetings did not happen in 2011. In Burma, the MNHRC is very selective in its engagement with NGOs. The MNHRC’s position is to only engage with groups that are officially registered. In South Korea, civil society groups have protested against the Chairperson of NHRCK, demanding for his immediate stepping down in response to his controversial reappointment and numerous problematic positions that the Commission has taken under his term.

In general, it can be observed that NHRIs’ engagements with CSOs have not been institutionalised and hence depend much on the will of the particular NHRI or its members. Better cooperation is seen where the NHRI has a comfortable position with the CSOs, most often either depending on the issues they engage with or the level of relationship of the individual members of the NHRI with particular CSOs.

Bangladesh: National Human Rights Commission is in critical juncture of hype versus real action

Ain o Salish Kendra (ASK) and Human Rights Forum, Bangladesh¹

I. Introduction

This report is a critical assessment of the performance of the National Human Rights Commission (NHRC) of Bangladesh in the protection and promotion of human rights, mainly between January to December 2011 including critical events in 2012. This report draws attention to selected issues of concern on independence and effectiveness of the NHRC as an institution and examines its full compliance with the international standards for national human rights institutions – the ‘Paris Principles’.

This country report is structured and prepared according to the guidelines of the 2012 ANNI regional report. It is divided into two major parts. Firstly, it looks at the general human rights situation of the country and the NHRC’s role in addressing the human rights situation. Secondly, it makes an assessment of the NHRC’s independence and effectiveness in the context of its performance in protecting and promoting human rights.

II. General Overview of the Country’s Human Rights Issues

2011 was the third year of the office of 14- parties Grand Alliance, led by the Bangladesh Awami League. The alliance formed a government in 2009 after a massive victory in the general election following the two years rule of an unelected military-backed caretaker government. The electoral promise of the 14-party Grand Alliance was to “bring the change”. Thus people were eager for the situation to visible change in the third year of their governance. Though the beginning of their office had seen some positive initiatives taken to

¹ Prepared by Sultana Kamal is the Executive Director of Ain o Salish Kendra (ASK) and Zakir Hossain is the Chief Executive of Nagorik Uddyog and a member of Steering Committee of the Human Rights Forum, Bangladesh (a coalition of 19 organizations). The writers sincerely acknowledge the generous support by the NHRC in providing relevant information and the expert input provided by Sayeed Ahmad, Country Program Manager at FORUM-ASIA. The research support provided by Billal Khasru of ASK and Hozzatul Islam of Nagorik Uddyog was also instrumental.

protect and promote human rights, in 2011 people began to lose their hope in the government as the ‘agent for change’. The overall human rights situation of Bangladesh in 2011 left them with a feeling of frustration. While there has been some progress, the drawbacks are further alarming.

Law and Policy Development: with regard to legislative and policy developments, the year 2011 (and early 2012) has seen some progress. The major initiatives include:

- i. Establishment of a Tribunal to prosecute International Crimes perpetrated during the Liberation War in 1971 of Bangladesh following an amendment by Parliament of the International War Crimes Tribunal Act, 1973.
- ii. The Parliament enacted the Legal Aid (Amendment) Act 2011 to provide legal assistance to the poor and underprivileged for ensuring access to justice. The Parliament also passed a Domestic Violence (Prevention and Protection) Act 2011 with a view to give protection of women within the family sphere.
- iii. The Human Trafficking Deterrence and Suppression Act 2012 has been enacted
- iv. A National Children Policy 2011 and National Women Development Policy, 2011 were adopted.
- v. The Ministry of Education has issued a circular to all educational institutions, following a Supreme Court judgment banning eleven types of punishment in schools, to stop physical and mental punishment of students, and to instruct Teachers’ Training Centers and governing bodies of educational institutions to implement guidelines issued by the Court.

But concern remains with some drawbacks within the above mentioned achievements as well as with the slow progress in implementation of the laws. For example, the women policy promised to bring gender equality in various sectors, but remains silent on discriminatory personal laws, limiting women’s rights within the family including unequal inheritance right. The amendment of the 1974 Children Act has stalled because of the setback created by the Ministry of Law pushing the debate over determining the age of a ‘child’. This is also the case with the Protection of the Rights of the Persons with Disability Act. No substantial progress has been observed to implement health and housing policy.

Disappearances or ‘secret killings’: In 2011, ‘disappearances’ or ‘secret killings’ were

increasingly reported in the media. Found decomposed bodies of some of the victims bore visible sign of torture, such as tied hands and legs or uprooted finger nails. In some cases, the relatives of the disappeared or persons killed alleged the involvement of law enforcing agencies, particularly the elite force Rapid Action Battalion (RAB). ASK documentation reveals that in 2011, the total number of enforced disappearances was 58, out of which only 16 dead bodies recovered.²

Extrajudicial killings: The ruling party Awami League had promised in its election manifesto to end extrajudicial killings and establish the rule of law. Families of victims have alleged that they have not been informed by the RAB of any investigation into extrajudicial killings nor of any action been taken against RAB personnel. On the contrary, RAB officials have justified such killings as having resulted from "cross fire" with armed gangs or in cases of self-defense. 100 persons were reported to have been killed in custody of law enforcement agencies in 2011.³

Mob violence: The involvement of members of the law enforcement agencies, particularly the police, in crime became extremely clear. On 27 July 2011, the police handed over 16 year old Shamsuddin Milon to a mob that beat him to death in Noakhali. The police then took away his dead body. In another incident on 18 July 2011, six students, suspected of robbery, were reported to have died following a mob beating at Aminbazar, Savar. Evidence by Al-Amin, a friend of the six young victims, showed that a local mob had beaten his six friends to death in the presence of police. Such acts of lawlessness indicate a loss of confidence in procedure of law enforcement and in the criminal justice system. ASK documentation indicates that 195 persons (January 2011 to June 2012) were killed in mob beatings, out of which seven were killed in the presence of police. No actions were taken against this mob behaviour or neglect of the law enforcement agencies.

Torture by the police and custodial deaths in jail: In the night of 15 July 2011, Abdul Quader, a student of Dhaka University was arrested by the police and the officer in charge of the Khilgaon Police Station tortured him ruthlessly with a *Chapati* (type of knife). The torture had been so severe that Quader had to appear before the Court in a wheelchair. In a separate incident, lawyer Mr. Mamtaj Uddin Ahmed died in the prison hospital after his arrest on 26

² Human Rights Situation of Bangladesh in 2011, ASK, http://www.askbd.org/web/wp-content/uploads/2012/08/HR_Situation_Bangladesh_2011.pdf

³ Ibid.

August 2011. His family alleged that his death was caused by custodial torture. The number of deaths in jail custody in 2011 reached 116.⁴

Border killings by the Border Security Force (BSF): Although several meetings took place between the two border forces, the BSF and the Border Guards Bangladesh (BGB) took place and the Indian Home Minister assured lethal bullets would no longer be used, continuous deaths at the border were reported. The Government of Bangladesh has failed to address this issue and has not taken effective diplomatic actions. In December 2010, Human Rights Watch (HRW) released ‘Trigger Happy, Excessive Use of Force by Indian Troops at the Bangladesh Border,’ which documented nearly 1,000 killings by the BSF over the last decade. According to ASK reports, from January 2009 to June 2012, around 239 Bangladeshis were killed, 231 tortured and 146 allegedly abducted by the BSF. This includes a highly publicized case in which a 15-year-old Bangladeshi girl, called Felani, trapped in the wire fencing on the border, was shot by the BSF in January 2011. A video was also released in 2011 showing BSF soldiers brutally torturing a Bangladeshi man caught smuggling cattle.

Road safety: The government has failed to take strict regulatory measures to prevent road accidents by ensuring proper licensing for drivers, improving road conditions, enforcing traffic rules and speed limits. In 2011, the government issued 10,000 licenses without maintaining a proper procedure.⁵ According to official statistics, road accidents claimed about 6,146 lives in 2010-2011 including of some eminent personalities.

Freedom of peaceful assembly and association: In 2011, in numerous cases, the law enforcement agencies used excessive force, including mass arrests, to prevent observance of any protest or rally being it political or any other in nature. Mobile courts were extensively used to instantaneously arrest participants in political processions and convict them for different terms. In many instances, non-state actors such as the student wing of the ruling party have been used or allowed to disrupt rallies and protests with the backup from law enforcement agencies. In 2011, more than 374 political violence cases took place in Bangladesh and more than 56 people were killed and 6111 were injured. Administration

⁴ Ibid.

⁵ Staff Correspondent, “No driving license without test, please, Govt urged,” The Daily Star, 21 August 2011. See url: <http://www.thedailystar.net/newDesign/news-details.php?nid=199578>

issued 133 orders imposing restriction on peaceful assemblies. In most of the cases, law enforcement agencies were seen operating without accountability and transparency.⁶

The government has cancelled many NGO registrations without a transparent process. The NGO Affairs Bureau⁷ initially drafted a new NGO Act that would drastically curtail the independence of NGOs.⁸ Concerns remain until the final version of the Act is enacted.⁹ A number of restrictions were placed on NGOs, foreign journalists and human rights activists in the Chittagong Hill Tracts (CHT), stopping indigenous peoples (IPs) from rallying on World Indigenous Peoples' Day¹⁰ following a circular issued by the Local Government and Rural Development (LGRD) Ministry, and deportation of three foreigners from the CHT.

Right to a Fair Trial: A huge number of cases have been withdrawn on grounds of political considerations. Cases initiated with allegations of involvement in severe offences including murder, rape were also withdrawn on political grounds. Almost all of the cases that were withdrawn in political consideration were filed against the ruling party leaders or activists. This tendency of withdrawing criminal cases on political grounds and without maintaining proper judicial process deters the establishment of rule of law in the society.

Freedom of Expression: Although the media enjoys relatively more freedom, there have been cases of restrictions on TV talk show programmes, control over the internet, including the social media¹¹ and disruptions to transmission of broadcasts of rallies organized by the opposition.¹² The High Court issued a contempt rule against two political leaders and a talk show moderator for making derogatory remarks about the court.¹³ State television BTV is used as a mouthpiece for the government's publicity. From 2010 to September 2012, 987 journalists were tortured.¹⁴ Adopting a National Broadcasting Policy is in process which

⁶ http://www.askbd.org/web/wp-content/uploads/2012/08/HR_Situation_Bangladesh_2011.pdf

⁷ The NGO Affairs Bureau of the Office of the Prime Minister is the regulating authority for over 2,500 NGOs that receive foreign donations.

⁸ Although a section of the Government was initially reluctant, the NGO leaders were able to constructively engage with the authority through a series of consultations which by the time of writing this report led to a revised version that appeared to have addressed their key concerns.

⁹ Any provisions that may be introduced to impose undue restrictions on NGOs would not only adversely affect the potentials of the sector, but also specifically jeopardize the work of NGOs and civil society to protect and promote human rights in Bangladesh.

¹⁰ Prothom Alo, 11 August 2012 (See url: <http://www.prothom-alo.com/detail/date/2012-08-11/news/280932>).

¹¹ In several occasions facebook and youtube were blocked. Youtube remains blocked at the time of writing this report as well.

¹² Star Campus, March 18, 2012

¹³ The Daily Star, February 2012

¹⁴ ASK documentation from national newspapers

raises concern on unfairly restricting the media and increasing government control; its proposed 44 pre-conditions for broadcast programs and 63 pre-conditions for broadcast advertisements, include barring “derogatory comments” about “national figures”.¹⁵ Several laws undermine freedom of expression.

Workers Rights: In 2010-2011 constant labour unrest in the ready-made garments sector continued over wages and work conditions, due to delayed payment of wages and overtime, low wages, retrenchment, midlevel management actions, and bad worker-employer relations.¹⁶ Labour rights activist Aminul Islam was found dead in 2012 allegedly with torture marks on his body following threats from intelligence agents.¹⁷ In 2011, 40,000 Bangladeshi migrant workers were deported from host countries triggering a major crisis. In October 2011, eight Bangladeshi migrant workers were beheaded in Saudi Arabia. Women migrant domestic workers faced sexual harassment.¹⁸ Despite guidelines issued by the High Court Division, workplace safety rules are not complied with, particularly in the ship breaking industry. A draft of “Hazardous Waste and Management of Ship Breaking Waste Rules, 2011” was prepared without consulting the environmental experts and the workers.

Women’s Rights: The government adopted the 2011 National Women’s Development Policy expressly referring to CEDAW¹⁹, and restoring promises of gender equality in various sectors, but retaining discriminatory personal laws, limiting women’s rights within the family including unequal inheritance rights. New laws addressed domestic violence, human trafficking and marriage registration for Hindus and enabled Bangladeshi women to transmit citizenship rights to foreign spouses and children.²⁰ However gender discriminatory personal laws remained in place. Despite many deterrent measures taken by the government and the administration, sexual harassment and stalking of women and girls has been a serious threat to the security of young school and college going women. In some cases, the stalkers attacked

¹⁵ “Cancel draft broadcasting policy, speakers urge Government,” The Daily Star, 29 September 2011.

¹⁶ The investigation was carried out by the Ministry of Labour and Employment, reported in the Kaler Kantha, 10 April 2012.

¹⁷ Jim Yardley, “Fighting for Bangladesh Labor, and Ending Up in Pauper’s Grave,” The New York Times, 9 September 2012. See url: http://www.nytimes.com/2012/09/10/world/asia/killing-of-bangladesh-labor-leader-spotlights-grievances-of-workers.html?_r=1&smid=tw-share

¹⁸ The Daily Jugantor, 14 July 2011.

¹⁹ CEDAW, Convention on the Elimination of All Forms of Discrimination against Women, ratified by Bangladesh in 1984

²⁰ See the Domestic Violence Prevention and Protection Act 2010, Human Trafficking Prevention and Control Act 2012, the Hindu Marriage Registration Act 2012 (Hindu marriage registration law passed, Bdnews24.com, 18 September 2012 Please see url: <http://www.bdnews24.com/details.php?id=232598&cid=2>), and the Citizenship (Amendment) Act 2009.

those who protested sexual harassment. In 2011, 33 women and girls committed suicide because they were being stalked and 23 were killed by the stalkers for protesting such acts.²¹ Despite Appellate Division's judgment declaring extrajudicial punishment in the name of *fatwa* to be a criminal offense, the number of incidents of violence against women in the name of *fatwa* or *shalish* (traditional arbitration) had increased in 2011 compared to the previous year. 59 women were subjected to torture by *shalish* or issuing of *fatwa* in 2011.²²

Rights of Indigenous People and Implementation of CHT Accord: The 15th amendment to the Constitution (2011) contravenes the equality guarantee by providing that “all residents of Bangladesh are Bangalees,” which undermines the basic right of the indigenous people to self-identification and marginalizes them.²³ It was adopted, rejecting the IPs' demands for constitutional recognition. The government has also repeatedly denied the existence of IPs, despite its election manifesto commitments.²⁴ Several incidents of human rights violations against IPs were reported, including killings, torture, religious persecution, sexual violence against women and children and land dispossession by Bengali settlers and military personnel in the CHT and the plain lands.²⁵

III. Independence of the NHRC

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. This report discusses the independence of the NHRC of Bangladesh under these three criteria.

Established by a distinct law or legislation: The Founding Act (NHRC Act 2009) talks about the independence of the Commission. According to Section 3(2) ‘The Commission shall be a statutory independent body having perpetual succession and the power, among

²¹ Human Rights Situation of Bangladesh in 2011, ASK, http://www.askbd.org/web/wp-content/uploads/2012/08/HR_Situation_Bangladesh_2011.pdf

²² Ibid.

²³ Please see Annex 7 for the International CHT Commission's letter to the Prime Minister about the 15th amendment of the national constitution.

²⁴ In March 2012 the Local Government and Rural Development (LGRD) Ministry sent a Memorandum to government officials instructing them not to support celebrating World Indigenous Day.

²⁵ The parliamentary Caucus on Indigenous Peoples proposed to enact a ‘Bangladesh Indigenous Peoples’ Rights Act’ and to set up a ‘National Commission on Indigenous Peoples’ under the Act to ensure the rights of indigenous communities on their ancestral lands.

others, to acquire, hold, manage, dispose of property, both moveable and immoveable, and shall by the said name sue and be sued.” The position of the members is also been guaranteed by the Act. According to Section 8(1) of the Act, “The Chair 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.”²⁶

However, a major constraint for the independence of the NHRC is that although according to the NHRC Act 2009, the Commission can formulate any rule, they need to be sent to the President for approval. However, there are a few other steps i.e. to send the rules to the Ministry of Public Administration and the Ministry of Law, Justice and Parliamentary Affairs for vetting. Through this process the executive branch has a big role to play. One classic example of this is the formulation of the staff rules of the NHRC. The NHRC first drafted its rule for the recruitment of staff in 2008²⁷ and sent them to the Ministry of Law and Justice to facilitate getting approval from the President. The Ministry then returned the rules with their objection on almost every clause of it. This started a long process of back and forth communication between the Ministry and the NHRC which ended with the NHRC getting the approval on the rules in mid 2011. The rules regrettably made it possible for the government to ensure that the Secretary (key administrative person) will always be a seconded person from the government. Moreover, the service rule very cleverly ensured that senior positions like Directors and Deputy Directors within the NHRC can only be filled up with government seconded staff. As a result of this, the NHRC has at present 28 human resources in total of which 12 are for substantial work and among these 12, the top 5 are seconded including the Secretary, 2 Directors and 2 Deputy Directors. Other 16 service providing staff members only adds up to furnish a bureaucratic hierarchical culture in the NHRC. Moreover, the UNDP Capacity Development Project has 12 regular (including some service staff) and few irregular consultants to support the work of the NHRC, following largely the own interest of this institution. While it is acceptable that a new institution has a need for experience people to set up its path and the seconded staff members can of course contribute, the risk of having all seconded staff at the top level is that the institution might establish the same bureaucratic

²⁶ The National Human Rights Commission Act of 2009 (Founding Act), http://www.nhrc.org.bd/PDF/NHRC%20Act%202009_1_.pdf

²⁷ The NHRC, Bangladesh was first established in 2008 under the NHRC Ordinance 2007. Later the new legislation-NHRC Act 2009 was enacted and the present NHRC was reconstituted in 2010 under that Act.

procedure as the government bureaucracy. The NHRC Chair time and again mentioned his helplessness with the bureaucratic culture within the NHRC.

In terms of resourcing, the founding Act ensured the independence of the NHRC in using its resources. The NHRC Act 2009 reads: “the Government shall allocate specific amount of money for the Commission in each fiscal year; and it shall not be necessary for the Commission to take prior approval from the Government to spend such allocated money for the approved and specified purpose” (Sec 25). But the Act limits the NHRC in getting direct funding from donors. The current multi-donor ‘National Human rights Commission Capacity Development Project’ is a joint project undertaken by UNDP and the Government of Bangladesh (GoB). The UNDP project is mobilizing maximum resources for the NHRC. In 2011 this project has contributed USD 1,400,000 while the government allocated a mere USD196, 250. While this UNDP project support is important at the initial stage of institution building, it has also certain drawbacks. As this project is joint project with GoB, the project activities need to be in line with the comfort of the Government. Furthermore since UNDP is an intergovernmental organization, it has its own limitations and preference with regards to human rights activism. Most of this project support is being used for purposes such as foreign trips of NHRC members and staff (There are multiple instances where all members have gone on a foreign trip together)²⁸ creating a legal vacuum as well, as hiring international and national consultants, purchasing equipments and mainly carrying out expensive promotional events. This dependency of NHRC on the project has gone in such interior that the NHRC has hired international consultants for almost all its major tasks, including such basic tasks as conducting a baseline survey of the human rights situation, formulating five years strategic plan and almost all operational procedure. It should be noted in this regard that Bangladesh has a well recognized intellectual community with very vibrant and capable civil society organizations. The NHRC members themselves are also well knowledgeable and capable to carry out such tasks by themselves. But this dependency on the funding of this project is crippling the NHRC to value their existing strength and reflects negatively on the vibrant human rights activism that had been nourished for years and still strongly exists in the country. A crude example of such dependency was seen in the preparation of the Universal Periodic Review (UPR) stakeholders report by the NHRC very recently. It is really praiseworthy that the NHRC has submitted its UPR stakeholders report. It shows their

²⁸ <http://www.nhrc.org.bd/PDF/Annual%20Report%202011.pdf>

commitment to work as an independent body. This was the very first report from their end to engage with UN Human Rights Mechanisms. However, the unfortunate fact is that NHRC had hired international consultants to prepare this report under the UNDP project fund. Our further discussion referring to the report will show how this UPR report has failed to address the real human rights situation on the ground and even the NHRC's own commitments. This dependency on UNDP has already created such a national debate that the NHRC Chair had to clarify at a public event in September 2012.²⁹

Autonomous of any State agency or entity in carrying out its administrative functions: According to the NHRC Act, the institution is recognized as a 'statutory independent body'. In many occasions, the NHRC has also given the impression that they do not face any intervention from the government and the commission members time and again praised the cooperation they receive from the Government.³⁰ While we noticed some examples of cooperation in case of increasing budgetary allocation, providing human resources, status and protocol to the NHRC members, examples of a lack of cooperation from the executive branch of the government have also not gone unnoticed.

Generally, the NHRC has a good relationship with the judiciary. In a number of cases, the judiciary has asked NHRC to investigate or to be present before the court to deliver its opinion. Regarding the relationship with the executive, it is evident that the relationship really varies from issue to issue. In general, the local level executive authorities are responsive to the NHRC. The ongoing 'Countrywide Awareness Campaign' to introduce the mandate and work of NHRC involving the local level administration is playing an important role to that end. However, on issues such as human rights violations by the law enforcement agencies, the NHRC is faced with a lack of cooperation from the relevant authorities. The NHRC has received very few reports from the Home Ministry in response to numerous requests made. On 29 September 2011, the Chair of the NHRC went to visit Sylhet Jail, but had to return after waiting for two hours without being able to visit the prison, as permission from the prison authority could not be obtained. Following this, the Chair of the NHRC stated that he would not undertake any prison visit.³¹ Later on, the Chair and the Full time Member of the NHRC did visit prisons with informing the authorities in advance.

²⁹ <http://www.nhrc.org.bd/Audio/Closing%20Chairman.MP3>

³⁰ <http://opinion.bdnews24.com/bangla/2012/05/17>

³¹ <http://www.theindependentbd.com/national/103730-i-will-not-visit-any-jail-says-nhrc-chairman.html>

The lack of cooperation, especially with the Home Ministry was so severe that the NHRC Chair publicly brought up these allegations against the Home Ministry on several occasions.³² The Ministry reacted by asking the NHRC not to go beyond its jurisdiction regarding the activities of the disciplined forces.³³ To mitigate the tension, the NHRC met with the Home Minister on 5 June 2012, submitting a list of 20 cases of alleged violations by law enforcement agencies that the NHRC earlier had requested for investigation reports. Some of the cases were pending for over two years.³⁴ Taking this as a serious issue, the most popular Bangla Daily of the country (Prothom Alo) conducted an online survey on 26 May 2012 with the question-‘Do you think that the Government will cooperate with the NHRC in investigation cases of human rights violations? Among 3731 respondents in total, only 7.96% respondent answered ‘yes’ while 91.18% said ‘no’.³⁵

As part of this severe interference from the executive body, the law, justice and parliamentary affairs Ministry said in a letter issued in August 2011 that the Commission Chair would require permission of the Prime Minister for any foreign tours “as it was not a constitutional office”.³⁶ However, that was resolved later by the positive understanding within the government.

The present commissioners were appointed in June 2010 and thus the opportunity for them to be reappointed will come in few months. At this critical juncture, there is the risk to see the NHRC in rather compromising mood as has happened in many other countries as well. The UPR stakeholders report prepared by the commission also resonates this speculation as this report has failed to demonstrate the strong commitment expressed by the NHRC on several issues.

The NHRC had taken some commendable initiatives starting from the follow up of the implementation of the UPR recommendations and preparing a stakeholders report for the second UPR-cycle. The NHRC advocated with the ministries to get UPR focal points at all major ministries. The Commission organized the recommendations coming out of the previous UPR in 8 thematic areas and held separate consultation meetings on each thematic area. One of these thematic areas was on *‘Refugees, Persons with Disability, Indigenous*

³² <http://www.thedailystar.net/newDesign/news-details.php?nid=237155>

³³ Daily Sun, 5 May 2012

³⁴ <http://www.thedailystar.net/newDesign/news-details.php?nid=237155>

³⁵ <http://www.prothom-alo.com/onlinepoll/page/130>

³⁶ <http://newagebd.com/newspaper1/frontpage/29645.html>

people' and the thematic consultation was held on 4 August 2012 (details has been furnished in the Annex A of the NHRC UPR Report).³⁷ On 18-19 September 2012, in a two day National Seminar, the NHRC shared their draft report titled 'Indigenous Peoples' Rights' (2.8). The Foreign Minister was present in the seminar as guest of honour and reiterated the government's position that there are no indigenous peoples in Bangladesh. The civil society members put forward their views and repeatedly urged the NHRC to keep up its position of recognizing the indigenous people. The NHRC Chair in his closing remark of the opening session of the seminar assured that the objective of the seminar was to get the input from the people and the NHRC's position would be what the people want to see. The Honorary Member of the Commission Nirupa Dewan in his speech said that-"the indigenous people of the country want to be identified as 'indigenous' and anything contrary to this would be a violation of their human rights."³⁸ At the end of the two day seminar the Full Time Member of the NHRC summarised the seminar's recommendations, which includes strengthening the NHRC, protecting the rights of children, the physically challenged, indigenous people, minority communities, migrant workers, refugees and other vulnerable groups.³⁹

A day after the seminar, the Foreign Minister made an unprecedented visit to the NHRC office (her first visit to the NHRC). What we saw after, was that in the final UPR submission, the NHRC had replaced the term "indigenous peoples' rights" with "ethnic minorities' rights" (2.7.2)⁴⁰ while the same document shows in the annex that the NHRC identified refugees, persons with disability and indigenous people as one of their thematic areas. It is also noted that in the five year strategic plan, the NHRC has mentioned ten issues as their priority areas. One of those areas is "discrimination against indigenous peoples and ethnic and religious minorities"⁴¹. The question arises how the NHRC will justify the implementation of its strategic plan?

The position of NHRC on indigenous peoples in their UPR report is compromising their earlier stand where the NHRC chair even went as far as saying that the Commission is ready to disobey the State's position: "We (the Commission) believe that it (recognition as indigenous peoples) is a rightful demand of yours and the father of the nation taught us not to obey command of the leader when the leader is wrong,' quoting an excerpt from the

³⁷ <http://www.nhrc.org.bd/PDF/Stakeholder%20Report%20Universal%20Periodic%20Review.pdf>

³⁸ <http://www.prothom-alo.com/detail/date/2012-09-20/news/290979>

³⁹ <http://www.thedailystar.net/newDesign/news-details.php?nid=250531>

country's founding president Sheikh Mujibur Rahman's autobiography 'The Unfinished Memoirs',⁴²

Another example relates with the HRW report on the trial of BDR mutiny. On 4 July 2012, HRW published a report titled "The Fear Never Leaves Me-Torture, Custodial Deaths, and Unfair Trials after the 2009 Mutiny of the Bangladesh Rifles" where one of the recommendations is to "disband RAB and create a non-military unit within the police or a new institution, which puts human rights at its core to lead the fight against crime and terrorism".⁴³ This report immediately received strong criticism from the government terming it as "interference to state sovereignty" and "part of conspiracy". Interestingly, the NHRC Chair also rushed with the comments that "a foreign organisation like Human Rights Watch cannot recommend disbanding the Rapid Action Battalion"⁴⁴. He even went further to write an article which has been published on the online news portal BD News 24.com on 12 July 2012, justifying his position and arguing that anyone before making any report on the human rights situation on Bangladesh, should consult with the NHRC.⁴⁵

On many occasions, some inconsistency can also be seen in the position of the NHRC. For example, after meeting with the Home Minister on 5 June 2012, the NHRC Chair told the media "I have expressed concern over the law and order situation and recent incidents of human rights violations by lawmen".⁴⁶ Only a month later, on 4 July 2012, media quoted him saying that "the human rights situation of the country has improved significantly. Reports of foreign human rights bodies do not project the real scenario of the human rights situation in Bangladesh".⁴⁷ Then again on 10 August 2012, the NHRC issued a statement that the NHRC Chair himself received a death threat.⁴⁸

The other inconsistency is that the NHRC Chair time and again criticized the elite force RAB regarding the allegation of their involvement in enforced disappearance and extra judicial killing and asked to fix their ToR to avoid overlap with the police. Contrary to this request, the NHRC has referred cases of crime to the RAB, explaining that they have done so for a

⁴⁰ <http://www.nhrc.org.bd/PDF/Stakeholder%20Report%20Universal%20Periodic%20Review.pdf>

⁴¹ http://www.nhrc.org.bd/PDF/Human%20RightsStrategic_Plan.pdf

⁴² http://newagebd.com/detail.php?date=2012-08-09&nid=20049#_UH_hPMXR7do

⁴³ <http://www.hrw.org/reports/2012/07/04/fear-never-leaves-me>

⁴⁴ <http://www.thedailystar.net/newDesign/news-details.php?nid=241279>

⁴⁵ <http://www.nhrc.org.bd/PDF/chairman%20on%20bdnews.pdf>

⁴⁶ http://newagebd.com/detail.php?date=2012-06-06&nid=12833#_UH6cRMXR7do

⁴⁷ <http://www.thedailystar.net/newDesign/news-details.php?nid=240842>

⁴⁸ <http://www.thedailystar.net/newDesign/news-details.php?nid=245708>

“positive and quick response”.⁴⁹

Another example of inconsistency is that, while NHRC is carrying out a project with UNHCR on protecting the rights of the refugees, the NHRC Chair’s remark after Bangladesh pushed back the refugees from Myanmar was that “Bangladesh did not break the international law by sending back the Rohingyas.”⁵⁰

IV. Effectiveness of the NHRC

One of the most important activities undertaken by the NHRC in 2011 was the national survey of peoples’ attitudes and perceptions of human rights. The summary report of findings, “Perceptions, Attitudes and Understanding: A baseline survey on human rights in Bangladesh” was published by the Commission in December 2011. The purpose of the survey as mentioned in the NHRC Annual Report “was to learn what people across the country think, know and understand about human rights, and to determine what they see as their most important rights issues facing Bangladesh.” It further says “The baseline survey revealed that more than half of those surveyed had never heard of “human rights”, with those who had heard of it much more likely to be from an urban area, male, educated or among the least poor. But when asked to identify what “human rights” means, those familiar with the term showed a fairly good understanding of them as basic rights accorded to all people from birth and relating to personal freedoms. Even so, nearly 1 out of 5 people who had heard of “human rights” could not describe what the term means.” The Annual Report claims “In analyzing the survey outcomes, the Commission has been able to assess the strengths and weaknesses of the legal and policy framework for human rights protection in the country. The NHRC also received recommendations regarding how stakeholders and other interested actors can support the Commission in its quest to improve dramatically the basic rights situation in Bangladesh. The baseline that has been established as a result of the survey will be used by the Commission as a measurement against which to evaluate the success of the NHRC’s future efforts in all areas of endeavour -- complaints handling, human rights monitoring, awareness-raising and education, and advocacy and policy development.”⁵¹

Comparing those claims with the performance of the NHRC, we see lot more areas of improvement. One of the encouraging activities conducted by the NHRC was a campaign

⁴⁹ <http://thedailystar.net/forum/2012/October/rethinking.htm>

⁵⁰ <http://www.thedailystar.net/newDesign/news-details.php?nid=240842>

⁵¹ Annual Report of the NHRC of Bangladesh, 2011

titling “Working together to promote human rights: giving young people a voice” around the Human Rights Day in 2011. As part of the campaign, the NHRC sponsored a human rights-focused creative competition for youth around the country. Featuring drawing, painting, photography and essays, the competition was able to bring forward young people to explore human rights concepts through art, sensitizing them to rights issues and identifying ways in which they can become more actively involved in their protection. The NHRC’s intention to engage the younger generation is praiseworthy as they really target this younger group in their events.

The huge gap between the expectation created by the NHRC especially by the Chair and the actual performance demonstrated by the Commission as an institution is another matter of concern. From January 2011 until October 2012, the NHRC has conducted only 8 investigations on their own, covering the cases of murder, rape, communal violence, allegation at orphanage etc. No single investigation was conducted on any of the high profile human rights violation cases such as disappearances, extrajudicial killings, torture, mob violence etc. The NHRC Chair raised concern about the ordeal of Limon⁵² but they did not have their own investigation even when law enforcement agencies framed criminal cases against Limon and portrayed him and his family linked with notorious criminals.

While the NHRC themselves acknowledged that they have received highest number of complaints on the cases of enforced disappearance, not a single case has been investigated by the NHRC. This is the same in cases of extrajudicial killings and custodial torture. The NHRC may argue putting forward the limitation mentioned in Section 18 of the NHRC Act regarding investigation on cases against disciplined forces where it is said “notwithstanding any other provision of this Act the Commission *suo-moto* or on the basis of any application may call for report from the Government on the allegation of violation of human rights by the disciplined force or any of its members”. The NHRC interprets this in a way that they cannot investigate cases on the allegation of disappearances and extrajudicial killings, rather they can only ask for reports from the concerned authority. But a proactive and creative

⁵² On April 6, 2011, *Prothom Alo* reported news of “extreme police brutality” involving a 16 year-old youth, Limon Hossain, who was shot in the leg by a RAB officer. Limon is the youngest son of day labourer Mr. Toafzzal Hossain and lives in the village of Saturaia, Rajapur Upazilla, Jalakhati District. On March 23, 2011, according to the article, Limon Hossain was bringing the family’s cows home from the field, when on the way a team of RAB-8 stops him to and ask his name. Limon identified himself as a student but one RAB officer shoots him in the leg without any questioning. Later, the RAB-8 claimed he was a suspect in a crime and they filed two cases against him.

interpretation may put forward that this provision does not impede the NHRC to conduct an investigation.

The Chair has made on the spot visits to places where human rights violations happened. He visited Ramu, where on 5 October 2012 sectarian violence occurred. At a press conference, he accused the detective branch of the government for failing to alert these violations.⁵³ On the other hand, he has never made visits on cases of disappearance, extrajudicial killings involving law enforcing agencies. Many activists are of the opinion that if the NHRC is really willing, it can make use of creative methods. For instance, since the law enforcement agencies are claiming that they are not involved in disappearance cases, the NHRC can go for investigation of these cases to reveal the truth that there are inconsistencies between the reality on the ground and the claim by the law enforcement agencies. Using such creativity, it was possible for the NHRC to investigate whether the framed cases by RAB against Limon were real or not.

The NHRC Chair has visited more than 5 hospitals in 2011 and strongly critiqued the poor management of the public hospitals which created much attention in the media. This led to a strong protest from the doctors' community alleging the violation of their human rights because of the NHRC Chair's sweeping comment- "doctors are inhuman, bloodsuckers"⁵⁴ in statements and articles.⁵⁵ The tension was so high that the NHRC Chair had to write a correction in an attempt to cool the situation down.⁵⁶ Although these visits were instrumental to raise the question of accountability of the doctors and hospital managements, they did not bring any sustainable change in the system as it was for the case of his visit to the orphanages that led the government to create the position of a cook in each orphanage and increase the daily allowance for the orphans.⁵⁷

Mediation and arbitration is one of the important mandates given to the NHRC by its founding Act. Unlike NGO mediation, the NHRC is mandated to conduct mediation following an adopted rule and can even impose pecuniary penalties on any of the parties. At present the NHRC is involved in few cases through mediation and has imposed a fine in a few cases. The founding Act clearly describes- "the procedure of appointment and power of

⁵³ <http://www.bdnews24.com/details.php?id=233642&cid=2>

⁵⁴ <http://www.prothom-alo.com/detail/date/2012-03-06/news/230184>

⁵⁵ <http://www.prothom-alo.com/detail/date/2012-02-28/news/228378>

⁵⁶ <http://www.prothom-alo.com/detail/date/2012-03-09/news/231147>

⁵⁷ <http://www.nhrc.org.bd/PDF/Annual%20Report%202011.pdf>

the mediator or arbitrator shall be determined by rules” (sec 15 (2)). Without having such rule, the ongoing mediation is very ad-hoc and creates some controversy. Keeping in mind the long rule making process, the NHRC should foster the adoption of such rule, including a similar one for inquiry and investigation.

Regarding the complaint management of the NHRC, it is encouraging that the number of complaints is increasing (2009-76, 2010-166, 2011-453). The NHRC has created different benches to deal with the complaints. This is because of the NHRC is more known to people, the Chair and members are very accessible in terms of personal visit or over phone consultation. An online complaint system has been established, the complaints handling fact sheet and the practical handbook are published and disseminated by the NHRC. Other human rights organisations are also campaigning to access the NHRC for the remedies of human rights violations. Concern however remains on how effectively NHRC is functioning in terms of receiving and handling these complaints. First of all, the NHRC office is not easy accessible as it is situated on the 12th floor of a hectic area of Magbazar, where people cannot go by rickshaw (the vehicle most of the poor people use to get ride). The lift of the building is designed in such a way that no person with wheel chair can get into it. There is no special complaint receiving desk for human rights defenders, women or persons with disability or any other vulnerable group. Very limited assistance is provided for illiterate persons to have their complaint in writing. The person who receives the complaints complainant severely lacks knowledge of human rights and the mandate of the NHRC. The received complaints are not segregated according to gender, ethnicity, religion or age, which makes it difficult to draw any analysis of trends.

The NHRC Annual Report 2011 claims that “One of the NHRC’s very important tools for its awareness-raising and outreach efforts is the Commission website (www.nhrc.org.bd). The NHRC recognizes that an online presence is an essential component of any overall communications and education strategy in the 21st century. Accordingly, the Commission has designed and developed content for its website, which provides comprehensive information on the mandate, operations and activities of the NHRC, and improves citizen access to the Commission by offering the possibility of filing a complaint online. Website features, including online complaints filing, are being tested in various districts around the

country.”⁵⁸ However, a closer look at the website gives a different impression.⁵⁹ The website on its first glance looks much disorganized, provides only few documents and information about few events organized by the NHRC. The very first information at the home page (top, left most) is ‘we have moved’ with the address, while the NHRC has moved to this address on 1 February 2011. The website does not give any information on the current activities of the NHRC, the future events or any data/statistics of the human rights situation of the country. Introducing the online complaint submission is really welcoming and it is also interesting to see that the announcement made for this is written in Bangla unlike the whole website- which is in English. However to see the announcement in Bangla one has to click the menu bar written in English only ‘HR Complaints’. This indicates the difficulty for the user in accessing the online complaint management system. The online complaint dashboard mentions that only five complaints have been received in last 30 days, only one in last seven days.⁶⁰

The Annual Report 2011 of the NHRC states that ‘The Commission provided policy advice to the Government of Bangladesh through recommendations made on the National Women Policy and review of national legislation such as the Law on Human Trafficking, the Child Act and reforms of the Constitution in order to ensure that new laws and policies are consistent with international human rights standards.’ Interestingly, the laws and policies on which the NHRC has made recommendations are considered to be ‘soft’ issues. The NHRC did not make any recommendation or made any observation on the Anti Terror Law, Draft Foreign Donation Act, Broadcasting policy, Draft online media Policy etc.

There is also huge gap between the hype and expectation created by the Chair of the NHRC with his great media presence versus the institutional response from the NHRC. The NHRC Chair has responded on almost all contemporary human rights issues in media but this did not match with corresponding actions of the Commission. After a full commission meeting NHRC informed the media at a formal press briefing on 27 August 2012 that they will move to the High Court for Limon⁶¹ which did not happen. In response to the criticism made by several quarters terming the NHRC as a ‘toothless tiger’, the Chair publicly claimed that the

⁵⁸ <http://www.nhrc.org.bd/PDF/Annual%20Report%202011.pdf>

⁵⁹ The website was accessed on 20 October 2012

⁶⁰ <http://complaint.nhrc.org.bd/complaint/dashboard>

⁶¹ <http://www.newagebd.com/detail.php?date=2012-08-28&nid=21664#.UIPUB8XR7dp>

NHRC has given a tongue, not teeth⁶² and committed to make use of the tongue “Yes, we do not have any tooth, but we roar and roaring itself is important in human rights movement”. If the NHRC themselves acknowledge that they cannot bite will the roaring really matter?

V. Thematic Issues

The thematic issues identified for the 2012 ANNI Report relevant for NHRC Bangladesh are: (a) the relationship between the NHRC and human rights defenders and women human rights defenders; (b) the interaction between the NHRC and international human rights mechanisms.

Human Rights Defenders and Women Human Rights Defenders

NHRIs are considered to be the ‘Defender of Defenders’. Until now, the NHRC has conducted only one training program for 25 human rights defenders (HRDs) in November 2011. The NHRC has still not internalised the conception of a human rights defender and scope of the UN Declaration on Human Rights Defenders.⁶³ The NHRC has no special desk or mechanism to address the issues of the HRDs. The online complaint management system also does not provide any special attention to the protection and confidentiality for the HRDs.

Interaction with International Mechanisms

The year 2011 was instrumental for the Bangladesh NHRC to get international recognition. The Commission was awarded “B” status by the International Coordinating Committee of National Human Rights Institutions (ICC-NHRI) in May 2011 and became an Associate Member of the Asia Pacific Forum (APF) of NHRIs at the 16th Annual Meeting in September 2011. Although the NHRC has accredited ‘B’ status by the ICC, The ICC Sub Committee on Accreditation (SCA) did made following observations and recommendations:

- ‘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’

⁶² http://newagebd.com/detail.php?date=2012-07-27&nid=18575#.UH_jTMR7do

⁶³ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN GAR A/RES/53/144, 8 March 1999, <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>.

No further step has been taken to address the SCA recommendations. The NHRC has also submitted its UPR stakeholders report in October 2012, the very first report to the UN Human Rights Mechanism. However, the NHRC has not engaged with any of the Special Procedure mandate holder or treaty bodies.

VI. Cooperation with Civil Society

It is really praiseworthy that the NHRC is open to cooperation and collaboration with civil society. The NHRC Chair and members regularly attend civil society events. The NHRC also invites civil society members at their events. In many cases, the NHRC did seek and praised the cooperation of the civil society. There is a good cooperation with regard to referral of cases as well. In our opinion, this is because of the openness and easy accessibility of the commission members. The NHRC has also started the discussion and process to identify a panel of investigators, mediators and lawyers from human rights organizations. The NHRC has also provided its support for preparing a 'Practical Handbook on submitting complaints to the NHRC' and later reprinted the same for wider dissemination. Yet there is need to take effective steps to institutionalize this cooperation to obtain better result.

It should be noted in this regard that, before the ICC accreditation, ASK as the ANNI member did send a statement to the SCA on 18 May 2011 where it strongly advocated in favour of the NHRC, Bangladesh saying 'the NHRC, although still at the early stage has given a strong indication to be an independent and effective institution'. This statement of ASK has been cited informally by the ICC and APF as an unprecedented gesture from a CSO to the NHRC. One year after that statement was made, now we want to evaluate the NHRC by the result it has achieved and by the impact it has created. Two and half years have passed and now time has come for the NHRC to prove the importance and necessity of such state institution as it is not at its early age anymore.

VII. Conclusion and Recommendations

The NHRC is comprised of the Chair, one other full time member and six other honorary members. There are instances to believe that the NHRC lacks team work and many members do not always support the position of the Chair as expressed by him in the media. This is apparent from seeing the official statements issued by the NHRC. While the Chair has given his opinion in almost every case of human rights violation, the NHRC has issued less than 20

press statements in more than two years (the majority on events and visits). There were no statements expressing the position of the NHRC on certain human rights issues, except on Limon.⁶⁴ Even the media has posed question about the inactiveness of the members of the NHRC.⁶⁵

The NHRC writes in the conclusion of its Annual Report 2011 which reads “the Commission expressed its gratitude to the highest levels of the Government for the ongoing support and cooperation it has received during the year 2011. As the institution strengthens, the NHRC can more effectively play its dual role vis-à-vis the Government – not only what some may say is a thorn in its side but just as importantly, a feather in its cap.” But we should say that as the members of the civil society as well as citizens of the country, we consider this as a matter of great concern to see the NHRC as the ‘feather in government’s cap’.

Recommendations to the Government of Bangladesh (GoB):

- a) Take immediate step to remove the loopholes in governing legislation by widening the definition of ‘human rights’, removing the obstacle to take proceedings against disciplined forces and opening the space to receive direct funding.
- b) The GoB should be open to the criticism made by the NHRC and take those in the light of bringing change in their actions.
- c) The GoB should take concrete steps to make the NHRC functionally, institutionally, financially independent and to uphold it as a dignified national institution.
- d) Completely fulfil the proposed organogram of the NHRC and locate it in an accessible location. Provide sufficient budget to NHRC to make it less dependable to the donor funding.
- e) The GoB should comply with the NHRC’s recommendations with utmost priority and sincerity.

Recommendation to the NHRC:

- a) Take immediate step to set up independent functional secretariat in a location where people get easy access
- b) Put focus on systematic violence and set an example and precedence so that those can be regarded as national level standards and be useful as tools for the human rights

⁶⁴ <http://www.nhrc.org.bd/news.html>

⁶⁵ <http://www.nhrc.org.bd/PDF/How%20empowered%20is%20the%20Commission%20to%20protect%20human%20rights.pdf>

defenders.

c) Make maximum and creative use of the NHRC legislation and explore and exhaust all possible avenues to remedy the human rights violations. Forge out new strategic tools to carry out human rights obligations.

d) Take NHRC to the door-steps of the people with setting up branch offices and taking other methods. Make people aware about their rights. Make a simplified procedure of complaints.

Burma: Curb Your Enthusiasm. Analysis of the Establishment of the New Myanmar National Human Rights Commission

Burma Partnership¹

Human Rights Education Institute of Burma

I. General Human Rights Situation in Burma

One year ago, on 5 September 2011, the Burma Government established the Myanmar National Human Rights Commission (MNHRC). The establishment of the Commission was announced in the state-run newspaper, *The New Light of Myanmar*, only a few days after the UN Special Rapporteur on the situation of human rights in [Burma], Tomás Ojea Quintana, ended his visit to the country and reiterated his call for the establishment of an international commission of inquiry. A month after the MNHRC's establishment, the United Nations General Assembly (UNGA) discussed its annual resolution on the situation of human rights in [Burma], and ASEAN made its decision regarding Burma's bid to chair the regional bloc in 2014. Thus, there is a widespread perception that the establishment of the MNHRC is merely an attempt by the regime to appease the international community and to rehabilitate its image on the international scene.

Notwithstanding this, the establishment of the MNHRC has often been cited as among the positive changes that have taken place over the past year, along with Daw Aung San Suu Kyi's election to the Parliament, the release of political prisoners and the easing of media censorship.

Despite these undeniable relative improvements, serious human rights abuses have been taking place over the past year. A closer inspection of the incidences of human rights violations and the subsequent responses by the MNHRC raise serious questions of its will to hold perpetrators of human rights violations accountable.

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Despite what appears to be a relatively free and competitive multi-party by election in April 2012 and the subsequent election of Daw Aung San Suu Kyi and other members from the opposition National League for Democracy (NLD) to Parliament, the opposition currently only holds 6.6% of the total seats, making it very difficult for them to effect any significant change within the Parliament. Furthermore, according to the Assistance Association for Political Prisoners – Burma an estimated 311 political prisoners remain behind bars throughout the country as of October 2012, with probably many more unverified. Activists are still subjected to threats, government surveillance and arrests. This year has seen an increase in the number of arbitrary arrests and detentions of activists: over 200 people have been arrested for politically motivated reasons since the start of 2012 without formal charges. There have been an increasing number of reported cases of land confiscation, while armed conflicts continue in many ethnic states despite ceasefire agreements. In Kachin State, human rights violations committed by Burma Army soldiers against civilians are commonplace. Villages are burnt, women raped, civilians tortured and killed. Civilians in Arakan State have been the victims of communal violence, while the Rohingyas continue to suffer from constant human rights violations and discrimination by the Government of Burma. Meanwhile, impunity for Government officials remains rampant and is enshrined in Article 445 the 2008 Constitution which grants amnesty for any regime official who has committed any crime as a result of its official duties.

While the establishment of the MNHRC appears as a positive step, it must nevertheless be welcomed with cautious optimism. As this analysis will further demonstrate, there are already strong reservations about the Commission’s independence, effectiveness, transparency and accessibility.

II. Independence

The MNHRC: The President’s Tool?

The MNHRC was established under Union Government's Notification No. 34/2011² dated 5 September 2011. The Government’s Notification announced that the “Myanmar National Human Rights Commission was formed [...] with a view to promoting and safeguarding the fundamental

² Union Government’s Notification No. 34/2011, 5 September 2011, available at <http://bit.ly/QmEtWH>

rights of citizens described in the Constitution of the Republic of the Union of Myanmar”, and included the names of the 15 members of the MNHRC.

The only other source of information available to the public about the MNHRC is the letter the Commission sent to Burma Partnership in response to its inquiry about the Commission’s mandate. The letter, entitled “Replying on Myanmar National Human Rights Commission's Responsibilities and Entitlements,” is in Annex 1 to this report. The letter provides a list of the MNHRC’s fifteen members, as well as a list of the Commission’s responsibilities including receiving individual complaints, working with UN agencies and raising awareness on human rights issues. It also states that the MNHRC reports to the President’s Office and gives the term of office of the MNHRC members.

The MNHRC plans to exist on the sole basis of this list of “responsibilities and entitlements”. As Win Mra, Chairman of the Commission, stated in an interview with the *Myanmar Times*³ the commissioners were already working on a set of rules and procedures.

However, on 16 March 2012, the Parliament refused to allocate to the MNHRC the budget requested (around 843, 028 USD⁴) by the Government as part of the 2012-13 National Planning Bill. The decision was based on the fact that the Parliament considered that the MNHRC’s establishment was not consistent with the Constitution which requires that the “Leading Bodies of the State” be formed with the approval of the Parliament.⁵

On 27 March 2012 the MNHRC released a statement⁶ announcing that as a consequence of the Parliament’s decision it is drafting an Enabling National Human Rights Commission Act and will submit the draft to the President and, if approved, present it to the Parliament for adoption.

³ “We won’t be influenced by the govnt,” *The Myanmar Times*, 19 September 2011, available at <http://bit.ly/MaXJIP>

⁴ The exchange rate used here is the 'unofficial' market rate (1 USD = 815 kyat) as opposed to the official exchange rate. For decades the authorities kept the official exchange rate extremely low as a method to hide away hundreds of millions of US dollars yet every transaction was made through the market rate.

⁵ “Hluttaw Refuses Human Rights Body Budget” *The Myanmar Times*, 26 March 2012, available at <http://bit.ly/MaZENJ>

⁶ “Statement of the Myanmar National Human Rights Commission on Its Establishment and Its Current Status of Functioning,” 27 March 2012, available at <http://bit.ly/Mb16iQ>

Despite calls by civil society members⁷ for a transparent and participatory drafting process, neither the MNHRC nor the President have published the draft of the Enabling Act or conducted consultations with civil society groups. Burma Partnership also submitted recommendations to the Commission regarding its Enabling Act in March 2012 (See Annex 2), yet the letter remains unanswered.

Thus, no information regarding the content or the schedule of the Enabling Act has yet been made public.

As a consequence, to our knowledge at the time of writing, the only document publicly available to assess the MNHRC is the letter in Annex 1. The list of responsibilities and entitlements described in the letter is considered by the MNHRC to be its mandate.

The MNHRC's Relationship with the Executive and the Parliament

To assess the MNHRC's independence it is crucial to examine its relationship to the Executive.

The letter in Annex 1 states that the MNHRC "shall report directly to the President on its conducts" while the Office of the High Commissioner for Human Rights (OHCHR)⁸ considers that National Human Rights Institutions (NHRIs) should answer to an authority other than the Executive, most usually the legislature.

The letter also mentions that the MNHRC will "carry out tasks entrusted by the State President". When the MNHRC visited the Insein Prison and the Hlay-Hlaw-Inn Yebet Prison on 27 December 2011,⁹ presidential authorization was required and interviews with prisoners were conducted in the presence of prison officials.¹⁰

This is in contradiction with OHCHR's recommendation that members and staff of NHRIs should not receive instructions or be required to seek authorization from Government ministers or other public officials.

⁷ "Statement Calling for a Transparent and Participatory Drafting Process of the Myanmar National Human Rights Commission's Enabling Law," 10 May 2012, available at <http://bit.ly/MivG09>

⁸ "Assessing the Effectiveness of National Human Rights Institutions", page 12, Office of the High Commissioner for Human Rights, 2005, available at <http://bit.ly/Q7kS2V>

⁹ "Statement by the Myanmar National Human Rights Commission on Its Visits to the Insein Prison and Hlay-Hlaw-Inn Yebet Prison Labour Camp," 30 December 2011, available at <http://bit.ly/NoTKi7>

¹⁰ "Progress report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana," paragraph 19, 7 March 2012, available at <http://bit.ly/NoOVkA>

Moreover, when Chairman Win Mra spoke about the drafting process of the MNHRC's terms of reference, he explained that it would need to be officially approved by the authorities.¹¹ As noted by the UN Special Rapporteur on the situation of human rights in [Burma] in his latest report: "This would seem to indicate that it is not fully independent of the Government."¹²

While the future Enabling Act of the Commission represents a possibility for further engagement with Parliament, at the moment the MNHRC needs presidential approval to carry out its duties and reports to the President only. This raises serious concerns regarding the independence of the MNHRC from the President.

The Selection Process of the MNHRC Members

The appointment of the members of the MNHRC was made in the same Government notification that announced its creation with no explanation of the methods of appointment. Moreover, the only extra information provided in letter of the MNHRC were on the tenure of the commissioners (five years, which may be renewed for another term), and on their criminal and civil immunity for acts taken while executing the responsibilities and entitlements of the MNHRC.

In contravention of the Paris Principles that emphasise that NHRIs should be established by procedures that ensure pluralist representation, the current members of the MNHRC were appointed solely by the President.¹³ The report of Tomás Ojea Quintana further explains:

"While the President appointed commissioners representing different ethnic minority groups, the vast majority are retired Government civil servants. Some informed the Special Rapporteur that they had been neither consulted nor informed in advance of their appointment."¹⁴

¹¹ "We won't be influenced by the govnt," op.cit

¹² Tomás Ojea Quintana, op.cit

¹³ "We won't be influenced by the govnt," op.cit

¹⁴ Tomás Ojea Quintana, op.cit

Furthermore, Burma's 15-member body includes former military regime's ambassadors, as well as retired civil servants with little prior knowledge of human rights. There are no representatives of NGOs, trade unions or professional associations. Based on the composition of the MNHRC and the way they were appointed, there are serious concerns that the Commission might only serve as a tool for whitewashing Burma's appalling record of human rights abuses.

Win Mra, the Chairman of the MNHRC is a retired career diplomat. He served as the permanent representative of Burma to the UN from 1994 until 2001. In his capacity as the regime's former Ambassador to the UN in New York, Win Mra spent seven years routinely defending the regime against allegations of human rights violations.

For instance, in his statement to the 52nd Session of the UNGA in November 1997, he blatantly denied the occurrence of human rights violations and impunity in Burma.¹⁵

“I would like to reiterate here that, as a matter of policy, Myanmar does not condone human rights violations as it is committed to the principles enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights.”

He continued, stating that there is no impunity in Burma:

“No perpetrators of offences punishable under law enjoy impunity in Myanmar. To suggest that such privilege exists in Myanmar for government agents is outrageous and is totally unacceptable.”

Impunity for army generals and regime officials who perpetrate human rights violations is a widely-known and well documented fact. The establishment of the MNHRC generated hopes that it could become an institution that would actually hold violators responsible for their abuses. However, the Chairman's previous public denials of the very existence of impunity in the country raise serious doubts on the ability of the Commission to carry out its mandates and responsibilities independently.

¹⁵ UNGA, 52nd session, Statement by H.E. U Win Mra to the UN, on the Draft Resolution “Situation on Human Rights in Burma,” 24 November 1997, available at <http://bit.ly/PoDFW6>

Win Mra has also denied the occurrence of forced labour at the International Labour Organization annual session¹⁶ and stated that there was no religious discrimination and no racial group known as Rohingya in Burma.¹⁷

Kyaw Tint Swe, the Vice-Chairman of the MNHRC, is also a former career diplomat who succeeded Win Mra as the regime's Ambassador to the UN in New York from 2001 to 2010. While serving in this position, he claimed on several occasions that Burma was the victim of a "systematic disinformation campaign."¹⁸ In a statement to the UNGA in November 2003, he refuted the allegations of rape and other abuses against civilians carried out by the Burma Army in Shan and other states, "I again reiterate that these allegations were maliciously fabricated by two well-funded NGOs."¹⁹

According to Article 3 of the Paris Principles, the range of responsibilities that should be within the operational mandate of an institution includes, "To contribute to the reports which States are required to submit to the United Nations bodies and committees [...]" As the Chairman and Vice-Chairman of the MNHRC have in the past consistently denied the occurrence of human rights violations in Burma and continuously defended the regime's human rights violations at the UN, there are valid scepticisms over the ability of the new MNHRC to provide accurate and independent reports on the human rights situation in the country.

Other members of the MNHRC include Hla Myint, a former Burma Army Brigadier General and Nyunt Swe, a former Burma Army General and State Law and Order Restoration Council (SLORC) Deputy Foreign Minister. From 2006-2007, Nyunt Swe served as the military regime's Deputy Ambassador to the UN in Geneva where in 2007 he said: "No forced recruitment is

¹⁶ "But Government Maintains No Abuses Exist: Burma Pledges to Help on Forced Labour Issue," *The New York Times*, 4 July 2001, available at <http://nyti.ms/PoDPwD>

¹⁷ "36th session, Summary Record of the 960th Meeting: Myanmar," 06 June 2004, available at <http://bit.ly/PoDXfo>

¹⁸ UNGA, 58th session, Statement by H.E. Kyaw Tint Swe on the Draft resolution "Situation on Human Rights in Burma," 23 November 2003, available at <http://bit.ly/PoE5LW>; UNGA, 62nd session, Memorandum on the Situation of Human Rights in the Union of Myanmar prepared by H.E. Kyaw Tint Swe, 5 November 2007, available at <http://bit.ly/PoEaiX>

¹⁹ UNGA 58th Session, op.cit

carried out and all soldiers joined the armed force of their own accord” and “Myanmar is not a nation in a situation of armed conflict.”²⁰

The appointment of the two former high-ranking officials in the Burma Army to the MNHRC, both of whom have explicitly made statements to defend blatant and gross human rights violations, raise serious doubts over their willingness to investigate allegations of human rights violations committed by their peers. Such appointments do nothing more than to strengthen the perception that the Commission is merely part of the regime’s campaign to whitewash human rights abuses, leaving well-founded scepticism over the ability of the MNHRC to carry out its duties with autonomy and independence.

Resourcing of the MNHRC

In terms of financial independence, the Paris Principles require that funding be sufficient to allow the NHRI to have its own premises and staff in order to be independent of other Government bodies.

Moreover, the International Coordination Committee of NHRIs (ICC) in its General Observation²¹ notes that “the classification of an NHRI as a public body has important implications for the regulation of its accountability, funding, and reporting arrangements. In cases where the administration and expenditure of public funds by an NHRI is regulated by the Government, such regulation must not compromise the NHRI’s ability to perform its role independently and effectively. For this reason, it is important that the relationship between the Government and the NHRI be clearly defined.”

However, no information has been made available thus far on the funding of the MNHRC. It is also unknown whether the MNHRC itself will be able to determine how to direct and use its resources and what transparency and accountability mechanisms will be established.

²⁰ Statement by the Deputy Permanent Representative U Nyunt Swe at the Fourth Session of the Human Rights Council, 23 March 2007, available at <http://bit.ly/PoEnT6>

²¹ “ICC Sub-committee on Accreditation, General Observations,” June 2009, available at <http://bit.ly/Q7ns99>

The MNHRC will soon present a new Enabling Act to the Parliament. Even though the content of the Enabling Act remains unknown, it represents a chance to further advocate for the Commission's independence. However, the above analysis leads to a conclusion that the Commission is not an independent body but rather a tool created by and for the President.

III. Effectiveness

The MNHRC: An Empty Gesture?

To assess the MNHRC's effectiveness Burma Partnership looked at its mandate and the activities it carried out over the past year.

The MNHRC's Mandate to Promote and Protect Fundamental Rights

The mandate of the MNHRC is to promote and protect "the fundamental rights of citizens described in the Constitution of the Republic of the Union of Myanmar."²² The 2008 Constitution violates the fundamental rights of the people of Burma and is an instrument used by the regime to maintain power and oppress the population.²³ Therefore, the MNHRC's core mandate is problematic in itself.

However, according to the letter in Annex 1 and the MNHRC's statement dated 6 October 2011,²⁴ the Commission can accept complaint letters. This is much welcomed as it is a core function to protect people's rights, yet more information is needed to assess the actual power this represents. There are already serious concerns as to the real effectiveness of the complaint mechanism. The MNHRC requires that complainant send a copy of their national registration card. This provision excludes an important number of victims of human rights violations especially people from ethnic and religious minority groups. Moreover, by filing complaints against state officials or Burma Army soldiers stationed in their area most victims are putting themselves at risk.

²² Union Government's Notification No. 34/2011, op.cit

²³ "List of the Most Problematic Provisions in the 2008 Constitution and Burmese Laws," Burma Lawyers Council, 29 June 2012, available at <http://bit.ly/QDDHrG>

²⁴ "Accepting of Complaint," 6 October 2011, available at <http://bit.ly/QDEFo0>

Therefore, the MNHRC should accept a mechanism of civil society organisations making complaints on behalf of victims. This would enable the Commission to receive complaints from a broad range of parties and curtail further risk on the part of the victim. The MNHRC should also put in place protection mechanisms for the victims and witnesses against danger of reprisal. Otherwise this would seriously restrict its capacity to receive complaints from victims of human rights abuses.

Another serious limitation to the MNHRC's mandate to receive complaints is the statement made by Win Mra at a press conference at Thailand's Ministry of Foreign Affairs on 14 February 2012.²⁵ In his statement he explained that the MNHRC would not investigate human rights abuses from ethnic conflict area. This seriously restricts the mandate of the MNHRC and the possibility of victims of human rights abuses to seek accountability, especially since the most egregious human rights violations take place in ethnic remote and conflict areas.

Another concern is that there is no information regarding what the MNHRC can do with its findings. For instance, it is unknown whether the MNHRC has the power to recommend reparations for victims, whether it can refer cases to the relevant court or authority and whether it can monitor the implementation of its recommendations.

Finally, the letter in Annex 1 states that, "when carrying out its functions, the Myanmar National Human Rights Commission can call upon relevant persons for questioning. It can call for viewing of relevant documents with the exception of those particularly prohibited under state requirements." The concern is that Burma's authorities have been interpreting the notion of state requirements and security very broadly. Those concepts have been used to restrict the freedom of expression, assembly and association of the people of Burma for decades. Therefore, this could represent an additional serious limitation to the MNHRC's capacity to investigate complaints.

Finally, Burma's statement at the UN Human Rights Council in March 2012 mentioned that the MNHRC has so far received a total of 1,250 complaints and that findings on 283 cases were transmitted to the relevant Government ministries. There is no way to corroborate such information as these reports were not sent to either an accountability body or the public as a

²⁵ "Head of HR Commission Rules Out Conflict-Zone Inquiry," *The Irrawaddy*, 15 February 2012, available at <http://bit.ly/QDJdum>

whole. No information is available about complaints received, investigated and advice given to the Government. Moreover, some of Burma Partnership partners have filed a high number of complaints with the Commission but have received only a very limited number of answers.

It appears that serious limitations to the complaint mechanisms already exist. However, the Enabling Act could detail more precisely the MNHRC's mandate and abrogate these restrictions in order to give the Commission the necessary power to investigate cases of human rights abuses independently and effectively.

The MNHRC: Proponent of the Regime?

To analyse the effectiveness of the MNHRC it is crucial to look at the activities it has been carrying out. In the case of Burma, it indicates that the MNHRC is a very effective proponent of the regime.

The MNHRC's Activities

Since its establishment the MNHRC has released eight statements, two open letters, given several interviews and travelled overseas to visit Asian NHRIs.²⁶

In three press statements released on 10 October, 12 November and 30 December 2011 respectively, the MNHRC called on the regime to release "what is referred to as prisoners of conscience by the international community."²⁷ However, the MNHRC continues to use the regime's number of political prisoners without having carried out an independent investigation, adopting the regime's discourse as its own. Furthermore, in a statement released on 30 December 2011,²⁸ the MNHRC refuted allegations by Amnesty International that authorities mistreated the prisoners who staged a hunger strike at Insein Prison. The Commission also did not mention any of the problems of health, food, hygiene, torture and other mistreatment of prisoners despite

²⁶ A complete list of the MNHRC statements and activities is available at <http://bit.ly/NG01Eo>

²⁷ The Myanmar National Human Rights Commission submitted a request in open letter to President of the Republic of the Union of Myanmar, 10 October and 12 November 2011 available at <http://bit.ly/NFSfKx> and <http://bit.ly/NFSp40>

²⁸ "Statement by the Myanmar National Human Rights Commission on its visits to the Insein Prison and HlayHlaw-Inn Yebet Prison Labour Camp," *op.cit*

ample documentation on these issues.²⁹ The Commission did not call on the regime to take any concrete actions, but rather recommended that meditation classes be offered to prisoners.

On 27 November 2011, the MNHRC released a statement welcoming ASEAN's decision to grant Burma the Chairmanship in 2014. Again on 14 January 2012,³⁰ the Commission released a statement welcoming the President's "magnanimity" for releasing prisoners and on 2 July 2012³¹ it released another statement to welcome the signing of the plan of action for prevention against recruitment of the under-aged children for military service between Burma Government and the UN. Instead of thoroughly investigating and monitoring the human rights situation, the MNHRC's statements that publicly welcomes and endorses the Government's assertion supports the perception of the MNHRC being a body set up merely to window dress the Government's human rights record.

On 10 December 2011, in its statement for international human rights day,³² the MNHRC referred to the importance of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights but did not call on the regime to ratify these two fundamental international instruments.

In that same statement, the MNHRC further stated, "The Constitution adopted on 29 May, 2008 overwhelmingly by the people of the Republic of the Union of Myanmar also enshrines these fundamental human rights." This statement is problematic in at least two aspects: First, the 2008 Constitution is an undemocratic military-drafted document adopted by a deeply flawed referendum held days after Cyclone Nargis hit Burma, killing at least 138,000 people and leaving 2.4 million people struggling to survive. Second, as stated above the 2008 Constitution does not guarantee people's fundamental rights as it includes very broad limitations to fundamental freedoms such as of association, expression and assembly.³³

²⁹ "Extreme Measures: Torture and Ill Treatment in Burma since the 2010 Elections," Network for Human Rights Documentation – Burma, May 2012, available at <http://bit.ly/R93IRu>

³⁰ "Statement by the Myanmar National Human Rights Commission," 14 January 2012, available at <http://bit.ly/NG1qKY>

³¹ "Statement of the Myanmar National Human Rights Commission on the Plan of Action for Prevention Against Recruitment of the Under-Aged Children for Military Service," 2 July 2012, available at <http://bit.ly/NG1CtL>

³² "Statement by the Myanmar National Human Rights Commission on International Human Rights Day," 10 December 2011, available at <http://bit.ly/NFUHAL>

³³ Burma Lawyers Council, op.cit

On 13 December 2011, the Commission released a statement after four of its members visited Kachin State.³⁴ It stated, “Under coordination by the Kachin State Government, humanitarian assistance [...] were systematically distributed to the population in the camps and their basic necessities were provided for.” This directly contradicts numerous reports on the need for humanitarian assistance in Kachin State, where, at the time of writing and for many months before, Internally Displaced Persons (IDPs) are in urgent need for food, clothes and health care³⁵ while the Government still denies access to UN relief agencies.

The MNHRC returned to Kachin State in July 2012, and released a statement dated 14 August 2012,³⁶ reiterating that only the Kachin Independence Army is recruiting child soldiers. It does not mention any crime committed by the Burma Army despite it being well-known that it continues to recruit child soldiers and commit war crimes.³⁷ With this statement, the Commission, conveniently for the regime, makes ethnic armed groups appear solely responsible for the violence and once again remains silent about human rights abuses committed by the Burma Army.

Similarly in its statement following its visit to Arakan State in July 2012³⁸ the MNHRC states that “the basic needs of food, clothing, shelter and health of the victims [...] are being met” while numerous reports³⁹ alarmed the international community about the ongoing humanitarian crisis. Once again the MNHRC’s statement appears to legitimize the Government actions rather than pointing out serious human rights violations such as discrimination against Rohingya, excessive use of force by soldiers and the police, and scattered access to humanitarian help.

³⁴ “Statement by the Myanmar National Human Rights Commission,” 13 December 2011, available at <http://bit.ly/NFUPjG>

³⁵ Human Rights Watch “Ensure Aid Access to Kachin State,” 21 December 2011, available at <http://bit.ly/NFUVYT>

³⁶ “Statement of the Myanmar National Human Rights Commission on its trip to the Kachin State,” 14 August 2012, available at <http://bit.ly/PG6yND>

³⁷ « Untold Miseries : Wartime Abuses and Forced Displacement in Burma’s Kachin State,” Human Rights Watch, 20 March 2012, available at <http://bit.ly/NFZouu>

³⁸ “Statement of Myanmar National Human Rights Commission Concerning Incidents in Rakhine State in June 2012,” 11 July 2012, available at <http://bit.ly/NG45V6>

³⁹ “The Government Could Have Stopped This: Sectarian Violence and Ensuing Abuses in Burma’s Arakan State,” Human Rights Watch, 1 August 2012, available at <http://bit.ly/NG4mrh>

Win Mra, Chairman of the Commission also refused to back an investigation into alleged abuses in Arakan State on 8 August 2012, stating that:

“Truth commissions are established by new governments in countries that have transformed after violence, unrest and human rights abuses so they can be rediscovered and revealed. That is why it is a different condition here: the transition in Myanmar was peacefully attained by the election.”⁴⁰

While the MNHRC commissioners’ travels to conflict areas appear to be a positive step at first sight, the outcomes of these field missions seem to suggest that they are nothing more than a public relations exercise. The MNHRC’s statements clearly reveal that it does not have the free space to report about human rights violations committed by the regime and the Burma Army.

The MNHRC’s activities over the past year give the very strong impression that it is nothing more than an institution created to “window dress” Burma’s human rights record in the eyes of the international community and to legitimize the regime’s.

IV. Consultation and Cooperation with NGOs

The MNHRC seems keen to engage with international actors. The Asia Pacific Forum (APF) has been involved in the drafting process of the MNHRC’s Enabling Act.⁴¹ The Office of the High Commissioner for Human Rights (OHCHR) also started engaging with the Commission as well as the Swedish International Development Cooperation Agency (SIDA), the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) and the University of Lund of Sweden.⁴²

However, the engagement of the MNHRC with local stakeholders including civil society remains limited. The MNHRC claims it has been organizing monthly meetings with NGOs in Rangoon, we haven’t been able to verify this information as none of Burma Partnership’s partners based inside the country have been informed on any of these meetings. Moreover, some of the partners

⁴⁰ “Human Rights Body Cool on Truth Commission Proposal,” 8 August 2012, available at <http://bit.ly/PG8uWf>

⁴¹ “APF Discusses Myanmar NHRI’s founding legislation,” 21 May 2012, available at <http://bit.ly/MivYUJ>

⁴² “Human Rights Workshop Kicks Off,” *The New Light of Myanmar*, 16 March 2012, available at <http://bit.ly/NoKbLE>

have invited the Commission to participate in various events that they organize and Burma Partnership has been sending letters inviting the MNHRC to organize consultations on the Enabling Act, but all these requests remain unanswered. As far as Burma Partnership is aware, no consultation with civil society actors has been organized on the drafting of the MNHRC's Enabling Act.

The Commission has been very reticent about meeting with some civil society groups and very selective in its engagement with NGOs. In a meeting with the Human Rights Education Institute of Burma in July 2012, the MNHRC explained that to engage with the Commission groups had to be officially registered. This poses a serious problem in that the current 1988 Registration Law is overly restrictive and prohibits NGOs to be involved in politics and to advocate for good governance. Any association that is not registered under this law is considered unlawful, and the law provides for NGOs to pay an unrealistic amount up to 500, 000 kyat (around 550 USD) for registration fees.

The Commission's current position implies that it will most likely only engage with Government affiliated or registered groups rather than independent community and grassroots organizations. The commissioners need to understand that engaging on a regular basis with a broad range of the civil society actors can only strengthen its independence and legitimacy. Currently the MNHRC seems to be more accountable to the President than to the public or the Parliament.

V. Conclusion and Recommendations

At this point in time, there are significant reasons to doubt the independence and autonomy of the MNHRC. There are clear indications to support the perception that this body may serve to legitimize or cover up human rights violations committed by the regime rather than fulfil an NHRI's supposed mandate of protecting and promoting the rights of the people of Burma.

As the Special Rapporteur summarized in its latest report:

“Despite such developments, many questions remain about the composition, role and functioning of the commission and, to date, there are no indications that it is fully independent and compliant with the Paris Principles.”⁴³

The forthcoming Enabling Act of the MNHRC may address some of the main concerns raised in this report regarding its effectiveness and independence. For the MNHRC to be in compliance with the Paris Principles, it would require a complete reconstitution of the Commission, including by ensuring an inclusive and transparent selection process, clearly defining its relationship with the Government to guarantee independence, and strengthening its mandates and functions. Furthermore, based on the concerns over the track record of the current Commissioners, the MNHRC’s members need to be restructured to ensure the credibility and legitimacy of the Commission.

Thus, with the goal of an independent, effective, transparent and accessible human rights Commission in Burma that best serves the victims of human rights abuses, we recommend the following:

To the MNHRC, the President and the Parliament

- Ensure that the Enabling Act clearly sets out the MNHRC's role and powers in order to guarantee the institution's permanence and independence.
- Ensure that the Enabling Act fully reflects all the Paris Principles' requirements including a broad mandate based on universal human rights principles, pluralism of members, adequate financial resources and power of investigation, as well as representation of civil society.
- Ensure that the drafting process of the MNHRC's Enabling Act is transparent and participatory.

In order to guarantee transparency and meaningful participation from the public and civil society we recommend implementing the following steps to ensure that the drafting process of the

⁴³ Tomás Ojea Quintana, *op.cit*

MNHRC's Enabling Act is credible, inclusive, transparent and consistent with the Paris Principles:

- To widely publicize and disseminate the draft of the Enabling Act in Burmese and other ethnic nationalities languages, especially through the media, and to allow adequate time for meaningful public participation in the drafting process, including recommendations by the public on its content.
- To publicly identify a focal person within the Government and within the MNHRC to oversee the drafting process as well as to appoint a parliamentary committee to facilitate broad based consultation and communication with the public.
- To enable input at all stages of the drafting process, including the initial draft of the law and its subsequent discussion in the Parliament.
- To ensure pluralism through an inclusive consultation process with all relevant stakeholders, including both registered and non-registered civil society, community-based organizations inside the country and on the border, as well as grassroots people and communities throughout the country, especially those from ethnic areas, women's groups, and the media.
- To ensure that enough resources are allocated to the consultation process to enable it to be effective, inclusive and comprehensive.
- To ensure a conducive and secure atmosphere for people to take part in the consultation process, especially in ethnic areas.
- To seek technical assistance from international experts and the regional network of National Human Rights Institutions on the consultation process and the draft Enabling Act.

To the Myanmar National Human Rights Commission

- Engage on a regular basis with civil society groups including both registered and non-registered civil society, community-based organizations inside the country and on the border, as well as grassroots people and communities throughout the country, especially those from ethnic areas, women's groups and media.

To the Office of the High Commissioner for Human Rights (OHCHR), the Asia Pacific Forum (APF) and international organizations engaging with the MNHRC:

The engagement with the MNHRC must concentrate on:

- Securing a solid legal framework for the MNHRC that fully complies with the Paris Principles.
- Encouraging an inclusive consultation process with all relevant stakeholders, including both registered and non-registered civil society, community-based organizations inside the country and on the border, as well as grassroots people and communities throughout the country especially those from ethnic areas, women's groups, and the media.
- Increasing transparency of the MNHRC's activities and its functions.
- Increasing accessibility of the MNHRC to victims of human rights violations.
- Starting outreach programs about the MNHRC for victims of human rights violations to increase public awareness of Commission's existence, functions and mandate.
- Starting capacity building activities for civil society and community-based organizations, including on the Paris Principles.

Annex 1: Answer from the MNHRC to Burma Partnership regarding its mandate
(Unofficial Translation from Burmese to English by Burma Partnership)

12 January 2012,

Subject: Replying on Myanmar National Human Rights Commission's Responsibilities and Entitlements

1. The Myanmar National Human Rights Commission was established as follows under Union Government's Notification No. 34/2011 dated 5.9.2011:
 - a) U Win Mra
Ambassador (Retd) Chairman
 - b) U Kyaw Tint Swe
Ambassador (Retd) Vice-Chairman
 - c) U Tun Aung Chein
Professor (Retd), Department of History Member
 - d) U Hla Myint
Ambassador (Retd) Member
 - e) U Than Swe
Director-General (Retd), Forest Department Member
 - f) Dr Nyan Zaw
State Medical Officer (Retd) Member
 - g) Dr Daw Than Nwet
Professor (Retd), Department of Law Member
 - h) Daw Saw Khin Gyee
Professor (Retd), Department of International Relations Member
 - i) U Tin Nyo
Director-General (Retd), Basic Education Department Member

- j) U Kwa Hteeyo Member
State Law Officer (Retd)
- k) U Khin Maung Lay Member
Director (Retd), Labour Department
- l) U Lapai Zawgun Member
Consul (Retd)
- m) U Nyunt Swe Member
Deputy Director-General (Retd), Ministry of Foreign Affairs
- n) Daw San San Member
Director (Retd), Labour Department
- o) U Sit Myaing Secretary
Director-General (Retd), Social Welfare Department

2. Responsibilities and entitlements of the Myanmar National Human Rights Commission are as follows:

- a) To accept complaint letters on violation of citizens' fundamental rights stipulated in the Constitution of the Republic of the Union of Myanmar, to investigate the complaints and to forward the findings of investigation to relevant Government departments and organs so as to take necessary action;
- b) To investigate information acquired on violation of citizens' fundamental rights and to forward the findings of investigation to relevant Government departments and organs so as to take necessary action;
- c) To assess whether rights defined in international human rights conventions to which Myanmar is a party are fully enjoyed, and to advise on Myanmar's reports to be submitted to international human rights organizations;
- d) To assess whether Myanmar should join the international human rights conventions to which Myanmar is not yet a party, and to present recommendation on it;
- e) To contact and work with UN agencies and partner organizations both inside the country and abroad which are working for promotion and protection of human rights;

- f) To assist on subject matter regarding human rights capacity building programs and research programs;
- g) To initiate and assist in raising public awareness on human rights promotion and protection;
- h) To carry out tasks entrusted occasionally by the state President with regard to human rights promotion and protection.

3. The Myanmar National Human Rights Commission shall report directly to the President on its conducts and human rights developments in annual reports.

4. When carrying out its functions, the Myanmar National Human Rights Commission can call upon relevant persons for questioning. It can call for viewing of relevant documents with the exception of those particularly prohibited under state requirements.

5. No one can sue the Myanmar National Human Rights Commission, Commission members or those assigned tasks by the Commission, whether in criminal proceedings or in civil proceedings, for executing in sincerity responsibilities and entitlements ascribed in this notification.

6. The tenure of the Commission Chairperson and members shall be the same as that of the state President, and they can serve for two terms.

(Signed) (for) Chairman, (Sit Myaing, Secretary)

Annex 2: Answer from Burma Partnership to the MNHRC

Myanmar National Human Rights Commission

No. 27, Pyay Road

Hline Township, Yangon

Republic of the Union of Myanmar

Burma Partnership

P.O. Box 188

Mae Sot, Tak

63110, Thailand

15 March 2012,

- f) To assist on subject matter regarding human rights capacity building programs and research programs;
- g) To initiate and assist in raising public awareness on human rights promotion and protection;
- h) To carry out tasks entrusted occasionally by the state President with regard to human rights promotion and protection.

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Myanmar National Human Rights Commission

No. 27, Pyay Road

Hline Township, Yangon

Republic of the Union of Myanmar

Burma Partnership

P.O. Box 188

Mae Sot, Tak

63110, Thailand

15 March 2012,

Dear Chairman U Win Mra,

I would like to thank you for the Myanmar National Human Rights Commission's reply dated 12 January 2012. We appreciate your answer and your engagement with civil society groups like Burma Partnership. We hope that we can continue communicating and sharing information in the future as the Paris Principles recognise that relationships with civil society can help National Human Rights Institutions (NHRIs) to protect their independence and pluralism, and enhance their effectiveness by deepening their public legitimacy. The Paris Principles also encourage full and regular consultation at every stage from planning to implementation and evaluation, as a way to ensure that civil society organisations support the work of NHRIs.

In this regard and in order to work together towards an independent and effective Myanmar National Human Rights Commission (MNHRC) that can best serve the people of Burma, we would like to share with you our analysis and recommendations for the Commission to comply with the Paris Principles and hope you would be able to provide us with additional information.

We believe that independence is the key attribute for an NHRI's legitimacy, credibility and effectiveness. As you may know, the Paris Principles provide that a national institution should be established in the country's constitution or by a law that clearly sets out its role and powers in order to guarantee the institution's permanence and independence. However, as stated in your letter, the MNHRC was established by the Union Government's Notification No. 34/2011. Therefore, we believe that the MNHRC should point out this inadequacy and advocate the relevant authorities to adopt organic laws regarding the commission. In addition, the MNHRC should advocate for the law to include and detail, among other things, some of the following issues.

- **Appointment procedures of the MNHRC's members**

Your letter states that "the tenure of the Commission Chairperson and members shall be the same as that of the State President, and they can serve for two terms." We also take note that the MNHRC members were appointed by President U Thein Sein, but that information about the method and criteria of appointment and the dismissal process remain unknown.

The Paris Principles and other relevant documents explain that direct appointment by the executive branch of Government is undesirable and that the appointment process should be open, transparent and inclusive. Therefore, we recommend that the terms and conditions that govern appointment and dismissal of members is transparent, set out in a law and that the appointment process of the MNHRC's members involves the Parliament and representatives of civil society.

- **Lines of accountability and operational independence**

We would like to express deep concerns about the fact that, according to your letter, the MNHRC “shall report directly to the President on its conducts.” According to the Paris Principles, the MNHRC should not answer to the Government but to an authority other than the executive, most usually the legislature.

You also mention that the MNHRC will “carry out tasks entrusted by the State President”. According to the Paris Principles, it should be clearly stated that members and staff of NHRIs should not receive instructions or be required to seek authorization from Government ministers or other public officials. Moreover, it has been reported that the Commission's draft rules of procedure were being examined by the judiciary and were awaiting approval by the council of ministers. All these issues seem to indicate that the MNHRC is not fully independent of the Government. Therefore we would appreciate if you could clarify these issues. We recommend that the MNHRC advocate the relevant authorities in order to make the necessary changes and guarantee its independence.

- **Mandate and powers of the MNHRC**

We take due note of the responsibilities and entitlements of the MNHRC that are listed in your letter. However, as mentioned above, we would recommend that those be set out in a law. Moreover, the various functions of NHRIs that are described in the Paris Principles as “responsibilities” suggest that there are things that institutions are obliged to do. Therefore we would further recommend, to ensure that the MNHRC enjoys a broad mandate, that it includes the following competences regarding civil and political rights, but also economic, social, and cultural rights.

Receiving complaints from individuals or groups

We welcome the statement made by the MNHRC dated 6 October 2011 on its ability to receive complaints from individuals. In order for us to better understand the procedure we would appreciate if you could provide us with detailed information on the issues listed below.

Can civil society organisations make complaints on behalf of victims? We believe that the MNHRC should be able to receive complaints from a broad range of parties. It is important to recognize that some people may find it difficult to lodge complaints with an official body, therefore it appears that civil society organisations should be permitted to make complaints on their behalf.

Has the MNHRC put in place protection mechanisms for the victims and witnesses? Victims and witnesses should be protected if the circumstances indicate that there is a danger of reprisal. Therefore, we believe that the MNHRC should develop structures and procedures that support confidentiality and should also be able to recommend suspension from duty of officials under investigation for human rights violations.

Does the MNHC have the power to recommend reparation for victims? We believe that the right to remedy following a violation of rights is in itself a fundamental right.

What is the time jurisdiction of the MNHRC? That is to say, can the MNHRC investigate past human rights violations?

Finally, Burma's statement at the UN Human Rights Council mentioned that the MNHRC has so far received a total of 1,250 complaints and that findings on 283 cases were transmitted to the relevant Government ministries. We would thank you for providing us with this information. However, we would like to remind the MNHRC that these reports should be sent not only to an accountability body but to the public as a whole and should include complaints received and investigated, monitoring and advice given to the Government.

Commenting on existing and draft laws

The Paris Principles provide that NHRIs should have the power to monitor laws on their own initiative. That is to say, it should review any law that is relevant to human rights and recommend amendments where appropriate. In Burma's actual context, it is of particular importance that the MNHRC ensure that old or existing laws are consistent with international standards. New draft laws could be in compliance with international human rights standards, however they would remain ineffective as long as old or existing oppressive laws remain on the books.

Therefore, we recommend that the MNHRC advocates for its list of responsibilities and entitlements to include the mandate to comment on existing and draft laws and that the MNHRC starts with the review of the laws previously identified as not in full compliance with international human rights standards, such as the State Protection Act (1975), the Unlawful Association Act (1908), sections 143, 145, 152, 505, 505 (b), and 295 (A) of the penal code, the Television and Video Law (1985) the Motion Picture Law (1996), the Computer Science and Development Law (1996), and the Printers and Publishers Registration Act (1962) and accordingly recommend appropriate amendments.

Monitor domestic human rights situation

The Paris Principles state that monitoring the national human rights situation is an essential function of NHRIs. In this regard we welcome the fact that the MNHRC has the power to gather information and evidence in that purpose. We also welcome the visit by the MNHRC to Kachin State and to Insein and Hlay-Hlaw-Inn Yebet Prison. However, we are concerned by reports stating that presidential authorization is required for prison visits and that interviews with prisoners were conducted in the presence of prison officials. Therefore, we recommend that the MNHRC advocates to ensure it has the authority to make regular visits to all places of detention without prior authorization and in absence of prison authorities.

We also would like to have further information about whether the MNHRC has an all-encompassing jurisdiction. That is to say, can the MNHRC monitor the performance of

private and public bodies including relevant authorities, such as the police and the Burma Army?

Finally, we would like to encourage the MNHRC to take a more proactive role in the investigation of violations in conflict areas, contrary to the statement made at a press conference at Thailand's Ministry of Foreign Affairs on 14 February 2011.

Monitoring and advising on compliance with international standards and co-operating with regional international bodies

We welcome that according to your letter, the MNHRC can “assess whether rights defined in international human rights conventions to which Myanmar is a party are fully enjoyed [...]” and make recommendations on Burma joining the international human rights conventions to which it is not a party yet. This is a core responsibility for an NHRI and therefore we would like to enquire about what actions the MNHRC has taken in this regard. We also take due note that the MNHRC is engaging with United Nations agencies and other partner organizations. We do encourage you to further co-operate with these agencies and in particular with the Office of the High Commissioner for Human Rights and with international mechanisms, including treaty bodies and the special procedures of the UN Human Rights Council.

However, we are concerned by the mention in your letter that the MNHRC has the responsibility to “advise on Myanmar’s reports to be submitted to international human rights organisations.” We would like to emphasize that, according to the Paris Principles, NHRIs should not submit reports to international bodies on behalf of a Government but rather on their own behalf. Therefore we would welcome a clarification from you on this issue.

Educating and informing the public, authorities and relevant agencies in the field of human rights

We are glad to read that the MNHRC has among its responsibilities to raise awareness on human rights and assist in capacity building programs. Therefore, we would like to know whether you could share with us what actions the MNHRC has taken to date in this regard.

- **Funding**

The Paris Principles provide that NHRIs' funds should be efficient and granted through a mechanism that is not under direct Government control, such as a vote in Parliament. We know the Parliament rejected the MNHRC's budget bill on the basis that it was not formed as a national level institution since it was established by a Union Government Notification. Therefore, we would like to know how the MNHRC will now proceed. We would also like for the MNHRC to share information about its available funds and the number of its staff with the public, including Burma Partnership.

We hope that you will find these recommendations useful and will take them into consideration. We remain at your disposal should you need further information.

Thank you for your consideration of the issues and questions raised in this letter and we look forward to hearing from you again soon.

Sincerely,

Khin Ohmar

Coordinator of Burma Partnership

Hong Kong: An Overview of Human Rights Situations under the New Era of Ruling

Hong Kong Human Rights Monitor¹

I. Highlights of the Year 2011 and First Quarter of 2012

New Chief Executive with poor human rights record obtains 689 votes in small circle election

The fourth Hong Kong Chief Executive (CE) election was held on 25 March 2012. It was a small circle election with approximately 1200 Election Committee members out of a population of 7,000,000 Hong Kong people.² There were three candidates: former Chief Secretary for Administration Henry Tang, former convener of Executive Council CY Leung and pan-democrat lawmaker Albert Ho. The first two candidates were perceived as pro-Beijing candidates. News commentators described Henry Tang and CY Leung as representing different political interest groups within the pro-establishment camps, with Henry Tang representing the heads of local property developers and CY Leung standing for second-rated property developers³ and local veteran supporters of the regime in China.⁴

It was believed that Henry Tang would become the next Chief Executive until scandals, smearing materials and dirty tactics such as illegal structures at his apartment⁵ and extramarital affairs surfaced. CY Leung's integrity was also attacked. Questions were raised regarding his conflicts of interest in the West Kowloon project,⁶ accusations of "black gold politics" were made,⁷ and Leung was suspected of having been an underground China

¹ Prepared by Mr. YK Chong (First Deputy Chairperson) and Ms. Debbie Tsui (Education and project officer), Hong Kong Human Rights Monitor

² Only Election Committee members can cast votes in Chief Executive Election. The members were from different sub-sectors, and only the voters from current functional constituencies can elect their representatives. For details please refer to the website of Election Committee sub-sector elections at <http://www.eac.gov.hk/en/ecse/ecse.htm>

³ Joseph Lian's commentary on the CE Election and press taking sides (Chinese title: 唐梁爭霸搞合縱連橫 媒體圍觀竟吶喊抬轎). Hong Kong Economic Journal. 1 February 2012.

⁴ Henry Tang received 379 nominations including those from major local property developers and business. CY Leung, who was regarded as having support from local veteran supporters of the regime in China and second rated property developers, received 293 nominations.

⁵ The South China Morning Post Hong Kong, "Tang declares basement off limits". 18 February 2012.

⁶ The South China Morning Post Hong Kong, "People's champion or bogeyman?". 26 March 2012

⁷ The South China Morning Post Hong Kong, "Who asked Mr. Kwok to dinner?". 11 March 2012. The South China Morning Post Hong Kong, "People's champion or bogeyman?". 26 March 2012

Communist Party member.⁸ Henry Tang called attention to CY Leung's alarming human rights record, drawing particular attention to Leung's suggestion that the government use anti-riot police and tear gas to suppress protestors in the anti-Article 23 legislation demonstrations in July 2003 during the closed door Executive Council meeting.⁹ CY Leung denied the accusations. No relevant supporting documents have been released. Besides this, CY Leung has been criticized for "losing his conscience" by changing his attitude toward the June Fourth massacre for political gain. In 1989, he issued statement condemning the Tiananmen Massacre. But he later changed his stance and even claimed that former Chinese leader Deng Xiao-ping, who was believed to have ordered the Tiananmen Massacre, should have been the first Chinese to receive the Nobel Peace Prize in 2010.¹⁰

A 3.23 Mock Chief Executive Election was held two days before the CE election by the Public Opinion Programme of the University of Hong Kong led by Dr. Robert Chung. The mock election was mainly intended to be a show of public opinion on the internet.¹¹ Hackers attacked and disabled the website of the 3.23 civil referendum. At least 220,000 people, mostly turned up at polling stations to cast their votes on makeshift ballot paper instead of voting in the tampered website.¹² More than 121,000 people (54.6%) cast a blank vote to express their demand for genuine universal suffrage and anger toward the small circle election and unsatisfactory CE candidates.¹³

With the support of the Liaison Office of the Central Government in Hong Kong (hereafter "China Liaison Office")¹⁴ and local veteran supporters of the Chinese regime, CY Leung eventually won the election with 689 votes (60% of the votes cast), a percentage of votes much lower than that of the former Chief Executives Tung Chee-hwa and Donald Tsang (both 80% or over 80%¹⁵) in the small circle election which could facilitate manipulation. CY

⁸ Martin Lee from the pro-democrat camp argued one country two systems would be destroyed as new Chief Executive CY Leung was believed to be an underground communist member as he was appointed as the Secretary General of the Basic Law Consultative Committee in 1985. The South China Morning Post Hong Kong, "People's champion or boogeyman?" 26 March 2012. Florence Leung also wrote in her book that CY Leung was underground communist member.

⁹ The South China Morning Post "Tang ramps up the accusations". 20 March 2012.

¹⁰ The South China Morning Post, "Deng should have been first Chinese to get Nobel Peace Prize". 13 November 2010.

¹¹ Dr. Robert Chung had been criticized by about 87 articles by the Chinese Liaison Official and pro-Beijing press since December 2011 as he released polls for Hong Kong people's identity. The South China Morning Post Hong Kong, "Hard lessons in academic freedom". 22 March 2012.

¹² The South China Morning Post Hong Kong, "Hackers fail to deter voters in mock CE poll" 24 March 2012.

¹³ The civil society called for Blank vote campaigns. Results of 3.23 Civil Referendum: Blank Vote (54.6%); Henry Tang (16.3%); CY Leung (17.8%), Albert Ho (11.4%). <http://hkupop.hku.hk/english/release/release915.html> The South China Morning Post Hong Kong, "Majority cast blank votes in people's poll for chief". 25 March 2012. Details of 3.23 Civil referendum <https://popvote.hk/index.php>

¹⁴ The South China Morning Post Hong Kong, "Thousands to rally on Sunday against Leung", 29 March 2012.

¹⁵ Mingpao Hong Kong, "CY Leung won the CE election with low votes and low public support", 26 March 2012(Chinese only)

Leung was described as having “low votes, low support and low cohesive force.”¹⁶ At the same time, approximately 2,000 people protested outside the polling station against the small circle election and China Liaison Office’s interference in Hong Kong affairs. They also raised concern about the four main political tasks in Hong Kong allegedly imposed on the new CE (the enactment of national security legislation, national education, constitutional reforms and emasculating Radio Television Hong Kong)¹⁷ and demanded CY Leung to resign.

CY Leung was found to have visited China Liaison Office for an hour before meeting the Legislative Council (LegCo) chairperson and the Chief Justice on the day following the CE Election.¹⁸ Civil society criticized CY Leung for thanking China Liaison Office’s intervention into the CE election in support of him and, in doing so, harming One Country Two Systems.

A week after the CE Election, about 150,000 people protested outside the China Liaison Office, opposing its interference in the CE Election and demanding CY Leung to resign.¹⁹ 180,000 people then attended the June 4th candle-lit vigil for vindication of the Tiananmen crackdown, condemning CY Leung’s changing stance on the crackdown and expressing concern about his possible imposition of restrictions on the freedom of expression in Hong Kong. 250,000 people demonstrated outside the China Liaison Office on 10 June, demanding an investigation into the suspicious death of Chinese labor activist Li Wangyang and urging CY Leung to express his stance on Li’s death. 400,000 people joined the demonstration on 1 July, which called for CY Leung to resign due to his integrity problem relating to illegal structures incidents and other reasons.²⁰

During the election, press freedom was infringed in a number of incidents. There was a suspected case of a senior official in the China Liaison Office ringing the boss of a newspaper and criticizing it for not supporting CY Leung.²¹ There was also a newspaper altering the

¹⁶ Radio Television Hong Kong, “Scholar described CY Leung was Chief executive with low votes, low public support and low coherence force”. 25 March 2012. The South China Morning Post Hong Kong, “Baptism of fire for outsider” 26 March 2012. Beijing has called for reconciliation among Tang’s camp and Leung’s Camp after CE Election with dirty tactics. For instance, President Hu urged unity in Hong Kong in April 2012. Wang Guangya, director of the Hong Kong and Macau Affairs Office under the State Council, urged for “great reconciliation and unity” in April 2012. The South China Morning Post, “President reiterates call for HK unity” 12 April 2012.

¹⁷ The South China Morning Post, Hong Kong, “Leung looks to current team for his top aides” 26 March 2012.

¹⁸ The South China Morning Post, Hong Kong, “C.Y. Leung visits liaison office after victory”. 27 March 2012.

¹⁹ The South China Morning Post Hong Kong, “Thousands to rally on Sunday against Leung”, 29 March 2012.

²⁰ The South China Morning Post Hong Kong, “Papers cast doubt on C.Y. explanation”. 26 June 2012 “C.Y. offers HK\$7 b of sweeteners” 17 July 2012. Not only CY Leung, his officials were also in illegal structure scandals. Secretary for development Mak Chai-kwong resigned after 12 days in the job and was arrested by the Independent Commission against Corruption (ICAC). The South China Morning Post Hong Kong, “Minister arrested by ICAC resigns”. 13 July 2012.

²¹ The South China Morning Post Hong Kong, “Anger at ‘Beijing media meddling’”, 23 March 2012.

contents of an article, and thereby materially changing its stance in a regular column to one that was pro-CY Leung.²² Members of the press took the side of particular candidates in their reporting.

CY Leung and his office were also criticized for infringing press freedom after he was elected. For instance, the Apple Daily published three reports on the personnel of the new government including recommendations on the appointment of Ronnie Chan, who was well known as CY Leung's supporter, as the chairperson of the Council of the University of Hong Kong. The Chief Executive-elect's office condemned the reports for inaccurate reporting and "unsettling the people concerned."²³ When journalists questioned Fanny Law, the head of the office and former Permanent Secretary for Education and Manpower who resigned from her duty as civil servant on the same day of release of the investigation report on academic freedom by Independent Inquiry Commission in 2007,²⁴ she replied that "it is because the Apple Daily obviously accused CY Leung."²⁵ Another example is that the CE-elect's office was criticized for "teaching the journalists how to ask questions." The office did not reply to the questions the press raised. Instead it listed questions the press had not raised and said that if the press had asked those proposed list of questions, it would answer "no such thing,"²⁶ which is somehow providing modal questions and answers for journalists.

CY Leung was also criticized as behaving in an autocratic manner, avoiding formal procedures when he was Chief Executive-elect before 1 July 2012. When four lawmakers filibustered the LegCo meetings in order to oppose the infringement of election rights by the bill on the LegCo's vacancy filling mechanism,²⁷ CY Leung stated that the filibustering was negatively affecting housing policies and government service and wasting time. He argued that "LegCo should not play politics"²⁸ and stated that the calls by LegCo panels for meetings to discuss the government restructuring proposal might also be another form of filibustering as he wanted his government restructuring proposal to be formally passed by the LegCo before 1 July 2012. He was criticized for intervening and ordering the LegCo to

²² Hong Kong Journalists Association's Press Release "Sing Pao Destroying Press Freedom" 23 March 2012. <http://www.hkja.org.hk/site/portal/Site.aspx?id=A1-991&lang=en-US>

²³ Press statement: "The Chief Executive-elect's Office (CEO) clarifies newspaper report" 22 May 2012. <http://www.info.gov.hk/gia/general/201205/22/P201205220477.htm>

²⁴ Commission of Inquiry on Allegations relating to the Hong Kong Institute of Education, "Report of the Commission of Inquiry on Allegations relating to The Hong Kong Institute of Education". 20 June 2007. <http://www.commissionofinquiry.gov.hk/eng/report/report.htm>

²⁵ Mingpao Hong Kong, "Fanny Law: Apple Daily obviously accused CY Leung and thus the CE-elect's office published statement." 24 May 2012.

²⁶ Apple Daily, Hong Kong, "Fanny Law taught the Apple Daily how to report." 25 May 2012.

²⁷ Public consultation on Arrangements for Filling Vacancies in the Legislative Council. September 2011. <http://www.cmab.gov.hk/en/issues/vacancies.htm> LegCo Bills Committee on Legislative Council (Amendment) Bill 2012, <http://www.cmab.gov.hk/en/issues/vacancies.htm>

²⁸ Apple Daily Hong Kong, "Anti-filibuster. CY Leung opined that LegCo should not play politics(立法會不應搞政治)" 15 May 2012. (Chinese only)

cooperate with his Administration and for ignoring the LegCo's roles of monitoring and consultation.²⁹

The new era of ruling was started by the new Chief Executive, who has a poor human rights record, an authoritarian style, is a suspected underground Chinese communist party member, and has tended to cover up his problems by giving out 'sweets' (small favours in the form of distributions of cash to the public and minor improvements to livelihoods) by spending Hong Kong's huge financial reserve.³⁰ In this environment, it will be a tough battle for civil society to unify and strongly uphold the values of freedom, human rights, the rule of law and democracy.

Hardline approach to assemblies and protests, particularly during Chinese leaders' visit to Hong Kong

The Hong Kong Government has been taking a hardline approach and threatens freedom of assembly through prosecutions motivated by political reasons and abuses of law and procedures. For instance, 440 protesters were arrested in 2011 (some after being abused with pepper spray), which is about eight times more than in 2010 because of large scale protests of the 6 March anti-budget protests, 4 June vigil protest and 1 July demonstration.³¹ Civil society has been questioning law enforcement, particularly the Hong Kong Police, as state apparatus for 'social stability' urged by the Chinese Central government.

For instance, several hundred protestors blocked the road in Central at night after the mass demonstration on 1 July 2011. The police arrested 231 protestors including an intern journalist on duty at the demonstrations impartially in the cordon.³² Police also attempted to arrest and remove an observer from the Hong Kong Human Rights Monitor in the cordon who had been monitoring possible human rights violations for almost 15 years. Civil society criticized the police's failure to recognize and respect the impartial role of human rights observers and journalists and its failure to comply with human rights norms and practices.³³ After a meeting between the two, the police sent a letter to the Monitor and stated that they "welcome independent and well balanced monitoring and will endeavor to facilitate the work

²⁹ The Standard, Hong Kong, "Time for new filibuster row as Leung 'turns back clock' ".24 May 2012.

³⁰ The South China Morning Post Hong Kong, "C.Y. offers HK\$7 b of sweeteners"17 July 2012

³¹ The Standard, "Top cop denies bid to muzzle protests" 8 January 2012. "Abuse of police powers claimed in protest"14 May 2012

³² South China Morning Post, HK, "Exco chief urges curbs on rowdy rallies". 3 July 2012

³³ Joint statement by Amnesty International, Asian Human Rights Commission & International Federation of Journalists, "HKSAR should protect and facilitate, not harass and obstruct, human rights observers". 12 July 2011. Human Rights Watch's press release: "HK Government should investigate police actions at July 1 rally". 11 July 2011. Videos: "Police attempt to arrest Monitor's Director Law Yuk Kai who's monitoring the protest at 1st July" <http://www.youtube.com/watch?v=nCej-pdSsM4> "Law Yuk Kai demand explanation from police officer & respond to press". <http://www.youtube.com/watch?v=V-NdYuU0A4Q>

of the press and unbiased observers” and that “these principles will be included in procedures” dated on 9 August 2011, a record of which was promised during the meeting.

When Chinese officials visited Hong Kong in August 2011 and June 2012, the police security arrangements were the most ‘mainlandized’. The police took a heavy-handed approach, attempting to hide protestors from the officials’ sight and hindering and interfering with the press. As a result, freedom of expression and press freedom were violated.

China Vice-premier Li Ke-qiang officially visited Hong Kong in August 2011. He visited the University of Hong Kong on 18 August to officiate its centenary ceremony. The university campus was ‘taken over’ by the police: only alumni, staff and students could enter the campus with identification cards. Students and alumni protesting on the school campus were kept far away from the ceremony hall. Three of the protesting students, who had attempted to walk closer to the ceremony hall, were blocked by the police and pushed into backstairs and prohibited from coming out for about an hour. In addition, when Vice-premier Li visited a residential estate in Lam Tin, a male resident leaving home in a June Fourth protest T-shirt was taken away when he stepped out of the elevator.

Police Chief Andy Tsang claimed the students and the resident were in the core security zone. The Bar Association and civil society questioned the legal basis of the core security zone and demanded a public explanation.³⁴

Moreover, there were lots of restrictions on journalists. These included full searches of the journalists’ wallets, the setting up of designated press areas in far-away locations, and the practice of feeding the press with official stories ‘covered by’ officials from Government Information Services.

When a Now TV journalist filmed the scene of removal of the June Fourth ‘T-shirt man’, who was a male resident leaving his home. When he stepped out of the elevator in Lam Tin, two policemen in blue vests and black clothes blocked the camera for a minute but refused to tell the reasons and their identities. During a LegCo hearing that raised criticisms of the event, Andy Tsang responded that “the officer who allegedly blocked a Now TV camera had reacted out of basic instinct when he felt a black shadow approaching.”³⁵

In January 2012, Reporters without Borders released the World Press Freedom Index

³⁴ South China Morning Post, “Police may face legal test over Li Keqiang visit” 26 August 2011.

³⁵ The South China Morning Post, “Row over campus incident deepens” 30 August 2011. “Comments put police chief under fresh pressure” 2 September 2011. The blocking of the filming is now widely and satirically known as the “black shadow” incident.

2011-2012. Hong Kong's ranking fell sharply from 34 to 54 due to the sharp deterioration in press freedom: "arrests, assaults and harassment worsened working conditions for journalists to an extent not seen previously and a sign of a worry change in government policy."³⁶ The Monitor opined that it was because of the policing handling during Vice Premier Li's visit in August 2011, the arrests of journalists on 1 July and in August 2011³⁷ and delay or limited information released to press on breaking news after the digitalization of police and fire service.

The University of Hong Kong published on 3 February 2012 its report of the review panel on the centenary ceremony. The report concluded that the police had used unnecessary force to push the students into backstairs without reasonable justification; however, it had not falsely imprisoned the students in backstairs.³⁸

The police also released on 7 February 2012 their review report. While stating that there had been communication problems, it did not mention controversial issues like the "black shadow incident" and "8.18 incident."³⁹

Independent Police Complaints Council (IPCC) released its interim report on complaint cases arising from the visit by the Vice Premier Li Keqiang in May 2012. It endorsed the findings in nine cases by Complaints against Police Officer including the one on "black shadow incident", which was found to be "substantiated."⁴⁰ The final report is not yet ready.

China President Hu Qintao visited Hong Kong in late June and early July 2012 for the celebration of the 15th anniversary of the handover from the United Kingdom. When President Hu visited Kai Tak Cruise Terminal Pier construction site on 30 June, the Apple Daily journalist Rex Hon, standing in the designated press zone, asked if President Hu had heard about the Hong Kong people's hope to vindicate 4 June Tiananmen crackdown. He was then surrounded by police officers and briefly detained. The police told him his voice was "too loud" and disrupted public order. But other journalists who shouted out questions were

³⁶ Reporters without Borders, "Press Freedom Index 2011-2012". January 2012. <http://en.rsf.org/press-freedom-index-2011-2012,1043.html>

³⁷ Three reporters were arrested for attempted burglary because they went into the Chief Executive's office within the new administration complex after they interviewed the Legislative Council in the new complex. They had registered at the reception office in the new complex and had passes. They were released without being charged. It sparked the worries that the police interfered with press freedom and treated the reporters as enemy. The South China Morning Post, Hong Kong, "Protestors kept out of new government offices" 12 August 2011.

³⁸ "Report of the review panel on the 8.18 centenary ceremony held on 18 August 2011". 3 February 2012. <http://www.gs.hku.hk/rpanel/Report.pdf>

³⁹ "Police Review of Policing arrangements during visits of political dignitaries to Hong Kong". 7 February 2012. <http://www.legco.gov.hk/yr11-12/english/panels/se/papers/se0207cb2-921-7-e.pdf>

⁴⁰ IPCC "Report (Interim) on Complaint Cases Arising from the Visit by the Vice Premier Mr. LI Keqiang" 3 May 2012. http://www.ipcc.gov.hk/en/reports_other.html

not removed.⁴¹ Civil society criticized the police for political censorship and deprivation of press freedom. It indicated the increased fragility of freedom in Hong Kong in recent years.⁴²

Non-governmental organizations (NGOs) and some of the political parties held a demonstration on 30 June to urge China's president to investigate the suspicious death of Li Wangyang, a Chinese labor activist who participated in the Tiananmen Square protests and was kept in jail for approximately 22 years.

Despite the fact that the Appeal Board on Public Meetings and Processions ruled that protesters could take up 40 meters of the pedestrian path opposite the hotel in which President Hu stayed, the police subsequently claimed that the ruling would seriously affect their security plan and they would therefore take corresponding measures to minimize the risk created.⁴³ Totally unexpected by the protesters and probably the Appeal Board, the police placed lots of two-meter tall two-tone water barriers at the perimeter to engulf and seal off the protest area so that protestors, their placards and banners inside were basically invisible to President Hu or anyone outside. Protesters could have a look outside through the narrow gaps of the water barrier. Of course, they could not see anything near the main entrance to the Convention Centre or the hotel, including the route of the President's convoy of vehicles. Such a measure almost totally defeats the intention by the Appeal Board to allow the demonstration to take place nearer to the Convention Centre and the hotel. When the protestors attempted to climb and confront the heavy barriers, the police fired pepper spray, including newly introduced more powerful ones from bottles the size of fire extinguishers.⁴⁴ The police explained they had acted in this manner in order to protect public safety.⁴⁵ Civil society criticized the police for hiding their protests behind water barriers and for the disproportionate force used.

National education made compulsory for schools

Echoing President Hu's urge in 2007 for national education, the work of National Education curriculum was accelerated. It was allegedly reported in the press that the implementation of national education was one of the four main political tasks for the new CE CY Leung, who denied the imposition of four such tasks on him by Beijing.

⁴¹ Radio Television Hong Kong (RTHK) "Police remove reporter questioning Hu" 30 June 2012. Video Clipping, "Reporter Detain for question of June 4th in Hong Kong". Al Jazeera's Rob McBride reports from Hong Kong.30 June 2012.

⁴² The Guardian, UK, "In praise of Rex Hon Yiu-ting" 2 July 2012

⁴³ Police's response: Ruling by the Appeal Board on Public Meetings and Processions on 30 June 2012. (Chinese only) <http://www.info.gov.hk/gia/general/201206/30/P201206300469.htm>

⁴⁴ The Standard, Hong Kong, "Police under cloud of pepper". 9 July 2012.

⁴⁵ Radio Television Hong Kong (RTHK), "Police defend using new pepper spray"4 July 2012.

The draft moral and national education curriculum released in May 2011 was widely criticized as being tantamount to brainwashing.⁴⁶ The amended curriculum was released in May 2012. The new curriculum would be introduced in primary schools in 2012 and secondary schools in 2013 with a three-year initiation period.

Despite adding concepts including human rights, democracy, freedom, the rule of law, universal values and global citizens, and having a chapter stating that teachers should discuss controversial issues with students and listing United Nations human rights documents as reference materials, the amended curriculum did not alter its nature of nurturing abjectly obedient nations instead of producing global citizens.

For instance, the curriculum emphasized responsibilities but not rights, particularly in junior grades. It encouraged students to follow the government in order to make its work smooth. It also required the teachers to remain neutral in controversial issues but never in other issues, which was a way to deny the value judgement of the teachers and made it impossible for them to teach by example. It did not mention any politically-sensitive issues but just claimed that controversial issues were allowed to be discussed in classroom. Just like the first draft, it was action-less and did not deal with basic concepts like social contract, nation, ruling party and citizen. The precondition of national study was to identify with national identity but not allow for opposition and independent thinking.

Assessment is a key to implementing national education. To assess the degree of patriotism, students may have peer review among themselves, which may lead to accusations among individuals as in the Chinese Cultural Revolution. Teachers and parents may need to assess the degree of national identity recognition of the students. Schools may need to self evaluate the effectiveness of its implementation of national education. For example, some schools used the Assessment Program for Effective and Social Outcomes produced by Education Bureau to evaluate the effectiveness of its implementation of national education. However, in quoting from the questionnaire of the International Association for the Evaluation of Educational Achievement (IEA) the Education Bureau only included questions on national identity recognition and not those on democracy, human rights and values of citizens.⁴⁷

The teaching manual ‘China model’ produced by the publically-funded National Education Services Centre and Advanced Institute for Contemporary China Studies generated a lot of

⁴⁶ The draft curriculum boosted nationalism by providing the students with incomprehensive picture of China. It emphasized the good sides but hid the dark sides. For details please refer to ANNI Report 2011.

⁴⁷ Mingpao Hong Kong, “Primacy schools which fail in assessment of national education intend to beef up its students”, “Human rights and democracy omitted. Scholar criticized the questionnaire by the Education Bureau does not show assessment on critical thinking”. 19 July 2012. (in Chinese)

criticism in July 2012; many stated that it constituted brain-washing political propaganda by the Chinese Communist Party. The manual lacked multiple perspectives and critical thinking. For instance, it described the Chinese Communist Party Government as “progress, selflessness and solidarity” while criticizing the American democratic system as one of “bitter party struggles victimizing the people.”⁴⁸ It mentioned the China model and universal values but did not explain universal values including universal human rights instruments and stated that “The West may define so-called democracy and freedom as universal values.” The curriculum was therefore more like a mixture of relativism and the so-called “Asian values.”

Civil society criticized the manual sponsored by Education Bureau and stated that it was in line with its official’s speech that “Universal value is Western value and is a way to pressurize China” made in May 2011.⁴⁹ In addition, a news report said that some of the national education materials were written by Beijing Normal University,⁵⁰ and that the government would implement national education through biased teaching materials, tailor-made assessments for schools, teachers, parents and among students, extra funds, school visits and sponsored China study tours, etc., in the presence of amended the curriculum. Even if it fails to brainwash the students – we are living in a modern society with the free flow of information – the curriculum would create an atmosphere that discourages different opinions, critical thinking, freedom of expression and thinking. It may become “education” encouraging students to keep silent, or to become dishonest and even speculative.

Civil society has for a long time criticized the Hong Kong government for persistently neglecting and undermining human rights education. The introduction of national education is seen as a major setback in education as it displaces civic education which concerns universal human rights values.

The imposition of such a curriculum on all children irrespective of race and nationality has already alarmed the ethnic minority community. The curriculum may also harm the international and regional relations of Hong Kong if it boosts nationalism without critical thinking, comprehensive picture of China and universal human rights values.

Development and obstacles in the efforts to establish an NHRI

Government’s unwillingness to set up an NHRI and enhance the power of human rights

⁴⁸ Mingpao Hong Kong, “Political Brainwashing Should Not Receive Government Subsidy” (in Chinese). 11 July 2012

⁴⁹ Mingpao Hong Kong, “Liberal Studies teachers criticized the new national education curriculum consultation was fake.” (in Chinese) 26 May 2011.

⁵⁰ Sing Tao Daily Hong Kong, “Beijing Normal University helps in writing the teaching materials for national education” (in Chinese) 13 April 2012.

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,⁵¹ the government reiterated it had no intention of setting up such an institution, claiming that the existing human rights protection mechanisms were operating well and setting up such an institution would supersede or duplicate the existing human rights protection mechanisms.⁵² However, it has not provided any substantial studies and research on the effectiveness or institutional weakness of the current mechanisms.

The reason the Government rejected the establishment of an NHRI and enhancement of the power of human rights protection bodies is probably for ease of governance and impunity for problematic government policies. It does not want to be monitored by a human rights commission with a wide mandate, which may criticize and censure the Government's policies and measures for human rights violations. An NHRI may therefore be regarded as possibly contributing to weakening the governing authority and policy choices.

All this shows that the government denies its obligations under international human rights conventions 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.

Restraints on the partly-elected Legislative Council (LegCo)

There is a strict limit for private member bills introduced by LegCo Members according to the Basic Law, the mini-constitution of Hong Kong. LegCo Members may introduce private bills only if the bills do not relate to public expenditure or political structure or the operation of the government.⁵³ The restraints mentioned cover most of the scope of the legislature.

For bills relating to government policies, the Chief Executive's written consent is required.⁵⁴ Given that the Government rejects the setting up of a human rights commission, if LegCo Members plan to introduce private bills to set up the human rights commission, it may not be approved by the Chief Executive and may eventually fail to be introduced in LegCo.

⁵¹ 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 *ANNI Report 2008*, at 50-56.

⁵² 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.

⁵³ Article 74, Basic Law.

⁵⁴ Article 74, Basic Law.

Even if a private member 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.⁵⁵ Currently the functional constituencies elections violate the principle of universality and equality. The functional constituencies too often oppose motions favoring public interests when compared to industry and government ones. It is very difficult for a private bill on setting up a human rights commission to be passed.

Weak cooperation among civil society

Apart from the United Nations' recommendations and the Government's unwillingness, cooperation among NGOs in Hong Kong to call for the establishment of a human rights commission is not strong. NGOs focus on different issues; while the human rights commission is one of these issues, it is not the main issue. The demand for the establishment of a human rights commission in Hong Kong is not unified, focused and given high priority. Hence, besides protracted efforts in education and promotion at mostly quite moments, it is important to seize opportunities like scandals or other failures or important developments in the current mechanisms to motivate and build consensus among NGOs with a view to better promoting public awareness through education and campaigning for a human rights commission for Hong Kong. Such local efforts should be strengthened by regional and international initiatives calling for a human rights commission for Hong Kong.

Prologue to Analysis

Although there is no human rights commission in Hong Kong, there is a weak and incomprehensive human rights protection mechanism, covering different but limited discrete areas of rights, with different human rights protection bodies such as the Equal Opportunities Commission (EOC), the Office of the Privacy Commissioner for Personal Data (PCPD), the Office of the Ombudsman, 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).

⁵⁵ Part 2, Annex 2: Basic Law.

For an analysis of other human rights protection bodies, please kindly refer to 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. It is expressly stated in the law that its Chairperson and members cannot be public servants⁵⁶ and 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.”⁵⁷ However, the EOC Chairperson and members are all appointed by the Chief Executive, who is himself appointed by the Central Government in Mainland China after an indirect election by an Election Committee whose members are returned by restricted franchise or appointment by certain corporate bodies.

B. Non-transparent Selection Process of Members

No improvement has been made to address the institutional problems of the EOC. The composition and selection process of the EOC members do not comply with the principles of independence and pluralism in the Paris Principles. It is the Chief Executive who appoints the EOC Chairperson and members and determines the requirement, remuneration and the terms and conditions of the appointments. The whole process is kept under wraps. The only restriction is that every appointment shall be published in the Gazette.⁵⁸ It has long been criticized for not being open or transparent, and for excluding civil society participation.⁵⁹

Although NGOs have previously proposed some candidates who are independent-minded and experienced in anti-discrimination work for the Government’s appointment, the Government has never adopted any suggestions and reasons have never been given. Instead members lacking experience in anti-discrimination work or with low attendance rates in the EOC meetings were appointed or re-appointed. The Government ignored the fact that experience and commitment to human rights and anti-discrimination work would facilitate the EOC Chairperson’s defense of human rights. It was suspected of deliberately weakening the EOC’s

⁵⁶ Section 65 (3), Sex Discrimination Ordinance.

⁵⁷ Section 63(7), Sex Discrimination Ordinance (Laws of Hong Kong Chapter 480)

⁵⁸ Section 63 (9), Sex Discrimination Ordinance.

⁵⁹ 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.

position as an anti-discrimination watchdog.

C. Resourcing of the EOC

The resources of the EOC 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 EOC in relation to the amount of money which may be expended by the EOC in any financial year and the EOC shall comply with those directions. Subject to such constraints and the Director of Audit to examine its books for proper use of resources, the EOC has the power to direct its own resources.⁶⁰

III. Effectiveness

A. Protection

1. Limited jurisdiction

The EOC has a narrow mandate as it can only enforce the Sex Discrimination Ordinance (Cap 480) (SDO), the Disability Discrimination Ordinance (Cap 487) (DDO), the Family Status Discrimination Ordinance (Cap 527) (FSDO), and 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 states that “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 in respect of racial discrimination from the RDO.

3. Complaints Handling

The EOC can receive complaints based on sex, pregnancy, marital status, disability, family status and racial discrimination.

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

⁶⁰ For the constraints on the EOC’s strategy due to the control of budget by the Government, please refer to ANNI Report 2009.

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

The EOC has previously been criticized for taking a non-committal approach toward handling complaints.⁶¹

The EOC may grant legal assistance for clients instituting legal proceedings, in particular if the case raises a matter of principle or if it is unreasonable to expect the applicant to deal with the case unaided given the complexity of the case.⁶²

However the EOC is not eager to approve legal assistance to the complainants. In 2011, among 872 complaints received, there were 75 applications for legal assistance. 24 of the applications were granted (32%). 42 applications were rejected (56%) and 9 applications were under consideration (12%).⁶³ It appears that it was more willing to grant an application than in 2010 but more reluctant than in 2009.⁶⁴

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

B. Promotion

The EOC has the role of conducting research, educational activities and services in order to promote equality of opportunity and principles of anti-discrimination in public education.⁶⁵

The current EOC Chairperson, Mr. WK Lam has adopted a relatively independent and proactive approach in anti-discrimination work compared to his predecessors – at least until mid-2012.⁶⁶ He seems to have taken a broader interpretation of the mandate of the EOC too. He has also actively expressed his concerns about discrimination generally, including those related to sexual orientation⁶⁷ and the discrimination against foreign domestic workers

⁶¹ The civil society criticized the EOC for the slowness in its processing of complaints. Please refer to the case of dress code on female teachers stated in *ANNI Report 2011*.

⁶² Section 85(2), Sex Discrimination Ordinance.

⁶³ EOC. Statistics on Enquiries, Complaints and Legal Assistance for the period of 1 January 2011 to 31 December 2011. <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/papers/statisticcontent.aspx?itemid=9841>

⁶⁴ In 2010, among the 931 complaints received, there were 57 applications for legal assistance. 13 of the applications were granted (22.8%). 32 applications were rejected (56.1%) and 12 applications (21.1%) were under consideration. See *ANNI Report 2011*. 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*. Legal assistance may only provide legal advice by the EOC lawyers or send a pre-action letter to the complainee on behalf of the complainant.

⁶⁵ Section 65, Sex Discrimination Ordinance

⁶⁶ See the section “Dual role of EOC Chairperson WK Lam as the convener of the Executive Council” below.

⁶⁷ “Same-sex marriages a distant prospect”, South China Morning Post, 15 August 2011.

triggered by right of abode judicial reviews⁶⁸ and anti-mainlander sentiments triggered by the huge amount of pregnant mainlander women giving birth in Hong Kong that puts a growing burden on public resources including hospitals.⁶⁹ In taking up the education and accessibility issues of persons with disabilities and the education issues of ethnic minorities in Hong Kong in various reports and advocacy initiatives, the EOC has been exerting pressure on the government for improvements and demonstrated the independence and proactive approach of its Chairperson. Civil society worries whether the independence and proactive approach of the Chairperson can be maintained in the future in light of the lack of improvements to the institutional problems of the EOC.

The EOC published research reports on gender stereotyping and its impact on the male gender as well as a study on racial encounters and discrimination experienced by South Asians in 2012.⁷⁰

Since around 2003, the EOC has been proposing the establishment of an Equal Opportunities Tribunal in order to deal with discrimination disputes in a quick, cheap and efficient manner. The EOC handed in recommendations to the government in 2009 and its final proposal on the establishment of an Equal Opportunities Tribunal to the government in August 2011.⁷¹ The Judiciary turned down the establishment of such a tribunal but conducted review on adjudication of Equal Opportunities Claims by the District Court in September 2011.⁷² In its review paper, the Judiciary proposed simplifying the procedural rules, enhancing active case management and adopting a multi-faceted approach on litigants in person.

Dual role of EOC Chairperson WK Lam as the convener of the Executive Council

On 29 June 2012, the Chief Executive-elect (CE-elect), CY Leung announced that WK Lam, the EOC chairperson, would become the convener of the Executive Council (ExCo) from 1 July 2012.⁷³ Human rights groups and a number of independent NGOs working on equal

⁶⁸ “WK Lam criticized that policy injustice may lead to social fear. The right of abode cases of foreign domestic workers may trigger racial hatred”, Apple Daily (Hong Kong Chinese newspaper), 25 October 2011. “Experts wary of tensions as maid’s appeal date nears”, South China Morning Post, 13 February 2012.

⁶⁹ “The EOC calls for tolerance and rationality in social debates”, EOC, 2 February 2012. “Hong Kong newspaper and rails against Chinese ‘invasion’”, CNN, 1 February 2012.

⁷⁰ EOC Research Reports: <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/research/default.aspx>

⁷¹ “List of Refined Recommendations: Establishment of a specialized Equal Opportunities Tribunal”, EOC, November 2011. <http://www.legco.gov.hk/yr11-12/chinese/panels/ca/papers/cacb2-214-1-ec.pdf>
Response of the Constitutional and Mainland Affairs Bureau: “Refined recommendations to the Government on the establishment of an equal opportunities tribunal in Hong Kong”. October 2011.
<http://www.legco.gov.hk/yr11-12/english/panels/ca/papers/cacb2-214-2-e.pdf>

⁷² The Judiciary, *Review on Adjudication of Equal Opportunities Claims by the District Court*, September 2011. http://www.judiciary.gov.hk/en/other_info/consult_papers/eoc_consultation_document_eng.pdf EOC Press Release, “EOC’s Submission to the Review on Adjudication of Equal Opportunities Claims by the District Court”, 28 October 2011.

⁷³ HKSAR Press Release dated 29 June 2012: “Exco Membership announced”:
<http://www.info.gov.hk/gia/general/201206/29/P201206290526.htm>

opportunities in different fields argued that the two conflicting roles undermined the independence and credibility of the EOC.⁷⁴

Lam did not see it as clashing with his watchdog role but promised that if the public generally thought that it created a conflict of interest, he would resign from the post of ExCo.⁷⁵ However, on 11 July 2012, Lam decided to keep both posts⁷⁶ but announced that he would not seek to continue his EOC chairmanship after his contract ends in January 2013.⁷⁷ In the EOC's press statement,⁷⁸ Lam said "[t]he majority of EOC Members, including a considerable number of our partner organizations, support me to continue to serve in my dual role. They see the role of non-official members of ExCo as advisory, bearing no executive authorities. They also understand that Non-official members do not serve under the Executive Branch of the HKSAR Government. Hence, the chance of real role conflict is minimal. Even if such conflict situation should arise, they also see that there are sufficient mechanisms both in ExCo and in EOC to tackle it." He also stated that "a handful of EOC Members and a number of human rights groups and service groups strongly object to the dual role." He admitted that his keeping of this dual role for a long time would weaken the EOC in the long run and he therefore has decided to not to seek the renewal of his contract as chairperson of the EOC.⁷⁹ Thirteen NGOs issued a joint statement on 11 July to deeply regret the fact that Lam would be staying on in both roles, thus violating the Paris Principles.⁸⁰ Fung Kim Kee, one of the EOC members, quit in protest against Lam's decision.

Under Hong Kong Basic Law, "[t]he Executive Council of the HKSAR shall be an organ for assisting the Chief Executive in policy-making." (article 54). At the operational level, the Executive committee members pledge to observe the rules of confidentiality and collective accountability. ExCo members are also under an obligation to support and promote government policies whereas the EOC should criticize government policies that are discriminatory. Such a political role is not limited to participation in ExCo meetings. Patrick

⁷⁴ Press statement of the Hong Kong Human Rights Monitor entitled "Lam Woon-Kwong should immediately resign from the chairmanship of Equal Opportunity Commission" (in Chinese). 29 June 2012: http://www.hkhrm.org.hk/resource/PR_EOC_WKLam_resign_call_29JUN2012.doc

⁷⁵ South China Morning Post: "Convener to quit ExCo if any conflict of interest" 5 July 2012

⁷⁶ HKSAR Press Release dated 11 July 2012: "Chief Executive welcomes Lam Woon-kwong's decision to stay in ExCo"

⁷⁷ South China Morning Post: "Exco convener Lam to quit EOC role in January" dated 12 July 2012

⁷⁸ EOC's press statement "Media Statement by Mr. LAM Woon Kwong, Chairperson of the Equal Opportunities Commission" dated 11 July 2012:

<http://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=10358>

⁷⁹ Mingpao Hong Kong, "WK Lam changed his mind. He would keep dual role for half year and would not renew his contract as the EOC Chairperson next year. 11 NGOs released joint press statement to express regrets." 12 July 2012. (Chinese only)

⁸⁰ 13 NGOs Joint statement: "Lam Woon-Kwong's retaining of both the chairmanship of Equal Opportunity Commission (EOC) and the post of Exco Convener sets a bad precedent that weakens the EOC" (in Chinese) dated 11 July 2-012: http://www.hkhrm.org.hk/resource/JS_Lam_EOC_ExCo_20120711.doc

Yu, a human rights expert, opined that independence is the key element under the Paris Principles. He also highlighted the importance of perceived independence: “[i]f it is not independent, or is seen to be independent, it is highly unlikely that it will be able to achieve much of lasting worth.”⁸¹ Lam’s decision erodes public confidence in the independence of the EOC; it sets a poor precedence for the EOC and other human rights institutions

IV. 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 is ready to meet NGOs and participate in activities regarding anti-discrimination.

Appendix: Updates on Other Human Rights Watchdogs

Independent Police Complaints Council (IPCC)

IPCC released the interim report in May 2012 on complaint cases arising from the visit by the Vice Premier Li Ke-qiang. In its report, IPCC endorsed the findings in nine cases by Complaints against Police Officer (CAPO) including complaint of the “black shadow incident.”⁸² The final report is not yet ready.

The current IPCC chairperson Mr. Jat Sew-tong was reappointed for two years from 1 June 2012 to 31 May 2014.

IPCC also sent observers to a mass demonstration on 1 July 2012. After that, IPCC invited civil society including mass demonstration organizers, journalists, unions and human rights organizations for a meeting on policing during President Hu’s visit in late June and the annual mass demonstration on 1 July 2012. While its chair has prematurely praised the police, commending them for handling the demonstrations “professionally,”⁸³ IPCC promised to closely follow the CAPO’s investigation of two complaints concerning the police’s severe measures during President Hu’s visit: the use of a more powerful pepper spray against protesters and the detention of the Apple Daily’s journalist who asked if President Hu had

⁸¹ 余仲賢：林煥光須捍衛平機會獨立性（明報 2012.7.11）with English original: “WK Lam should defend the independence of EOC in In-Media:”<http://www.inmediahk.net/node/1013599>

⁸² IPCC “Report (Interim) on Complaint Cases Arising from the Visit by the Vice Premier Mr. LI Keqiang” 3 May 2012. http://www.ipcc.gov.hk/en/reports_other.html

⁸³ The Commercial Radio, “Jat observed the police arrangement outside the China Liaison Office.” 1 July 2012. Chinese Only. Sharp Daily, “Jat appeared in the protest for understanding policing and police’s arrangement”. 1 July 2012. (Chinese Only)The Radio Television Hong Kong. “IPCC: Police’s arrangement for July 1st demonstration is appropriate”, 2 July 2012. Chinese only. Sharp Daily, “Jat appeared in the protest for understanding policing and police’s arrangement”. 1 July 2012. (Chinese Only)

heard the Hong Kong people's hope that the Tiananmen massacre would be vindicated.⁸⁴

Office of the Privacy Commissioner for Personal Data, Hong Kong (PCPD)

Amendments to the Personal Data (Privacy) Ordinance were passed in the LegCo in June 2012. One of the major amendments is to impose additional requirements on a data user in the use of the personal data of data subjects, or provision of such data to other persons, for direct marketing or in the sale or transfer of such data to a third person.

However, the Government rejected to adopt an “opt-in” mechanism to require data users to obtain explicit consent from data subjects before the use or sale of their personal data. Instead, the Government adopted an “opt-out” mechanism, saying that it would “strike a right balance between the protection of personal data privacy and allo[w] room for businesses to operate while providing data subjects with an informed choice as to whether to allow the use of their personal data in direct marketing.”⁸⁵

The Hong Kong Human Rights Monitor welcomed the amendments on Personal Data (Privacy) Ordinance, but opined that these amendments, especially the “opt-out” mechanism, failed to effectively safeguard the privacy of data subjects.

Office of the Ombudsman, Hong Kong

The Ombudsman released its annual report in June 2012 reporting cases of complaints and investigations regarding maladministration in the public sector.⁸⁶

Commissioner on Interception of Communications and Surveillance

The Commissioner Justice Woo released his fourth annual report in December 2012.⁸⁷ Justice Woo reported cases of non-compliance or irregularities and showed that it was necessary for the Commissioner to have statutory power to check the intercept product in order to ensure the effectiveness of the Commissioner. Despite the fact that Justice Woo has called for empowering the Commissioner to inspect and listen to intercept products since 2009, the government did not follow up promptly as it feared the privacy of suspects might

⁸⁴ Radio Television Hong Kong, “Two complaints over policing of Hu visit”.17 July 2012.

⁸⁵ For more details, please refer to Legislative Council, “Paper for the House Committee meeting on 25 May 2012 Report of the Bills Committee on Personal Data (Privacy) (Amendment) Bill 2011”, LC Paper No. CB(2)2113/11-12, 24 May 2012, <http://www.legco.gov.hk/yr11-12/english/hc/papers/hc0525cb2-2113-e.pdf>. Also the Personal Data (Privacy) (Amendment) Ordinance, <http://www.legco.gov.hk/yr11-12/english/ord/ord018-12-e.pdf>.

⁸⁶ The 24th Annual Report of The Ombudsman (April 2011-March 2012). June 2012. http://www.ombudsman.hk/annual_reports.shtml

⁸⁷ Commissioner on Interception of Communications and Surveillance, “2010 Annual Report of the Commissioner on Interception of Communications and Surveillance”. December 2011. http://www.info.gov.hk/info/scio/cs/eng/pdf/Annual_Report_2010.pdf

be violated.⁸⁸ Justice Woo found the Government's stance to be unacceptable and regretful.⁸⁹

The Government announced the appointment of the non-Chinese speaking Justice Darryl Gordon Saw as the new Commissioner with effect from 17 August 2012,⁹⁰ when Justice Woo's term expires. The appointment has sparked concern by some media and some of the public, who view it as an effort to make the Commission less effective by introducing a language barrier to the Commissioner and therefore ending Justice Woo's vocal pushes for substantive increases in the Commissioner's powers.⁹¹

⁸⁸ Ming Pao, Hong Kong, "Commissioner should wield more powers" 8 December 2011.

⁸⁹ Apple Daily, Hong Kong, "Lack of power to check audio intercept products for irregularities or non-compliance. Justice Woo criticized the Security Bureau." 6 December 2011. (In Chinese)

⁹⁰ "Government announces appointment of Panel Judges and Commissioner under Interception of Communications and Surveillance Ordinance" 27 July 2012.

<http://www.info.gov.hk/gia/general/201207/27/P201207270418.htm>

⁹¹ Mingpao, Hong Kong. "The government appointed non-Chinese speaking judge to be Commissioner on Interception of Communications and Surveillance. Lawmakers questioned the government for no intention to amend the law particularly for Commissioner's power to listen to intercept product." 28 July 2012.

National Human Rights Commission of India: Glimmers of Hope

- Yet a Long Way to Go

All India Network of NGOs and Individuals working with National / State Human Rights Institutions (AiNNI)¹

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

India has an array of laws for the protection for vulnerable groups. However, many structural and practice dysfunctions of the judicial system and the de jure and de facto impunities seriously undermine the ordinary persons' ability to access justice.² The implementation of laws, the weakness of new Bills and the laws' delay were areas of concern.³ India has an impressive array of laws and schemes aimed at assuring due process and fair trial as well as protecting minority rights, the rights of women and children. More recently laws and bills on the anvil as well as judgements of the Supreme Court aim at incrementally realising the aspirations set out under the Constitutional heading of 'directive principles' to guide state policy, such as health, education, food and environment. The large number of laws and schemes for the protection of rights and social benefit only does so on the books, while in the reality it throws non-implementation, official apathy, corruption and impunity on the ground into sharp relief.

Statistics and ranking provide an objective picture of reality. Despite an average growth rate of 8.2% between 2007– 2011 poverty declined only 0.8%. 77% of Indians live on a consumption expenditure of less than INR 20 [around USD 0.4] a day and India ranks 134 out of 187 countries on the UN Human Development Index⁴.

Despite a clear decrease in insurgency related violence, the state's response to these political issues has remained mainly militaristic, accompanied by draconian security laws that lead to widespread human rights violations.⁵ The Armed Forces Special Powers Act remains in force in Jammu & Kashmir and the North-Eastern States, conferring an impunity that often

¹ Final edit by Ms. Maja Daruwala, [Executive Director - CHRRI] & a National Convenor of AiNNI, prepared by Henri Tiphagne, Honorary National Working Secretary AiNNI for AiNNI with assistance from Ms. Sabitha (AiNNI), Ms. Kristin Nichole York and Ms. Anjali Manivanan [both interns]

² Human Rights in India – Status Report 2012. Prepared for India's second UPR at the UN by WGHR Pg 80

³ NHRC-India Submission to the UN Human Rights Council for India's Second Universal Periodic Review Pg 1

⁴ Human Rights in India – Status Report 2012. Prepared for India's second UPR at the UN by WGHR Pg 2 & 3

⁵ Human Rights in India – Status Report 2012. Prepared for India's second UPR at the UN by WGHR Pg 50

leads to the violation of human rights.⁶ Similarly Border Security Forces (BSF) continue to enjoy impunity despite piling complaints against indiscriminate killing of people along the border, in the name of restraining illegal activities like smuggling and trafficking.

35% of the complaints to the NHRC annually are against the police.⁷ 9% of the complaints to the NHRC in 2010-11 were on inaction by officials or their abuse of power, confirming that laws are often not implemented or ignored.⁸

A massive public distribution system has not assured the right to food because malnutrition is endemic.⁹ Over 90% of the workforce is in the unorganized sector, has no access to social security, is particularly vulnerable in the cities, and is therefore driven into permanent debt, often leading to conditions of bonded labour. The National Rural Employment Guarantee Scheme guaranteed 100 days of work a year to any rural household that needed it. Government data showed that 56 million households applied, 55 million were given work but on average received half the wages guaranteed. Public spending on health continues to be abysmally low, at about 1% of GDP, despite Government's commitment to raise it to 2-3%. The public health system is riddled with problems; vast numbers in the villages get little or no medical care.

A performance audit by the Auditor General and an evaluation done for the Planning Commission have both found serious deficiencies in the National Rural Health Mission. The current National Family Health Survey reports that "the percentage of children under age five years who are underweight is almost 20 times as high in India as would be expected in a healthy, well-nourished population and is almost twice as high as the average percentage of underweight children in sub-Saharan African countries." The quality of education, particularly in the villages, is dismal; the infrastructure is appalling, teachers are absent, para-teachers are poorly trained. Learning levels and literacy are both very low. The Indira Awas Yojana,¹⁰ set up to provide rural housing, requires that an applicant have a plot of land.

⁶ NHRC-India Submission to the UN Human Rights Council for India's Second Universal Periodic Review Pg 2

⁷ Ibid Pg 2

⁸ Ibid Pg 2

⁹ Ibid Pg 2

¹⁰ Indira Awaas Yojana is a Government of India social welfare programme to provide housing for the rural poor in India. The differentiation is made between rural poor and urban poor for a separate set of schemes operate for the urban poor (like the Basic Services for Urban Poor). It is one of the major flagship programs of the Rural Development Ministry to construct houses for BPL population in the villages. Under the scheme, financial assistance worth Rs. 75,000/- in plain areas and Rs. 75,000/- in difficult areas is provided for construction of houses. The houses are allotted in the name of the woman or jointly between husband and wife. The construction of the houses is the sole responsibility of the beneficiary and engagement of contractors is strictly prohibited. Sanitary latrine and smokeless chullah are required to be constructed along with each IAY house for

Millions of landless are excluded. The scheme does not give enough to build a house, and there is some evidence that those who take the money end up in debt.¹¹

India is yet to abolish Capital Punishment / Death Penalty and although there hasn't been an instance of it in the past year, the President of India rejected clemency petitions in as many as 5 cases.

Maoist insurgency continues to be one of the pressing issues that the country faces. According to Human Rights Watch, "... Naxalites¹² had killed nearly 250 civilians as well as over 1000 members of the security forces in 2011. Government officials assert that security forces killed more than 180 Naxalites between January and November 2011, though local activists allege that some of these were civilians"¹³.

Custodial torture and violence remain an entrenched and routine law – enforcement and investigation practice across India. Enforced disappearances and extra judicial killings remain widespread in conflict areas,¹⁴ reinforced by extraordinary powers of arrest, detention and immunity available to the security forces. The NHRC received 341 complaints of disappearance in 2010 and 338 by November 2011 and highlighted that these numbers were not comprehensive.¹⁵

The Right to Information Act, 2005 (RTI) continued to be an important tool that human rights activists made use of, to expose corruption and inaction. But the RTI activists faced threats and more seriously, attacks, which were fatal in nearly a dozen cases last year. The fact that the perpetrators in many of these cases are yet to be punished only goes on to prove the extent of risk that RTI activists face. A scan of the dailies reveals alarming figures of 'honour' killings¹⁶ and sexual violence against women in the country. Rights of children too were far from protected with corporal punishment, death due to improper infrastructure of educational

which additional financial assistance is provided from Total Sanitation Campaign and Rajiv Gandhi Grameen Vidyutikaran Yojana respectively. This scheme, operating since 1985, provides subsidies and cash-assistance to people in villages for construct their houses, themselves.

¹¹ NHRC-India Submission to the UN Human Rights Council for India's Second Universal Periodic Review Pg 3.

¹² The word Naxalite is a generic term used to refer to militant Communist groups operating in the eastern states of the mainland India (Jharkhand, West Bengal and Orissa), and in southern states like Andhra Pradesh and are also known as Maoists or under other titles. They have been declared as a terrorist organization under the Unlawful Activities (Prevention) Act of India (1967).

¹³ Excerpted from the India Chapter of the World Report 2012 by Human Rights Watch, accessible at <http://www.hrw.org/world-report-2012/world-report-2012-india>

¹⁴ National Crime Records Bureau Report, Crime in India – 2010, Pg 567

¹⁵ NHRC India submission to the UN HRC for India's Second UPR Available at – <http://nhrc.nic.in/reports/upr-final%20report.pdf>.

¹⁶ Killing of the boy or the girl or both for marrying without their family's acceptance, and sometimes for marrying outside their caste or religion

institutions etc. being a commonplace. The continuing untouchability, violence against minorities and the way in which India has reacted in international forums to human rights issues in other countries in the past year have also been a source of concern. The Planning Commission highlighted the fact that nowhere else in the world 'has any particular section [of society] been devoid of basic human rights, dignity of labour and social equality on the basis of classification that finds its roots in religious writings'.¹⁷

There are issues of institutional bias which are coming to the fore with alarming frequency. Following an inquiry by the National Minorities Commission (NCM) into recent communal unrest in Hyderabad, the NCM has asked the state government to hold somebody responsible for framing 11 Muslims, who were falsely acquitted by lower court in December 2011 after spending three years in jail for their alleged involvement in the 2008 Jaipur serial blasts. The NCM Chairperson Mr. Wajahat Habibullah told Times of India "If the court has not found them guilty and government has not appealed against the verdict in 90 days, the matter should be considered for compensation to each of the acquitted person." A disproportionately high number of Muslims are frequently booked under terrorist and preventive detention laws and kept in custody for over unconscionably long periods. These laws already broad and vaguely worded are ill-supervised by review boards that are neither regular, independent nor accountable. The general dysfunction of the justice system as a whole then creates insurmountable difficulties of access to justice and speedy resolution for the minorities in excess of what is faced by the general population. Despite the strong cumulative evidence of institutional bias within the police and delays and dysfunction within the criminal justice system affecting minorities in particular the NHRC has not acted on such issues with the urgency that they demand.

Key issues that the NHRCI needed to face:

In May 2011 the Sub Committee on Accreditation (SCA) of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) reviewed the National Human Rights Commission, India (NHRCI) for its performance and re-accredited it with an 'A' status. At the time that the NHRCI submitted its application, The All India Network of NGOs and Individuals working with National Human Rights

¹⁷ Planning Commission, Scheduled Castes Sub Plan – Guidelines for implementation, New Delhi 2006, available at : [planningcommission.nic.in/sectors/sj/SCSP_TSP %20Guidelines.pdf](http://planningcommission.nic.in/sectors/sj/SCSP_TSP%20Guidelines.pdf)

Institutions (AiNNI) had also made a shadow report submission on the performance of the NHRCI. The NHRCI issued a response, to it, which was also put up on its website¹⁸.

The SCA of ICC perused the NHRCI's application and the shadow report and made notes of concerns regarding composition and pluralism, appointment of Secretary General and Director General of Investigation from Central Government and Relationship with Civil Society. The abovementioned concerns would be taken up for review in ICC's first session in 2013, while recommending 'A' status¹⁹ for the Commission, vide a letter²⁰ dated 9 June 2011 from Ms. Rosslyn Noonan, Chairperson, ICC. There were concerns on the Complaints Handling Function and the Annual Reports of the NHRCI on which the NHRCI would have to report in 2016 when being reviewed. The NHRCI was not receptive to the well-argued concerns of the SCA of ICC, which cited the General Observations, the Paris Principles, the Statement of the UN Special Rapporteur on the Situation of Human Rights Defenders issued after her first country visit to India and recommendations that followed the accreditation in 2006 that had gone unheeded by the NHRCI.

The Chairperson of the NHRCI Mr. K. G. Balakrishnan submitted his challenge to the recommendations in accordance to the Article 12 of the ICC Statute vide a letter²¹ dated 4 July 2011 where he stated "The NHRC, India is unable to find any mandate that authorizes the SCA to "consider issues" on a member of the ICC, except as part of the accreditation or re-accreditation process, or if a special review is called for. The circumstances under which a special review may be held have been spelt out in the ICC's Statute and do not apply to the NHRC, India." The response²² to this Challenge by Ms Rosslyn Noonan, Chair, ICC, while acknowledging supplementary information provided by NHRCI also informed it that the NHRCI's concerns over the statutory basis of the SCA seeking to review certain issues of concern in two years and outside the ICC's 5 year cyclical re-accreditation process, would be clarified by the SCA Chair.

¹⁸ The response of the NHRCI to the Shadow Report submitted by AiNNI to the SCA-ICC can be accessed at http://nhrc.nic.in/Documents/NHRC_Comments_on_AiNNI_Report.pdf

¹⁹ The ICC 's Certificate conferring A Status to the NHRCI: http://nhrc.nic.in/Documents/icc_certificate.pdf

²⁰ The ICC – SCA's recommendations can be accessed at http://pwtw.weebly.com/uploads/7/4/1/0/7410258/united_nations_and_national_units.pdf

²¹ The Challenge submitted by the NHRCI has not been put up on the website of the NHRCI. AiNNI accessed it through an RTI petition that AiNNI had filed with the NHRC to obtain the same. The full text of the letter is available here: http://www.weebly.com/uploads/7/4/1/0/7410258/nhrc_challenge_to_the_icc.pdf

²² Reply of the ICC Chair to the Chairperson of the NHRCI: http://www.weebly.com/uploads/7/4/1/0/7410258/letter_from_the_icc_chair_on_indian_nhrci_accreditation.pdf

Issues that the NHRI actively confronted:

In July, 2012, the NHRCI Chair, while addressing a press conference, made a strong pitch for immediate passage of the Prevention of Torture Bill in Parliament, saying it is urgent to ensure that extracting information through torture is declared illegal. He went on to say ‘ that in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice.....’. ‘ India not having ratified the Convention Against Torture, its citizens do not have the opportunity to find recourse in remedies that are available under international law. Indian practices with respect to torture do not come under international scrutiny....’ ‘The victims are trapped with the local system, which in every aspect militates against their rights...’ ‘ Parliament needs to pass the Bill urgently so that the culture of extracting information through torture is made illegal and the guilty are punished by law....’²³ The NHRCI has also followed this in their UPR submissions. They also need to be seen publicly condemning acts of torture when they occur in the country very regularly even without them coming up as cases before them. The NHRCI has been taking a very pro-active interest in promoting the rights of persons with disabilities (PWD) relating to health, education and equal opportunities. On 14 January 2011, NHRCI organized a Seminar on the Rights of PWD in collaboration with the Commonwealth Secretariat. It has also advised the Government in amending domestic Laws/Regulations to bring them in conformity with the UN Convention.

The NHRCI also came down heavily on issues of fake encounters, custodial deaths and violence, bonded labour over the past years and this year. Below are some instances: In January this year, the Commission issued a report to the Union Home Secretary seeking a report on excesses by the Border Security Force (BSF). The Commission was acting *suo motu* based on media reports of atrocities perpetrated by the BSF. Here it is pertinent to note that the Commission conducted a two day program for human rights sensitization of BSF officers posted on the Indo-Bangladesh Border, organized at Kolkata on 16 – 17 February, 2012.

²³ Speech of Justice K.G. Balakrishnan, Chairperson, NHRC on Testimonial campaign contribute to eliminate impunity for perpetrators of torture in India organized by PVCHR on 12th July 2012.

On 22 June 2012 the NHRCI directed the Assam government to pay Rs.2500,000 as (USD 45454) monetary relief to the next of kin of five persons killed in an encounter with security forces on June 2009 in the state. It also directed the Orissa Government to register an FIR and act against persons, who illegally confined 17 persons in Puri district and extracted menial works from them under the pernicious custom of '*bartan*', a manifestation of the bonded labour system.

Independence

There has been no change in the laws and regime governing the NHRC since last reported in AiNNI's submission a year ago. The long standing recommendations of the Ahmedi Committee²⁴ and later the ICC where it also felt that the provisions of the law concerning the composition of the Commission are unduly narrow and restrict the diversity and plurality of the board.' The NHRC continues to be subject to the same vulnerabilities from government as before.

The corruption charges against the present Chair of the NHRCI and former Chief Justice of India Mr K. G. Balakrishnan still exist and in an unprecedented action, the Supreme Court on 10 May 2012 asked the government to inquire into allegations of corruption and misconduct leveled against him. A bench of Justice B S Chauhan and Justice J S Khehar said "the competent" authority in the government would conduct a detailed inquiry into the complaint by the Committee for Judicial Accountability against him (Justice Balakrishnan)"

During the drafting of the report for submission for the Universal Periodic Review (UPR), the NHRCI, at least one branch of it, demonstrated for the first time in recent times how independent it can be, by involving the civil society and coming down heavily on the government of India in the report²⁵. The report pointed out the failure of the Public Distribution System to assure right to food, the fact that the National Rural Employment Guarantee Scheme did not live up to its claims, the dismal quality of education in rural areas, the delayed reports to UN Treaty Bodies etc. It rebukes the Government for not signing and

²⁴ The Justice Ahmedi Committee was appointed by the NHRCI in 1998 to come out with proposals for amendments to the Protection of Human Rights Act [PHRA]1993 under which the NHRCI is constituted . It came out with a comprehensive and independent examination of the PHRA by a seven-member Advisory Committee, chaired by former Chief Justice of India, Justice AM Ahmadi (herein referred to as 'the Ahmadi Committee' After exhaustively reviewing the principal legislation, the Ahmadi Committee submitted a Draft Amendment Bill to the Commission, entitled the Protection of Human Rights (Amendment) Bill 1999.88 The Draft Bill incorporated the essence of the proposed amendments originally put forth by the NHRC .

²⁵ Available at <http://nhrc.nic.in/Documents/Reports/UPR-Final%20Report.pdf>

ratifying ILO Conventions 138 and 182, because though the government. “accepts the spirit of the Conventions, it cannot ratify them because socio-economic conditions make it difficult to prohibit the employment of children”. After the passage of the Right to Education Act in 2009, the Commission rightly points out that this is an argument now even less tenable. Civil society activists consider that this is perhaps the first time that such an independent report of the performance of the government has been provided by the NHRC to a UN mechanism in its history so far and this was also after a historic series of consultations with civil society that was held in 5 different regions of the country to which it seemed to be extremely sensitive.

Effectiveness

NHRCI needs to go a long way to be effective in Complaints Handling. During the period under review in the ICC Chairperson’s letter to the NHRCI this was the issue that was indicted to be reviewed in 2016. The ICC had quoted the UN Special Rapporteur on Human Rights Defenders’ statement in this regard where she had said that the civil society was disgruntled with the failure to take up complaints, delay in processing them and mainly making police, who are perpetrators of the alleged violations in most cases, perform the investigation of the cases. The Commission in its response says that the Special Rapporteur’s statement “is not factually correct” and points out that the NHRCI has helped to install the software that NHRCI developed for its complaints handling, in the offices of many NHRIs who are ICC members, while assuring that it will report a more thorough and responsive system in 2016.

AiNNI undertook a ‘random study’ of the Commission’s handling of the complaints regarding human rights defenders and *suo motu* cases in the year 2011 which are available on its website. It is also to be appreciated that the NHRCI website has undergone a change for the better with more information made available including an update of the suo motu cases and cases of HRDs. A summary of the same is given below:

- 1. Human Rights Defender Complaints**
- a. The predominant cause of case delay, as evidenced by all 34 complaints from 2011, has been the time lapse between the NHRC’s request for reports and the response from authorities and/or complainant²⁶. Further analysis indicates that the delay correlates to the NHRC’s

²⁶ The data used for this analysis came from the NHRC’s website <http://nhrc.nic.in/>. Information regarding the 34 human rights defender complaints came from the NHRC document “HRD_CASES_2012_05.pdf” and was compared with the individual complaint files found on the NHRC website.

follow-up procedures regarding requests, and consequent review of the materials. Of the 19 cases that include the dates of request and receipt of reports, the average time lapse between the first request for reports and either the date of receipt or 31 May 2012 (whichever date was earlier) is 166 days. Thus, it takes nearly six months for the NHRC to receive initial reports. Pinpointing dates is frequently confusing because although the NHRC notes that reminders to send/submit reports have been issued to authorities, neither the dates of issue nor the number of reminders are recorded. Only one reminder's date was recorded (complaint number 115/18/4/2011) out of the 13 cases that were either closed or still pending due to lack of response from the complainant. This pattern demonstrates that typically, the NHRC only issues reminders to the authorities while denying complainants this courtesy. Furthermore, while the NHRC sometimes makes threats of coercive action, it is seemingly inconsistent in how long it will wait or how many reminders it will issue before taking such action against the authorities. Additionally, since the NHRC does not hold authorities to its written deadlines, the authorities can delay submitting their responses, which greatly extends the time a case remains inactive. The average time lapse between recorded actions in a complaint is 90 days. From this information, one can conclude that the NHRC reviews a case roughly every three months.

- b. The NHRC has not itself undertaken or commissioned a study into the reasons why complainants do not act further on their complaints; The authors believe this should be a singular line of inquiry for the NHRC to see if it is because the complaints were used for collateral purposes in the first place, or the mere sending of a complaint achieved relief on the ground, or there was intimidation, victimisation or lack of means in the victim to act further on his or her complaint. A gendered analysis of complainants and their ability to continue with complaints is also a vital area of inquiry that will assist in enhancing the effectiveness and writ of the NHRC.
- c. Due to such delays, the Commission closed only six of its 34 open cases in 2011. These complaints were or have been open for an average of 276 days. Also, out of the open cases, at least 6 cases have remained open for at least one year, and the average number of days open is 436.
- d. Virtually no preventative, prosecutorial, or compensational measures were taken in any of the HRDs' complaints. No financial compensation has ever been issued or even considered. Only one of the 4 reports involving arrests and/or charges mentions the recommendation of a departmental disciplinary action against the accused. Most importantly, the NHRC has supplied no commentary or recommendation regarding the prevention of future attacks against human rights defenders. The NHRC does not also follow up to find out whether its

writ has run in such cases of HRDs. In fact there is no mechanism for following what has happened to recommendations made to the police in such cases.

2. *Suo Motu* Cases:

In cases where the NHRC has taken note and instituted inquiries of its own volition, waiting for information from the authorities was once again the primary cause of delay in all cases from 2011. In the 34 cases analyzed which was the full number for the period under review and for which information was available on its website, the NHRC spent an average of 196 days or over 6 months to receive the requested reports²⁷. It is not clear if these were full reports, first responses or partial responses which required further questions of the agency by the NHRC. Again, the NHRC states that it issues at least one reminder to authorities when the reports have not been received after the initial request. The NHRC has regularly failed to provide the dates of these reminders, making it difficult to determine the average time between requests, reminders, and receipt of reports. It is not clear to the authors from information requested and responses given, whether the NHRC sends regular reminders, or reminders are sent ad hoc, or there is a tracking mechanism that generates reminders; nor is it clear what timelines the NHRC has set for itself to receive responses before it acts against the erring authority.

- a. In just 17 cases, where deadline dates were available, the NHRC spent an average of 113 days, over three months, reviewing and responding to reports. Currently, of the 38 open cases where the date of last action was recorded, the average time since the NHRC last recorded an action is 71 days.²⁸ These exorbitant time delays result in *suo motu* cases remaining open for an average of 309 days, [[either through their closing date or 31 May 2012]]. 12 cases have been open for over one year, with the average number of days open at 432.
- b. In 14 cases, either the authority reports or the NHRC itself comments or recommends monetary compensations for survivors. The NHRC explicitly recommends monetary relief in nine of these cases and only provides a specific monetary amount in six. However, in these cases, at least monetary relief has been or is being distributed. In case numbers 103/33/3/2011 and 106/33/3/2011, the NHRC file notes that authorities reported that necessary action for “relief and rehabilitation” of survivors is being implemented, but no details of these efforts are given. In complaint 2634/30/0/2011, the deceased’s next of kin refused the INR two lakh released by the government, requesting justice instead. Upon

²⁷ The data used for this analysis came from the NHRC website <http://nhrc/nic/in/>. Information regarding the 51 *suo motu* cases came from the NHRC document “SUO_MOTU_MAY_2012.pdf” and was compared with the individual complaint files found on the NHRC website.

²⁸ Calculated using an end date of 31 May 2012

receiving the refusal for monetary compensation, the NHRC closed the complaint despite the further request for justice. Although the Supreme Court, where the case is pending, may secure justice, the NHRC itself has done nothing to assist the next of kin in achieving justice nor has it issued any recommendations for preventing future abuses.

- c. The NHRC's reports mention or recommend other remedies in addition to or instead of monetary compensation in 14 cases. Departmental action against the accused has been 'taken, recommended or considered' in 5 cases.

The NHRC's work and attitudes carries weight with the State Human Rights commissions (SHRCs) which dot the country. Victims can approach either. But if one Commission is seized of the matter it precludes the other taking up the same matter. It does not appear that once the NHRC refers a case to the SHRC or the SHRC has dealt with the matter that the NHRC will follow up to see if recommendations have been followed or ignored or provided fullest justice to the victim. In a case from the state of Madhya Pradesh [Case number 1842/12/38/2011] the SHRC took cognizance of the case before the NHRC and had already ordered that "suitable action" be taken against the accused. The NHRC closed the case without inquiring exactly what "suitable action" entailed or finding out if the said action was actually being taken. In addition to or instead of departmental action, the accused were arrested and/or charges were filed against them in five cases. Lastly, other remedies including education, rehabilitation and/or policy changes were implemented or noted in 7 of these 14 cases.

- d. In many cases which are referred to the SHRCs, there is no mechanism calling the SHRC to keep the NHRC informed of what was the response in the cases referred to them u/s 13(6) of the PHRA 1993 or instead asking the state government officials to whom the case was referred to, to report what was the action initiated as a result of the referral. In a study of 445 cases for which details were obtained through RTI from the SHRC in Tamilnadu for the year 2010, it was found that in 61% of the cases they were being referred to other governmental authorities for action at their end and the complaints were closed in the SHRC without any duty on the authority to report to the SHRC on what action they has initiated at their end. Each of these referrals to the authorities were also done in less than a month of the complaint being received and considered as a disposal of complaints.²⁹
- e. In a new and innovative move the NHRC now sits in what it terms 'public hearings' in different states – so far such 'hearings' have been conducted in the states of Odisha, Gujarat, Tamilnadu and Rajasthan to hear cases against the members of the Scheduled Castes in the

²⁹ Unpublished study undertaken by AiNNI in Tamilnadu with RTIs of orders passed processed by the SHRC in 4897/SHRC- RTI /2012dt 14.05.2012.

respective states. It would be preferable that the findings of the cases taken up in such hearings are also made known through its website and systemic, institutional remedies are recommended rather than only case wise responses. The reports of these extensive engagements have not been collated for public consumption and it is not clear what patterns of institutional behavior against Scheduled Castes have been discerned for discussion and rectification within institutions of state most particularly the police, the local judiciary and local authorities in local government who are charged with ensuring the effective implementation of general law and particular legislation outlawing discrimination and establishing penalties against violation of civil rights of this traditionally disadvantaged group. It is by doing this that these 'public hearings' will differ from the normal complaints handling activities of the NHRC.

- f. The NHRC has during the year under scrutiny started issuing sms acknowledgements of complaints and cases that it received.

II. Thematic focus: Human Rights Defenders and Women Human Rights Defenders

The AiNNI appreciates and applauds the appointment of a Focal Point on HRDs at NHRCI since May 2010. Over the last year the Focal Point has often responded quickly to threats and complaints by individual HRDs – even if calls are made late at night. The Focal Point now also travels across the country meeting HRDs in different training session and workshops. Since last year he NHRCI has a dedicated web space for HRDs which provides details of cases it receives from HRDs apart from recommendations and the Focal Point on HRDs has made himself available on Facebook. The effectiveness of this new mechanism would be much enhanced if the concerns mentioned in the recommendation for a Task Force on issues of HRDs made by the former National Core Group on NGOs of the NHRC were acted upon.

Secondly while individual cases find a better response than in earlier times we would point out that the Focal Point and the NHRC as a body has not addressed the issue of mass cancellations – often without cause or due process – of licenses to receive foreign contributions under the Foreign Contribution Regulation Act (FCRA). Over 4100 CSOs have had FCRA registration 'cancelled' without any procedure under principles of natural justice being followed and other FCRA's suspended on various extraneous considerations.

The lack of transparent procedures and the 'mass' nature of the cancellations throw up strong questions of timing and motive that the Commission has not cared to take notice of nor

responded publicly to. The action comes in the wake of strong public protests against government policies in relation to corruption, environmental degradation and public safety in industrial development and nuclear plants. The action has cast a chill and pall over dissenting voices in India's well regarded and vibrant civil society. In practical terms the actions have negatively affected the ability of various types of organisation's including development work to continue their activities. Organisations that receive foreign assistance and have had their licences arbitrarily cancelled are now in the position of having to prove they have done nothing to attract these strictures. This is entirely against the spirit of Indian jurisprudence - organizations have to seek new permissions under procedures which have little sanction before they can utilize funds that have already been permitted earlier. This leads to reducing the right to associate to a discretionary allowance. Though it is clear that these actions directly concern the right to associate and carry on activities without hindrance, the Commission, has not questioned them nor spoken of any concern, nor acted to inquire into their legitimacy.

Interaction with other mechanisms

In its recommendations to the NHRC in May 2011, the ICC / SCA had specifically stated for the presence of "deemed members" from the National Commissions addressing caste, women's rights, minorities, and scheduled tribes on the full statutory commission. While this is a welcome initiative, there are concerns that the aforementioned are not adequately involved in discussions on the focus, priorities and core business of the NHRC's non-judicial functions.

Similar concerns having been voiced by the UN Special Rapporteur on Human Rights Defenders at the conclusion of her official visit to India on January 21, 2011.³⁰ Since that the NHRCI's Full Commission along with its 'deemed members' have so far met in the years 2011 and 2012 only on two occasions ie. on 14th June 2011 and 7th February 2012³¹.

The NHRC's effectiveness and indeed its stature as the premier human rights mechanism would be greatly enhanced if the several dozen thematic N/SHRIs dealing with subjects such as human rights, women, minorities, SCs, STs, RTI, child rights and Persons with disabilities were convened by it periodically both to enhance capacity and exchange best practices and

³⁰ The ICC – SCA's recommendations can be accessed at http://pwtw.weebly.com/uploads/7/4/1/0/7410258/united_nations_and_national_units.pdf

³¹ RTI response provided by the NHRCI in 16(1)/PIO/2005 (RTI) 5814 & 6328.

overcome common challenges. The NHRC is well placed to convene these gatherings as well as to catalyse a formal collaborative mechanism much like the AFP at the national level. The absence of state mechanisms and specialized mechanisms from international conclaves and, more locally, the AFP disadvantages precludes them from being enriched by the several trainings and capacity building exercises they could be exposed to. There is an urgent need in the country today particularly since all of these institutions need to adhere to the Paris Principles and indulge in advising the governments, spreading human rights awareness and complaints handling.

Consultation and Cooperation with NGOs

In the past year the Commission has taken conscious efforts towards strengthening its relationship with the civil society. The NHRCI organized a national consultation on 17 October, 2011 in New Delhi for preparing a report on the human rights situation in the country for its submission to the UN Human Rights Council for the UPR II. Prior to this, they held 5 regional consultations covering various States and Union Territories in the country. These consultations saw active participation of the civil society, including NGOs and academics and enabled to bring out a comprehensive UPR report. The NHRCI has placed on record that the local or specialized knowledge that “... the civil society shared at these consultation was invaluable” in the report.

The NHRCI reconstituted its Core Group on NGOs for the second time and after the last meeting on 26 November 2010, had its meeting on 10 February 2012. AiNNI appreciates the Commission on its selection of very independent and efficient HRDs for the Core Group. As a result of this meeting, important decisions concerning the putting up of important documents on the website of the Commission, writing to state governments regarding the setting up of SC/ST cells etc. were arrived³². But it is disconcerting that the Core Group has met only once after its reconstitution.

Also, the Commission still does not take efforts to share its tasks with civil society or places enough trust on the civil society to involve them in functions like complaints handling. Even in arenas where they meet CSOs, an attitude of looking upon by some Commissioners as being superior to the representatives of civil society strongly prevails. This has to change to

³² Minutes of the meeting of the Core Group of NGOs held on 10 February, 2012:
<http://nhrc.nic.in/Documents%5CMinutes%20of%20the%20Core%20Group%20of%20NGOs%20on%20%2010.02.12.pdf>

bring about 'collaboration' in the real sense. While welcoming the public hearings that the Commission has been conducting, like the couple of open Public Hearings held recently in different states on complaints of atrocities against Scheduled Castes³³, AiNNI feels that those could be held in a better fashion, engaging more public as well as the deemed members of the NHRI from the National Commission for Scheduled Castes and the Chair / Members of the State Human Rights Commission. Given their mandates, their absence from these gatherings is inexplicable and can set up resistance that will impede the development of a culture of human rights that the NHRI is mandated to further.

Conclusion and Recommendations

The post ICC/SCA 2011 period has therefore seen significant changes in the functioning of the NHRCI which are appreciated although there is scope for much more improvement and engagement with its different thematic core groups in its effective functioning.

The website of the NHRCI has undergone a massive change during the past year and has definitely become more information-rich and user-friendly. Several reports that were hitherto not made public have appeared on the NHRCI's website. But there is still a lot to improve. Not all documents of public interest have been put up on the website. Most notably, while the NHRCI has uploaded with pride the certificate of the ICC conferring 'A' Status to the Commission, it has failed to put up the recommendations that the ICC has made or the Challenge that the NHRC posed to it and the ICC Chair's reply to the same. It is also equally important to place all responses to RTIs that the NHRC makes on its website and develop a public database of all the 'orders' that it passes on its complaints for other N/SHRIs in the country to learn from.

The NHRCI needs to be more transparent on its appointment process. Although one of its members, Mr. P.C. Sharma IPS³⁴ had retired from the NHRC in June 2012, this vacancy still remains unfilled and there is no public indication that the NHRC has addressed the government publicly in advance stating that this vacancy has to be filled in by a woman member from civil society to make up the lack of woman representation on the Commission since 27.08.2004.

³³ Held in Chennai for the State of Tamil Nadu from 7 to 9 August, 2012, at Puri for the State of Odisha on 9 April, 2012

³⁴ Indian Police Service (Retired)

The NHRC has to be more proactive and insistent in getting the government to hurry up on developments that will make it a more independent and representative institution, to allow it to publish its Annual Reports without waiting for the Parliament to pass it³⁵ so that the inordinate delay in making it available for the public is avoided.

III. Conclusion:

In conclusion it is pertinent to mention that there are definite improvements in the functioning of the NHRC since the last ANNI 2011 report. However, there is a lot more to be done. There is also a need for political parties and Parliament to intervene in matters relating to the NHRC to ensure the realization of the ICC/SCA's recommendations. The NHRC has now to place itself as a 'public defender of HRDs' in the country and come forward to speak loud and clear when gross violations of human rights take place across the country. The NHRC is circumscribing itself in unnecessary ways and we hope that this will change. Although there must be recognition that a half-fulfilled mandate may be seen as a glass half full for the Commission, but for the ordinary people of the country most of whom are poor and vulnerable and unable to access justice against very powerful forces, the work of the Commission is still a glass half empty.

³⁵ As per the PHRA an Annual Report cannot be made public until it is tabled in Parliament by the government, and this is not done until the government has prepared a response for follow up to the recommendations made by the NHRC in its Annual Report.

Indonesia:

Weakening Performance and Persistent Culture of Impunity

Institute for Policy Research and Advocacy (ELSAM) ¹

I. General Overview on Human Rights Situation in Indonesia

There has been little progress in the situation of human rights in Indonesia during the period between January 2011 and February 2012 compared to 2010. Violence and human rights violations have persistently occurred throughout the period under review, Torture, and agrarian conflicts, which further led to criminalization and intensified violence against peasants and the local community, violations of the rights to freedom of religion, continued violence in Papua, have been among the major human rights violations which occurred during this period. Overall, the protection of rights remained a textual commitment, which is yet to be realized in the daily lives of the people. With a persistent culture of impunity, citizens, especially human rights defenders and minority groups, continue to be at risk of human rights violations.

Torture and cruel, inhuman and degrading punishment remained persistent in 2011. According to ELSAM's monitoring report alone, there have been 19 torture cases committed by state agencies such as the Indonesian National Military (TNI), Police, and Prison Officers in the period between January and November 2011.² In several torture cases, the National Commission on Human Rights (KOMNAS HAM) carried out monitoring and investigations to further provide recommendations to the relevant parties in an effort to resolve those cases.

The situation in Papua remained volatile throughout 2011. Although the representative office of KOMNAS HAM in Papua always reported on the updates of the situation on the ground to the headquarters in Jakarta for further follow ups, they suffered from lack of adequate

¹ Prepared by Ikhana Indah Barnasaputri, Legal Advocacy Department, Institute for Policy Research And Advocacy (ELSAM)

² Based on *Laporan Situasi Hak Asasi Manusia Tahun 2011: Menuju Titik Nadir Perlindungan Hak Asasi Manusia* (Report on the Situation of Human Rights 2011: Towards Lowest Point of Human Rights Protection); ELSAM; 2011

resources, such as funding and personnel. Thus, KOMNAS HAM often responds slowly to the violations of human rights occurring in Papua.

The implementation of rights to fair and impartial judiciary has also been obstacle major problem in Indonesia. Legal prosecution for crimes such as petty theft have often been harsh, while cases of other more serious human rights violations that might be linked to high-ranking officials have often been abandoned and neglected. There is also a particularly worrying trend of the use of criminal charges, including for allegedly causing damage and looting, against peasants in agrarian conflicts.,

Indeed, conflicts related to land tenure have been prevalent in 2011. According to KOMNAS HAM's data, there were 378 complaints associated with land ownership conflicts in 2011.³ The disputes were triggered by the longstanding unsettled land disputes, often between business and local communities, which frequently culminated in communal violence.

Throughout 2011, human rights defenders faced various forms of harassment for carrying out their duties.

This report is aimed at providing a critical review of the performance of KOMNAS HAM in implementing its mandates to promote and protect human rights in Indonesia.

II. Independence and Effectiveness of KOMNAS HAM

2.1. Complaints Handling

In 2011, KOMNAS HAM received approximately 6.358 complaints. Figures 1 and 2 below provide a breakdown of these cases in 2011 according to categories of rights and alleged perpetrators respectively.⁴

³ The data were obtained at <http://portal.komnasham.go.id/component/content/article/1-latest-news/1684-komnas-ham-akan-paparkan-kebijakan-pemerintah-yang-tak-lindungi-ham>. While according to ELSAM in *Laporan Situasi Hak Asasi Manusia Tahun 2011: Menuju Titik Nadir Perlindungan Hak Asasi*, it was stated that in 2011 there were 151 incidents with land conflict background occurred between communities and company and state institutions.

⁴ KOMNAS HAM Public Accountability Report Period 2007- 2012

Figure 1: Complaints according to categories of rights

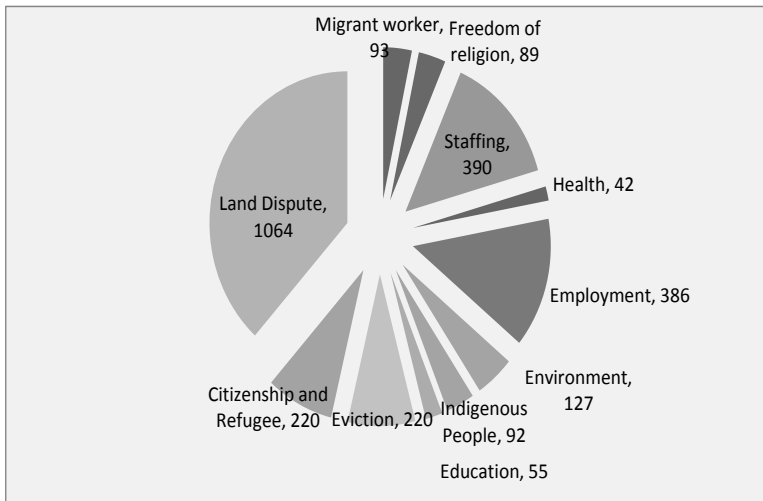
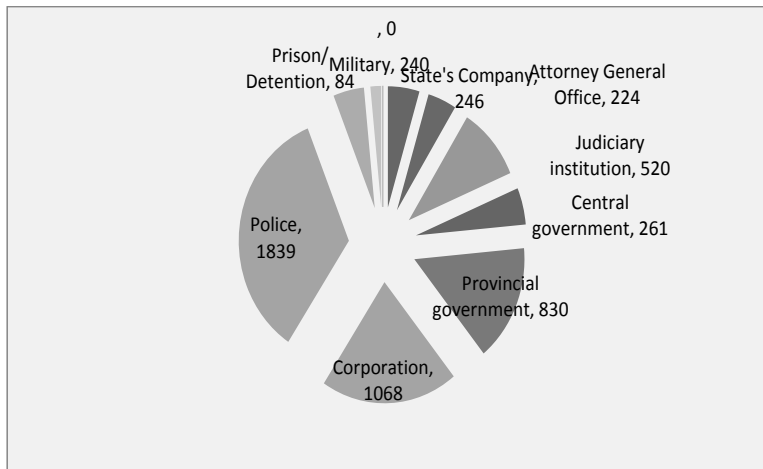


Figure 2: Complaints according to categories of alleged perpetrators



The highest number of complaints was filed against the police, and was related to cases of arrest and detention, discrimination, shooting, violence and torture during investigation processes. In late 2011, there was a rise in complaints related to violence committed by the police in land disputes. Another prevailing trend is the increasing number of complaints

against corporations. These include cases of land disputes between local communities and corporations, as well as cases of employee outsourcing by companies.⁵

Procedurally, KOMNAS HAM follows up on the complaints by meeting with the parties to clarify the details of the case, providing recommendations, and assisting with mediation. It also participates in investigations and monitoring and in certain cases, carries out fact-finding missions (especially for national-scale cases).

Issuing recommendations to the government and other parties is one of the responsibilities of the KOMNAS HAM. However the most frequent challenge is when the recommendation is not acted upon⁶. It is apparent that KOMNAS HAM cannot ensure compliance of its recommendations.⁷

According to KOMNAS HAM,⁸ while some its recommendations have been taken up, most others have been ignored. It is still unclear why Commission's recommendations have largely not been implemented. One plausible explanation is that there is no relevant mechanism to ensure the implementation of KOMNAS HAM's recommendations.⁹

KOMNAS HAM received a budget cut of 10%¹⁰ (from 57.2 billion rupees in 2011).¹¹The shrinking resources may further impact on the Commission's performance, particularly in monitoring and investigation, as well as in its ability to provide quick responses to violations of human rights¹².

2.1.1 Agrarian Conflicts

⁵<http://www.komnasham.go.id/component/content/article/1-latest-news/1455-komnas-ham-polri-paling-banyak-langgar-ham>

⁶ Based on an interview with a staff of KOMNAS HAM on 27 July 2012.

⁷ For example, see:

<http://nasional.kompas.com/read/2012/01/03/18410812/Komnas.HAM.Desak.Kapolri.Jalankan.Rekomendasi>

⁸ The information was obtained based on a phone conversation with KOMNAS HAM staff, 27 July 2012.

⁹ KOMNAS HAM has no authority to ensure that issued recommendation will be implemented. The authority of KOMNAS HAM which is provided in Law No 39 Year 1999 still assessed as having many shortages. Therefore KOMNAS HAM needs authority strengthening. This notion can be seen through a statement of KOMNAS HAM Commissioner at <http://www.hukumonline.com/berita/baca/lt4f7d11402f7ae/komnas-ham-butuh-penguatan-kewenangan>

¹⁰ The data is obtained at <http://www.komnasham.go.id/anggaran-komnas-ham/417-anggaran-komnas-ham-2011-detail>

¹¹ The data is obtained at <http://www.komnasham.go.id/anggaran-komnas-ham/417-anggaran-komnas-ham-2011-detail>

¹² Based on an interview with a staff of KOMNAS HAM on 27 July 2012, and supported by information from the media <http://news.detik.com/read/2012/05/21/171333/1921100/10/anggaran-dipotong-20-85-komnas-ham-komnas-perempuan-kpai-protes>

Throughout 2011, KOMNAS HAM received 738 complaints related to agrarian conflicts.¹³ This part tries to focus on the role of KOMNAS HAM in agrarian conflicts in Indonesia. Land conflicts generally involve business or state enterprises, and have often resulted in violence.¹⁴

Not only have agrarian conflicts been triggered by land confiscation by companies or military/police, they have also been caused by communities' demands for their right to environment. Several cases illustrating agrarian disputes which occurred in 2011, had drawn national attention, and involved KOMNAS HAM's interventions, which included investigations and the issuing of recommendations. Unfortunately, in these agrarian conflicts, KOMNAS HAM has largely failed to prevent the escalation of violence and has not been successful at pushing for the prosecution of the perpetrators of violence. In addition, there has been no concrete effort and mechanism recommended or implemented by KOMNAS HAM in order to secure the right to land to the affected community, which triggered the conflicts and violence. Three cases which took place in 2011, namely the case of Urut Sewu in Kebumen; the case of Bima in West Nusa Tenggara; and the case of Mesuji in Lampung are provided here to demonstrate the Commission's incompetence in solving the agrarian disputes

a. The Case of Urut Sewu in Kebumen

The case started in April 2011 as a brawl between the army and Urut Sewu community in Kebumen, Central Java, causing gunshot injuries to 14 civilians and damages of property. The incident started off as a land dispute between local community and the Indonesian National Army. This conflict resulted in the legal prosecution of 6 (six) Kebumen community members who were alleged of vandalism. KOMNAS HAM submitted its recommendations on this case and stated that there were allegations of human rights violations during the incidents. However the recommendations were not considered by the judge or prosecutor during the trial process.¹⁵

¹³ The number was referred to *Jurnal HAM*, KOMNAS HAM, 2011, page 182. ELSAM ourselves recorded that throughout 2011 there was 151 land dispute which culminate in violence action, can be seen at *Menuju Titik Nadir Perlindungan Hak Asasi Manusia*; Human Rights Situation Report 2011; ELSAM; 2011

¹⁴ *Menuju Titik Nadir Perlindungan Hak Asasi Manusia*; Human Rights Situation Report 2011; ELSAM; 2011

¹⁵ Based on investigation report conducted by ELSAM

b. The Case of Bima

The case originated as a protest by the local community of Sape, Bima Regency, West Nusa Tenggara who blockaded the Sape Port in mid-December 2011. The protest was preceded by a mining permit issued by the Sape Regent to PT. Sumber Mineral Nusantara (PT. SMN). The local community raised concerns that the mining would cause environmental pollution. The protest was forcibly dispersed by the police, which eventually led to violent clashes that caused the death of 3 (three) locals. The police identified 47 persons as suspects for damaging public property. KOMNAS HAM stated that there were allegations of violations perpetrated by the police including shooting with rubber bullets and live ammunition targeted directly to members of the local community.¹⁶ KOMNAS HAM also conducted an investigation and issued seven recommendations to the Chief of the Indonesian National Police. The recommendations *inter alia* requested that the Chief of Police should conduct the investigation independently and examine all the officials who allegedly committed human rights violations. KOMNAS HAM also requested the Chief of Police to guarantee the fulfillment of the rights of the suspects in the case.¹⁷

c. The Case of Mesuji¹⁸

Violence erupted in three locations in Register 45 and Sri Tanjung Village (both in Mesuji regency, Lampung province) and in the Sodong Village (Ogan Komering Ilir regency, South Sumatera) in late 2011. The incident was preceded by an agrarian conflict between the local community and PT. Silva Inhutani. The police and military were also involved in the conflict. The local community submitted their complaint to the KOMNAS HAM, who subsequently made recommendations on the conflict. However, the violence against the community continued to escalate and reached its climax in 2011. KOMNAS HAM then launched an investigation into the incident was part of the Joint Fact-finding Team of the Mesuji Case together with the Coordinating Ministry for Political, Legal and Security Affairs.

¹⁶ As reported by the media, can be downloaded at http://www.bbc.co.uk/indonesia/berita_indonesia/2011/12/111226_bimasclash.shtml

¹⁷ Kasus Bima, KOMNAS HAM Desak Kapolri Jalankan Rekomendasi (Bima Case, KOMNAS HAM urged the Chief of Police to Implement the Recommendations); KOMPAS 3 Januari 2012

¹⁸ Excerpted from various source, one of them is the Report of Joint Fact-finding Team, and also <http://regional.kompas.com/read/2011/12/15/19281641/Penjelasan.Komnas.Ham.Soal.Kasus.Mesuji>

In all three cases, investigations were conducted by KOMNAS HAM, who subsequently issued recommendations. However, it appears that most of its recommendations have not been implemented, resulting in unresolved conflicts – and even deterioration in the situation of human rights in some of the cases. This reflects the lack of effectiveness of KOMNAS HAM, particularly in fulfilling its human rights protection mandate.

Considering that violence against local communities are often preceded by land dispute, KOMNAS HAM has established a team to specifically work on settlements in agrarian conflicts. This team is made up of KOMNAS HAM and NGOs, and was established in early 2012. At the time writing, the team had just developed a mechanism to settle agrarian conflict. However, there is still no follow-up or recommendations made by KOMNAS HAM on the role of the President and the Coordinating Ministry on Political, Legal and Security in resolving these disputes.

2.2 Selection of candidates of KOMNAS HAM members

Due to the persistent gross human rights violations in Indonesia, and the existence of laws and regulations that lack human rights perspective in the country, KOMNAS HAM faces a difficult task as a state institution mandated to promote and protect human rights in the country. As such, it is important for the Commissioners and staff members to have strong capacities, in the comprehension of human rights and the skills to lobby other state institutions, as well as the courage to act on human rights violations.

Since the tenure of the current KOMNAS HAM members expires in 2012, the issue of selecting suitable candidates as Commissioners with competent qualifications, as well as process of selection, has come to the spotlight of the public, including civil society.

The selection process of the new KOMNAS HAM Commissioners commenced in November 2011 with the establishment of the Selection Committee. The Committee consists 7 (seven) persons from various groups: diplomats, a former head of the UN human rights commission, a researcher, a religious leader, a politician, and a journalist. The composition of the selection committee appears to be pluralistic.

KOMNAS HAM member candidates are required to be Indonesian nationals, be at least 35 years old; hold a minimum of bachelor's degree; possess a professional experience working

as a judge, attorney, police, lawyer/ other legal profession, religious leader, society leader, NGO activist, academic, journalist and human rights defender; be dedicated and possess high integrity, have no record in committing any demerit/involvement in corruption; have experience in empowering and protecting individual/group whose human rights are violated; and if selected as a member of KOMNAS HAM, be willing to surrender his/her position as a state official or other position that consumes time.

There are several stages of the selection process, namely administrative selection, profile assessment, public input/scrutiny, and interview, physical and psychological health-tests. As of April 2012, the selection process had passed 3 (three) stages. The first stage, which was the registration selection and administrative qualification process, saw 276 out of 363 applicants shortlisted to the next stage. After the next stage of public input/scrutiny, 120 persons were able to proceed to the next stage, which entailed psychological and health tests, which further streamlined the number of candidates to 60. KOMNAS HAM aims to select 15 persons to serve as its Commissioners during the period of 2012-2017..

In the selection process, civil society organizations that formed the Civil Society Coalition for KOMNAS HAM played a role in providing inputs in the form of position paper to the Selection Committee. From 276 applicants who passed the administrative selection, 89 persons were from NGOs and CSOs, making it the highest number in the category of occupation of applicants, followed by academics, who make up 51 applicants.¹⁹

In the Civil Society Coalition for KOMNAS HAM's position paper to the Selection Committee, it is asserted that the candidates should have integrity, courage, independence, transparency and accountability, strong determination to prevent human rights violations as the main and supporting criteria.²⁰ It is also stipulated in Paris Principles that KOMNAS HAM members are expected to come from diverse backgrounds. Thus the candidates should also be required to adapt quickly and easily to the working procedures of KOMNAS HAM.

The monitoring activities for the selection process of KOMNAS HAM members conducted by civil society include the establishment of a team of observers, research on the performance

¹⁹<http://www.komnasham.go.id/home/66-hot-news/1494-pengumuman-kelulusan-seleksi-administrasi-penerimaan-calon-anggota-konna>

²⁰ *Catatan Atas Proses Seleksi Calon Anggota Komisioner KOMNAS HAM* (Note on the Selection Process of Candidates of KOMNAS HAM member); delivered by Civil Society Coalition for KOMNAS HAM; 4 April 2012

and background of the candidates, media briefing, and lobbying of the selection committee. As of the time of drafting of this report, civil society had already conducted 2 (two) discussions and meetings with the Selection Committee and provided inputs in the form of position paper.

During the selection process, the Selection Committee conducted public discussions to request the input from the society regarding the selection criteria of candidates.²¹ The expectations from the society varied on various issues – from the issue of the role of Commissioners in resolving past human rights abuses to the issue of capacity of KOMNAS HAM members.

At the time of writing, 30 candidates have already been presented to the House of Representatives of Indonesia for the next stage. All candidates have diverse backgrounds, such as civil servants, medical doctors, lecturers/academics, NGO activists, employees of state institutions, religious leaders, journalists and lawyers²². Representatives of the NGO sector dominated the list, followed by lecturers/academics. Notwithstanding this, the Indonesian civil society coalition has noted that the civil society background of a majority of the Commissioners of KOMNAS HAM during 2007-2012 period have failed to guarantee an improvement in the Commission's performance in the promotion and protection of human rights in Indonesia.

III. Thematic Issue

3.1 Human Rights Defenders

Human right defenders have long been acknowledged for their roles in the promotion and protection of human rights. Several prominent examples of violations, including violence, against human rights defenders occurred in 2011. One of them was the violence against Petrus W Ajamiseba and Leo Wandegau – members of *Serikat Pekerja Seluruh Indonesia (Indonesian Trade Union, SPSI) in Papua.*²³ Journalists in particular

²¹ <http://www.komnasham.go.id/component/content/article/1-latest-news/1558-komnas-ham-harus-tuntaskan-kasus-berat>

²² Based on the announcement of KOMNAS HAM selection process, downloaded at <http://www.komnasham.go.id/component/content/article/1-latest-news/1717-pengumuman-kelulusan-seleksi-tahap-iv-tahap-akhir-penerimaan-calon-anggota-komnas-ham-periode-2012-2017>

²³ <http://www.frontlinedefenders.org/node/16411>

have been targeted in 2011. According to the record of LBH Pers, throughout 2011, there were 96 violence cases against journalists²⁴.

There is no regulation or legislation that ensures the protection for human rights defenders in Indonesia. Instead, a number of regulation and legislations which could put limits and barriers to human rights work have emerged. Such regulations include the Law on Conflict Handling, the Law on National Security, and the Mass Organization Bill. There are increasing concerns that those regulations will indirectly limit the space of human rights defenders in performing their duties.

There was also suggestion from the civil society to regulate the protection by revising the law on KOMNAS HAM or the law on human rights. Civil society has taken several steps in order to encourage the protection for human rights defenders. For example IMPARSIAL has signed an MoU with KOMNAS HAM to conduct a revision of the Law on KOMNAS HAM, aimed at encouraging the protection for human rights. However, these civil society initiatives have not been met with similar rigor on the part of KOMNAS HAM on this issue. It can thus be concluded that there is currently inadequate attention towards the protection of human rights defenders in the work of KOMNAS HAM despite the worrying trends of increasing curbs on the work of human rights defenders in Indonesia.

3.2 Relationship between KOMNAS HAM and Other State Institutions

Despite its limitations, KOMNAS HAM has tried to maintain good relationships with other state institutions. One of the measures taken was the signing of a Memoranda of Understanding with the Army and the Directorate General of Corrections to conduct training programmes on human rights, and to access facilities for monitoring and investigation in cases of human rights violations. Besides that, KOMNAS HAM also presented inputs to the House of Representatives on the Food Bill²⁵ as well as the regulations on security sector reform. KOMNAS HAM also often provides recommendations and inputs to related state institutions on issues related to human rights, although these recommendations are often not responded to. Notwithstanding this, these efforts of KOMNAS HAM must be welcomed, supported and continued.

²⁴ <http://nasional.kompas.com/read/2011/12/28/12503016/Tahun.2011.Kekerasan.terhadap.Jurnalis.Meningkat>

²⁵ In the discussion of the Food Bill, KOMNAS HAM asked to stop the discussion since it was assessed that it did not contained human rights perspective. The complete elaboration at <http://www.komnasham.go.id/siaran-pers/1500-siaran-pers-komnas-ham-hentikan-pembahasan-ruu-pangan-yang-tak-berperspektif-ham>

KOMNAS HAM has also collaborated with the Victim and Witness Protection Agency (LPSK) in ensuring the fulfillment of the rights of victims and witnesses. Regulation 44 of 2008 on the Provision of Compensation, Restitution, and Assistance to Witnesses and Victims allows victims and their families to request compensation through the LPSK, after a decision granted by the human rights court. Article 2 of the Government Regulation Number 44 year 2009 states that “victims of gross violations of human rights are entitled to compensation”.

In such cases, there are several requirements that need to be met by victims or families of victims of gross human rights violations in order to receive assistance from the Commission. Firstly, the compensation application should have a reference letter from KOMNAS HAM as an attachment, to demonstrate that an applicant is indeed a victim or family member of victim of gross violation of human rights.²⁶ When victims apply for compensation or assistance, from LPSK, they are encouraged to send an application letter to KOMNAS HAM to obtain a reference letter as a victim/ family of victim of gross violation of human rights as a requirement of application. The communications between LPSK and KOMNAS HAM on this aspect have not been very efficient, since not all of the letters from LPSK have been replied by KOMNAS HAM. This inefficiency on KOMNAS HAM’s part has affected LPSK’s efficiency in providing compensation to the applicants /victims.²⁷ Furthermore, the unclear division of responsibilities between the Commission and LPSK has impinged on the ability of victims to receive prompt compensation..

The ability of KOMNAS HAM members to lobby and influence politicians and the government is an essential criterion in the work of promoting and promoting human rights. However, not all Commission members appear to possess the adequate lobbying skills. While it is desirable that all members should play a role in lobbying activities, in practice, this is only done by several leaders of the Commission.²⁸ The lack of adequate skills to lobby, persuade, and influence may be one of the reasons behind the lack of progress in resolving past human rights abuses.

IV. KOMNAS HAM Relation with the Civil Society

²⁶ It is specifically provided in the Government Regulation Number 44 Year 2008 on the Granting of Compensation, Restitution, and Assistance to Witnesses and Victims Article 4 paragraph (2).

²⁷ Based on an interview with one of the LPSK Members on 18 July 2012.

²⁸ Based on an inputs given by a member of KOMNAS HAM, Yosep Adi Prasetyo

KOMNAS HAM often collaborates with civil society in conducting its activities. Civil society often encourages victims of human rights violations to submit complaints to KOMNAS HAM. Civil society also supports KOMNAS HAM by contributing data, facts, information about human rights violations.²⁹ KOMNAS HAM has also engaged with civil society in the monitoring and investigation process of the violation of human rights in the region.

However, KOMNAS HAM and civil society often held different views, on various issues. For example, in the cases of violence in Papua, while civil society has constantly brought the attention of KOMNAS HAM to the gross human rights violations in Papua, the Commission has consistently stated that these cases cannot be categorized as gross violations of human rights. The disagreements in determining whether gross violation of human rights have occurred or not are frequent points of contention between civil society and KOMNAS HAM. Thus, a common understanding is needed in understanding and defining what exactly constitutes a violation of human rights. This is important to ensure closer cooperation between civil society and the Commission.

V. Conclusion and Recommendations

Violations of human rights continue to occur in Indonesia. Most of the incidents are related to incidents or policies from previous years. KOMNAS HAM as a state institution has a significant role in resolving these violations of human rights. However, it appears that the performance of KOMNAS HAM in 2011 has not improved or changed significantly from the previous year. There has been no extra effort by KOMNAS HAM to improve its performance in promoting and protecting human rights in Indonesia. In order to improve the Commission's performance in the following years, the following recommendations are made:

1. The membership tenure of current KOMNAS HAM members will end in 2012. Before handing over their positions to new Commissioners, the current KOMNAS HAM members must finalize all unresolved cases, including by concluding the ongoing investigations on past human rights abuses;
2. KOMNAS HAM members should be absolutely free from intervention, especially from political parties since the very beginning of the selection process.. This is to

²⁹ Based on a discussion with KOMNAS HAM Staff, Mr. Sriyana

ensure that the members will certainly perform according to human rights values, will work for improvement and strengthening of knowledge and understanding on human rights among the members and staff of KOMNAS HAM.

3. Future KOMNAS HAM members ought to have the essential abilities and courage to settle the human rights violations, including the lobbying skills.
4. KOMNAS HAM members should be able to communicate and cooperate effectively with other state institutions in an effort to resolve cases of human rights violations.

Japan: Limited Mandate in Sight for Japan's Human Rights

Commission

Citizens' Council for Human Rights in Japan (CCHRJ) ¹

I. Developments in establishing a NHRI in Japan

When the Democratic Party of Japan (DPJ) took office in September 2009, human rights organizations in the country had high hopes for significant improvements in the human rights situation, including the establishment of a National Human Rights Institution (NHRI). The past year has seen slight substantial progress toward towards the realization of a Human Rights Commission (HRC). Yet the question remains: what type of Human Rights Commission will be established?

A Project Team (PT) on the Human Rights Remedy Institution of the DPJ was formed in March 2011 to discuss and clarify issues pertaining to establishment of the Human Rights Commission. The PT conducted three hearings: with the Ministry of Justice (MOJ), the Japanese Federation of Bar Associations and with academic and civil society organisations. In June 2011, the Project Team submitted an interim report compiling the results of its study and submitted it to the MOJ. Upon receiving the report in August 2011, the MOJ published a basic policy paper titled "Summary of the law under consideration regarding the establishment of the National Human Rights Commission" (Brief Summary) in December 2011.

¹ Prepared by Ms. Shoko Fukui

II. Provisions of the Brief Summary

According to the Brief Summary, the aim of the proposed Human Rights Commission is “to promote the human rights policy comprehensively and to contribute the realization of society which respects the human rights.” This rather narrow formulated aim will only enable the Commission to function within the framework of the policy of the government of Japan. However, it is paramount that the Commission is given the authority to question the adequacy of the government’s policy in accordance with the international human rights standards.

One of the responsibilities of NHRIs under the Paris Principles is to submit recommendations to the government on any matter concerning the promotion and protection of human rights. However, if the mandate of the Commission as stated in the Brief Summary remains unchanged, the Commission’s mandate will be limited to “promoting the human rights policy” and thus can only make recommendations regarding policies. This would make the Commission as noted in the Brief Summary fall far behind the standards set forth in the Paris Principles. The Brief Summary does not make any mention of international human rights standards, while again according to the Paris Principles, NHRIs should be given the competence “to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation”. In Japan, administrative bodies are required to be governed by the domestic laws and are not generally allowed to judge the domestic law systems. In order for the Commission to fully comply with the Paris Principles, it should be given the competence and responsibility to monitor domestic human rights policies in accordance with the international human rights standards, beyond the framework of the Commission as an administrative body.

It is problematic for the Commission to be established as an affiliated agency of the MOJ. This would hinder the Commission to deal adequately with human rights violations happening under the MOJ. For instance, the MOJ overlooks closed detention centres, such as prisons, police cells or immigration detention centres, which are often considered hotbeds for human rights violations and abuses. A Human Rights Commission established under the MOJ is unlikely to be able to critically address the human rights violations and abuses occurring in closed detention centres, as they are under the responsibility of the MOJ.

Another concern is that the Commission would not be able to make a judgment beyond the Constitution or the judicial framework if it is being established as an administrative body. The Brief Summary furthermore states that the Commission will delegate the administrative affairs of the Commission to the head of the Legal Affairs Bureau or District Legal Affairs Bureau, which further undermines the Commission's independency.

Definitions in the Brief Summary are viewed as problematic. In the Brief Summary, human rights violations are defined as "violations of constitutional provisions by the public authorities or the violations of Civil Code, Penal Code or other laws occurred between private individuals." Violations constituting "unjustifiable discrimination, abuses, other human rights violations, and behaviours which encourage discrimination" can also be investigated by the Commission. It is problematic that the Brief Summary does not specify clearly what is meant by "unjustifiable" and when filing a complaint to the Commission, the victim should be a specific individual. This means that, i.e. complaints made by groups such as foreigners living in Japan, sexual minorities or women in general fall beyond the jurisdiction of the Commission. Discrimination, human rights violations and abuses against such group of individuals are serious issues as those cases are almost impossible to be solved under current laws. Moreover, the alleged violations must be illegal, meaning if such acts are not defined as illegal acts in domestic laws, the complaints might not be considered by the Commission.

Discrimination created by the existing laws and systems will also fall beyond the jurisdiction of the Commission.

III. Alternative draft to the official Brief Summary

Civil society organizations have built a loose network to work together towards the establishment of a NHRI in Japan. A civil society group consisting of academics and lawyers has suggested an alternative draft to the official Brief Summary. It is unclear if the authorities will take this document into due consideration.

According to the alternative draft, the Commission should be authorized in the same manner as other public monitoring agencies and not merely as an administrative agency. State organizations in Japan corresponding to such monitoring agencies are the Board of Audit, which audits the State accounts and the National Personnel Authority, which recommends the personnel affairs of the public servants. It also recommends that the Commission itself should be able to pursue human rights issues with the United Nations human rights bodies such as the Treaty Bodies and Special Procedures. Currently the Ministry of Foreign Affairs is the agency in charge of communicating with the international institutions. If given the competence, the Commission itself would be able to determine human rights issues and address those who conflict with international human rights standards.

While the Commission should act a watchdog of the administrative bodies, the civil society group also suggests that it should be able to address individual cases of human rights violations. However, considering the fact that such Commission is neither a judicial nor a regulatory body, the proposal is that it should focus on remedies for the parties whose rights are violated rather than judging the illegality of the acts concerned. In that context, the Commission must not have its scope of authority limited as specified in the Brief Summary.

According to the Brief Summary, when issues on human rights violations are filed with the Commission, the investigation will be conducted on a voluntary basis. This means that if the suspected perpetrators deny the accusations, the investigation cannot proceed further and the persons will not be imposed any penalties. In this regard, civil society groups have suggested that public figures must be bound to respond to the investigation procedures of the Commission. As for the cases involving the public authorities, the Commission should be given the power to take effective measures, including publicize the facts or set the deadline to respond to the questionnaires.

Lastly, the Commissioners must be fully competent and qualified to secure the Commission's independence. Regarding the appointment of the Commission members, a pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights should be guaranteed, as set out in the Paris Principles.

IV. The next steps

Under the current Summary Brief, concerns were raised among the general public that a Human Rights Commission could possibly turn into an “institution that would curtail freedom of expression.” The reason for this is that the Commission under the Brief Summary is mandated to address mainly issues between private individuals rather than the human rights violations perpetrated by the public authorities. Civil society needs to make careful and repeated effort to clear this misunderstanding of the general public and counter the absurd claim that a NHRI would turn into an institution which violated the right freedom of expression, rather than to promote and protect this right.

Many civil society organizations have lobbied the National Diet members, including the

relevant Ministers to raise these concerns and insisted that the Commission should be established in full compliance with the Paris Principles that stipulate the independence of the Commission and ensures diversity among Commissioners. Civil society organisations continued to advocate for a Human Rights Commission which effectively deals with human rights violations committed by the public authorities and which also works on cases of discrimination against the minorities. They recommended that the Commission would be given the capacity to deal with all human rights specified in the Constitution and international human rights treaties which Japan has ratified.

The past year has again seen gradual progress towards the establishment of a Human Rights Commission. It is regrettable however that when making the comparison between the demands of civil society and the Summary Brief, it is apparent that the government has not paid much attention to the suggestions and recommendations of civil society.

Malaysia: A New Set of Commission, A New Sense of Hope?

ERA Consumer Malaysia¹

I. General Overview

Despite the Government of Malaysia (GOM)'s efforts to portray itself as a moderate Muslim nation that respects universal human rights, its actions especially with regards to national laws and legal instruments have largely proven otherwise. The human rights situation in Malaysia in 2011 was not significantly different from previous years as many human rights violations were recorded throughout the year. This was illustrated, among others, by the reluctance of GOM to respect freedom of speech and freedom of assembly, while police brutality and gross discrimination against LGBT rights remained rampant.

As in previous years, the year 2011 proved to be a difficult one for the Human Rights Commission of Malaysia (Suhakam). It was the new Commission's first full year in office, which was coincided by renewed calls by civil society organisations (CSOs) for the government to respect the right to freedom of peaceful assembly, the most notable being the street rally organised by a coalition of non-governmental organisations (NGOs) under 'Bersih 2.0', to call for electoral reform.

A major challenge faced by Suhakam in 2011 was in its position on sexuality rights, particularly in response to the banning of Seksualiti Merdeka, an annual sexuality rights festival held in Kuala Lumpur, organised by a coalition of Malaysian NGOs and individuals. Seksualiti Merdeka means "Sexuality Freedom".² While responding positively to human rights and LGBT community's consistently pressure on Suhakam to defend the rights of the LGBT community and the right to organise the Seksualiti Merdeka event,³ the Commission's position drew flak from many Islamic faith-based NGOs⁴ and politicians.

Another significant activity of the commission was its National Inquiry into the Land Rights of Indigenous People following numerous complaints and memoranda on alleged infringements of the rights of the Indigenous Peoples (IPs) to their customary land. The

¹ Report written by Mr Ravin Karunanidhi, Secretary General of ERA Consumer

² <http://www.seksualitimerdeka.org/p/introduction-what-is-seksualiti-merdeka.html>

³ <http://www.asiapacificforum.net/news/prof-datuk-khaw-lake-tee-human-rights-commission-of-malaysia.html>

⁴ <http://www.sinarharian.com.my/politik/desak-pemimpin-suhakam-undur-1.3888>

purpose of the National Inquiry was to examine the root causes of the problems relating to native customary right to land and to recommend appropriate solutions to the problems.⁵

II. Independence

A. Law or Act

Suhakam was established in 2000 by statute, namely the Human Rights Commission Act 1999 (Act 597). The Commission was set up to provide the public with a channel to submit complaints on violations and abuse of human rights, as well as to create awareness and understanding about human rights in Malaysia.⁶ Suhakam was established by the Malaysian government amidst huge international pressure for greater respect for human rights between 1998 and 1999, during a period of political turmoil which witnessed various gross violations of fundamental freedom and liberties.⁷ Due to national and international pressure, the Government in 1999 rushed the Act through Parliament without public participation and consultation with NGOs and other stakeholders.

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 the independence of the Commission is its top priority.⁸ Nevertheless, before amendments were made to Act 597 in 2009, section 5 of the said Act stated that members of the Commission shall be appointed by the Yang di-Pertuan Agong on the recommendation of the Prime Minister. It further stated that the members of the commission shall be appointed from amongst prominent personalities including those from various religious and racial backgrounds and they shall hold office for a period of 2 years with an eligibility of reappointment. This particular section had 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.

⁵ http://www.suhakam.org.my/c/document_library/get_file?p_l_id=35723&folderId=441003&name=DLFE-11001.pdf

⁶ 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.

⁷ 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.

⁸ 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.

Apart from the selection of the Commissioners, there are other concerns in 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 Commissioner’s duties demonstrates the non independence of the Commission. It will only be independent if Suhakam is put under the purview of the Parliament rather than the Minister’s.

Another concern that is prevalent with Suhakam is with regards to the relevance of its recommendations. Despite being required by its enabling Act to prepare an annual report and make recommendations to its findings, the Suhakam’s recommendations have largely been ignored by the Government. Under its enabling Act, the Commission may also submit special reports to the Parliament whenever it considers it necessary. However, the Parliament has never debated any of Suhakam’s report since its inception.

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

Public authorities in Malaysia are not obliged or required by law to cooperate with Suhakam as compared to other independent Commissions such as the Malaysian Anti-Corruption Commission (MACC). However, Suhakam is mandated to conduct Public Inquiries on major infringements of human rights and also to visit places of detention in accordance with procedures as prescribed by laws relating to places of detention and then make necessary recommendations to the Government based on their findings.

Suhakam held several Public Inquiries into allegations of violations of human rights throughout the year, including on allegations of the use of excessive force by the authorities prior and during the Bersih 2.0 public assembly on 9 July 2011 to which the Royal Malaysia Police (RMP) expressed its willingness to fully cooperate in the Public Inquiry.⁹

Despite it being an independent Commission, Suhakam in reality is not separate from the Executive both in law and in practice. The Commission is put under the direct purview of the

⁹ http://www.suhakam.org.my/c/document_library/get_file?p_l_id=35723&folderId=54464&name=DLFE-13601.pdf

Prime Minister's Department, with the Human Rights Commission of Malaysia Act 1999 (Act 597) stating that the Minister in charge of human rights may make regulations for the purposes of carrying out or giving effect to the provisions of Suhakam's enabling Act, including prescribing the procedure to be followed in the conduct of its inquiries.¹⁰

As per required by Suhakam's enabling Act, the Commission has prepared and presented its annual report to the Government and the Parliament on an annual basis since its inception. However, the report has never been debated in Parliament. 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."¹¹ Current Suhakam chairman, Tan Sri Hasmy Agam, in Kota Kinabalu recently said, "For the past 11 or 12 years in terms of Suhakam Annual Reports is that none have been discussed or debated in Parliament." He went on to say, "Every Suhakam chairman, including myself, have been pressing the government to bring it to Parliament". Tan Sri further added, "He (law Minister Nazri Aziz) assured me he would discuss with our parliament speaker to find a slot in parliament but nothing [has materialised] so far."¹² The inability of the Commission to ensure that its report gets discussed in Parliament has certainly undermined its work. It is also feared that the lacklustre attitude by the Executive and Parliamentarians towards the work of Suhakam would demoralise the Commission and portray an image that human rights is not a priority of national leaders.

It is worthy to note here that the Commission does not have any access to intervene during deliberations in the Parliament on any draft law which would have impact on Malaysia's human rights situation. Nevertheless, the Attorney General's chambers have invited the Commission for consultations on certain draft bills before they are sent to the Parliament. For instance, in 2011, Suhakam was invited by the Attorney-General for a consultation on the Public Assembly Bill and the Security Offences (Special Measures) Act (SOSMA). However, Suhakam was only notified of this consultation on the eve before the bill was sent to the Parliament. Moreover during the consultations, none of the Commission members were given a copy of the draft bill. Instead, the Attorney-General only read them out and asked for comments, providing little time, if any, for Suhakam to study the bills.

¹⁰ Section 22 of Act 597

¹¹ "Suhakam treads an arduous path", News Straits Times, 3 August 2008.

¹² <http://www.freemalaysiatoday.com/category/nation/2012/06/18/will-parliament-ever-hear-us/>

Over the past couple of years, Suhakam has stood firm in its recommendations to the government. For instance, although the government banned and outlawed Bersih 2.0 and its peaceful assembly, Suhakam continued to urge the government to allow the assembly. In fact, the Commission even called on the government to allow the counter rallies too.¹³ In addition, the Commission also proactively monitored the rally, and subsequently conducted a Public Inquiry on the alleged violence.

With regards to the Commission's relationship with the judiciary, Act 597 does not give Suhakam any power to intervene in court proceedings in any capacity.¹⁴ Notwithstanding absence of any enabling provisions in the Human Rights Commission Act 1999, Suhakam has appeared as watching brief in court several times to act as an observer in cases involving human rights. Between the year 2011 to February 2012, the Commission held watching brief for the following cases: *B. Vijayakumari Pillai vs Low Swee Siong & Tan Siew Siew*; *Noorfadilla Bintu Ahmad Salikin vs Cyaed Bin Basirum, Ismail Bin Musa, Dr Haji Zahri Bin Aziz, Ketua Pengarah Pelajaran Malaysia, Menteri Pelajaran Malaysia dan Kerajaan Malaysia*; *Teo Soon Heng & 5 Others vs The Election Commission of Malaysia*; *Zaina Abidin Bin Hamid @ S. Maniam & 3 others vs Government of Malaysia & 3 others*; *Gan Soh Eng vs Guppy Plastic Industries Sdn Bhd*. The Commission has applied to obtain *amicus curiae* (friends of court) wherein the Commission will offer information to assist a court in deciding a matter before it.

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, independence and transparency of the appointment is still in doubt as it does not reflect the true intentions of the Paris Principles¹⁵.

Despite the amendments, little or no regard was paid to the principle of openness, transparency and inclusiveness. First and foremost, the appointments of selection committee

¹³ <http://www.themalaysianinsider.com/mobile/malaysia/article/allow-july-9-rallies-suhakam-tells-putrajaya/>

¹⁴ Section 12(2) of Human Rights Commission Act 1999 states 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.

¹⁵ The Paris Principle relate to the status and functioning of National Institutions for the protection and promotion of human rights

members were non-transparent. The new selection process includes a five-member selection committee which will be consulted by the prime minister who will in turn advise the King on the selection of the commissioners.

Three persons from this five-member selection committee are to be representatives of civil society, as stated in the amended enabling law of Suhakam. However, in a letter from the Suhakam chairperson to Suaram¹⁶ dated Feb 4, 2010, it was revealed that the three members of civil society had already been appointed by the prime minister, without the knowledge and consultation of a majority of the civil society organisations working on human rights in Malaysia.

Although the government took cognisance of the recommendations of the ICC-NHRI and made certain positive amendments to the enabling Act, the nomination process of the Commissioners still lacked transparency and was not fully inclusive and participatory. Before the Commissioners were appointed on April 2010, the Prime Minister's Department sent out invitations to several CSOs to nominate candidates to be considered in the selection of new Suhakam Commissioners for 2010-2013. These CSOs were given approximately 2 to 3 weeks to make their recommendations. However, the sincerity of the GOM in this situation has to be questioned as the invitations were only extended to several CSOs.

Although the enabling Act fails to include qualification provisions of Commissioners, the Human Rights Commission of Malaysia (Amendment) Act 2009 ("Act 1353") provides the characteristics of the members of the Commission. Section 5 of Act 1353 states that members of the commission shall be appointed from amongst men and women of various religious, political, and racial background who have knowledge of, or practical experience in, human rights. In accordance with the provision, the current membership of the Commission reflects a near satisfactory pluralistic composition, although a better balance in gender would have been more desirable.

Currently, the amended Act provides the Commissioners to hold office for a period of three years with an option of being reappointed to a maximum of one additional term only.¹⁷ However, in April 2011, the current chairman, Tan Sri Hasmy Agam, has expressed his

¹⁶ A leading human rights NGO in Malaysia

¹⁷ Section 5(4) Human Rights Commission of Malaysia (Amendment) Act 2009

grouses that the 3 year term is too short to plan and implement all their activities and policies.¹⁸

It is unprecedented and commendable that five out of the seven Commissioners, including the Chairman, serve the Commission on a full time basis. In contrast, all previous Commissioners served the Commission on a part-time basis, which compromised the effectiveness of the Commission. Nevertheless, the government should have made it compulsory by law for the Commissioners to serve on a full time basis in conformity with the recommendations made by ICC-NHRI that, “Members of the NHRIs should include full-time remunerated members[...].”¹⁹

The Government does not provide the Commissioners of Suhakam with any appropriate human rights trainings. The trainings attended by the Commissioners or Suhakam staff are usually those provided by regional organisations such as the Asia Pacific Forum of NHRIs (APF).

In contrast with the previous Commission members, who were mostly made up of retired civil servants, the current line-up of three of the seven current Commissioners are from civil society and human rights activism background.

D. Resourcing of the NHRI

Section 19(1) of Act 597 stipulates that the government shall provide the Commission with adequate funds for its operation; while section 19(2) prohibits the Commission from receiving foreign funding. Further, section 19(3) only allows local funding from individuals or 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 (approximately USD3.05 mil.) from the Government.²⁰

III. Effectiveness

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

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)

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

Suhakam has a complaint handling mechanism which allows it to inquire and look into allegations of human rights violations and abuses. Such powers are carried out by the Commission's Complaints and Inquiries Working Group (CIWG), currently headed by Commissioner Muhammad Sha'ani Abdullah. Complaints can be made in the form of a memorandum²¹ or via Suhakam's official web portal.

Upon receiving a complaint, it will be filed, and notification will be given to the complainant within three working days after the complaint was lodged. The officer receiving the complaint (in the event the complainant complains personally in Suhakam's office) will conduct the first evaluation and make recommendations to the Assistant Chief Secretary of the CIWG (Supervisor) on the follow-up to the complaint. If the complaint is received in other forms (emails, letters), the Supervisor is responsible for evaluating the complaints. The decision on case classifications will be made by the Commissioner responsible or the Supervisor. For complaints outside the Commission's jurisdiction, a letter will be sent to the complainant informing them of the outcome.

Cases classified as human rights violations will then be passed on to the relevant officers and investigation on the complaint will be carried out. The contents of all correspondence cannot be acknowledged, approved and signed by the officers as it is the sole prerogative of the Commissioners 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 of the violation. The officer in charge will then inform and discuss the development of the case with the Supervisor and Commissioner until the case is resolved. Finally, a notification letter signed by the Commissioner will be sent to the complainant.

One of the major limitations with regards to receiving complaints is that Suhakam only has one office each in Peninsula Malaysia (Kuala Lumpur), Sarawak (Kuching) and Sabah (Kota Kinabalu) which are major cities, thus making it difficult for those in rural areas or in other states to reach it. Accessibility and travelling in the northern Borneo states of Sabah and Sarawak are limited especially from the rural areas. Interestingly, most human rights

²¹ SUHAKAM (2012) 2011 Annual Report, Kuala Lumpur: Report of the Complaints and Inquiries Working Group (pg39). It was reported that out of the 1,232 reports received by the Commission, 51 were in the form of a memoranda.

violations occur in these remote rural areas and their limited access to transport deters them from reporting cases to the Commission. There is also no ground or mobile team to move around in the rural areas and other parts of the country therefore, to lodge a complaint in person, the victim has to travel long distances. The effectiveness of e-complaint cannot be ascertained and has never been reported in Suhakam's annual report. However, a mobile team was formed during the National Inquiry into Land Matters, which proved to be effective as the Commission members and staff traveled throughout the country including to the most remote places to meet victims of human rights violations. During these visits, they managed to gather many complaints and, facts and figures which were useful in their Inquiry.

From January to December 2011, the Commission received a total of 1232 complaints of which 51 were in the form of memoranda. Out of the 1232, 407 complaints were found to be out of Suhakam's jurisdiction including administrative issues which should be addressed by the relevant agencies. Cases that were criminal in nature were therefore referred to the police or other investigation agencies, complaints that were pending before the courts or have been disposed off by the courts and those that were under the jurisdiction of professional bodies²² such as the Bar Council were also not accepted as Act 597 does not allow it.²³ The remaining 825 accepted cases were in relation to human rights violations such as police force's inaction, excessive use of force and abuse of power, Prison Department, Immigration Department, National Registration Department; preventive detention laws such as Internal Security Act 1960, Emergency (Public Order and Prevention of Crime) Ordinance 1969, land matters, Indigenous Peoples, refugees, migrant workers, person with disabilities, freedom of religion and freedom of expression.²⁴

Of the 825 complaints that were classified as human rights violations, the Commission has concluded investigation for 215 cases. The slow investigation is mainly attributed to the lack of funding and inadequate staffing. The Commission also priorities the many backlog cases from previous years before starting investigation on the current cases. Civil society has also been made to understand that certain complaints need a longer time to investigate as it often requires expertise and involves many parties.

²² SUHAKAM (2012) 2011 Annual Report, Kuala Lumpur: Report of the Complaints and Inquiries Working Group (pg40).

²³ Section

²⁴ SUHAKAM (2012) 2011 Annual Report, Kuala Lumpur: Report of the Complaints and Inquiries Working Group (pg41).

The Commission in the year 2011 exercised its powers to issue subpoena on both government authorities and general public during the National Inquiry and the Public Inquiry on Bersih 2.0. Interestingly, no one breached the subpoenas that were issued on them.

IV. Thematic Focus

A. Human Rights Defenders and Women Human Rights Defenders

Suhakam has a desk for human rights defenders (HRD desk) which is responsible to receive and investigate into complaints on human rights violations through phone calls, emails, submissions of written statements and memorandums from the public including HRDs. There is also a mechanism within Suhakam that responds to requests for assistance from 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.²⁵ Nevertheless, Suhakam must be commended for sending its team to monitor the vigil and condemning the police for arresting those in the peaceful assembly. Similarly, Suhakam sent a team led by Commissioner Muhammad Sha'ani to monitor the Bersih 2.0 rally. However, the presence on that day did not prevent police brutality on the protesters.

Despite having a few roundtable discussions with civil society organisations (CSOs), Suhakam has never lobbied the government openly for the implementation of international standards for the protection of HRDs such as the UN Declaration on Human Rights Defenders (HRDs) into domestic law.

B. Interaction With Regional and International Human Rights Mechanisms

Suhakam has in the past submitted shadow reports to treaty bodies, including the Committee on the Rights of the Child in 2006, as well as stakeholders report to the Universal Periodic Review (UPR) Working Group for the purpose of Malaysia's first UPR on September 2008. We have been informed that the Commission is also planning to submit its shadow report to the following treaty bodies:

²⁵ <http://thestar.com.my/news/story.asp?file=/2010/8/3/nation/20100803145014&sec=nation>

- i. Committee on the Elimination of Discrimination against Women
- ii. Committee on the Rights of the Child
- iii. Committee on the Rights of Persons with Disabilities

The number of communications sent by Suhakam to Special Procedures Mandate Holders not made known through its annual reports. However, Suhakam has engaged with the following Special Procedures Mandate Holders:

- i. In February 2007, Suhakam had a meeting with the Special Rapporteur on the Right to Education, Mr Vernor Munoz Villalobos during his country visit to Malaysia. In relation to this, at the 11th regular session of the Human Rights Council (HRC) in June 2009, Suhakam submitted a written and oral statement in response to Mr Munoz's report of his country visit to Malaysia.
- ii. In June 2010, Suhakam had a meeting with the Working Group on Arbitrary Detention (WGAD). In relation to this, at the 16th regular session of the HRC in February 2011, Suhakam submitted a written and oral statement in response to the WGAD's of its country visit to Malaysia.
- iii. In February 2011, Suhakam had a meeting with the Special Rapporteur on the Situation of Human Rights in Myanmar.

Since the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in October 2009, Suhakam together with the other members of the South East Asia National Human Rights Forum (SEANF) has requested numerous times to have a dialogue with AICHR to discuss issues of common concern and to seek avenues for formal engagement with AICHR for the promotion and protection of human rights in the region. However, up until the end of 2011, such engagements did not take place.

Following the publication of the SEANF Paper on Migrant Workers in November 2010, in which Suhakam played a leading role, SEANF wrote to the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW) to propose a meeting with ACMW to discuss the recommendations put forward in the in the Paper and also other issues concerning

migrant workers in ASEAN. However, to date, SEANF has not received any responses from ACMW.

C. NHRIs' Implementation of References Developed by the Advisory Council of Jurists (ACJ) on, Terrorism and The Rule of Law; Rights to Education; and Right to Environment

Numerous draconian and undemocratic laws have been legislated in Malaysia in the name of preserving national security. The Emergency (Public Order and Crime Prevention) Ordinance 1969 (EO) and the Internal Security Act (ISA) have been among the most controversial laws. Both the EO and the ISA provided for detention without trial for up to 2 years, which can be renewed indefinitely. The year 2011 was marred with 27 arrests under ISA and a further 722 were arrested under the EO. It is to be noted that all 722 of those detained under the EO have been released while 45 people remained held under the ISA at the time of writing, despite the repeal of the Act, which has since been replaced by the Security Offences (Special Measures) Act 2011 (SOSMA).

The ACJ in its final report made several recommendations on Malaysia. Among them was that the definition of the terms 'terrorism' and 'terrorist' in domestic legislation should be reviewed wherein a clear distinction should be made between legislation to combat national and international terrorism and legislation for heinous domestic offences against the State, person or property. After many years of campaigning and protest by civil society and Suhakam, in September 2011, the Prime Minister announced that the ISA will be repealed and replaced with SOSMA. In the same speech, the PM said that under the new replacement law, no individual will arbitrarily be detained due to political ideology. However, the SOSMA does not provide a definition for terrorist. The ISA provided the police with a broad scope of powers to detain anyone on the mere suspicion of acting in a manner prejudicial to the security of Malaysia, or to the maintenance of the country's essential services or economic life. While SOSMA appears to narrow down the scope to only those suspected of "security offence", the definition of "security offence" remains overly broad as it includes committing acts "prejudicial to national security and public safety". Thus, in reality, SOSMA is equally as problematic as the ISA.

The ACJ also expressed its concerns over the detention period of the ISA. Under the ISA, the police could detain individuals for an initial period of 60 days, which could be followed by

two years of detention, renewable indefinitely under the orders of the Home Minister. This power has been taken away and the detention period now been reduced from 60 days to 28 days under SOSMA, upon which the Attorney-General must decide either to charge or release the detainee. SOSMA also promised to ease incommunicado detention by mandating immediate notification of next-of-kin and access to a lawyer chosen by the suspect. However, that initial access can be postponed for 48 hours should a higher level police officer consider it necessary.

A far better plan would be for Malaysia's policymakers to immediately scuttle this first attempt at replacing the ISA and seriously rethink what it means to protect national security concerns while simultaneously protecting the democratic rights and freedoms of all Malaysia's people.

Similar to its stand in the past, Suhakam took the position that laws relating to detention without trial goes against the spirit of the Federal Constitution and contravenes Articles 9, 10 and 11 of the Universal Declaration of Human Rights (UDHR). Thus, such laws must be repealed and replaced with legislation that serves security needs and at the same time complies with human rights principles.²⁶ Suhakam commended the repeal of the ISA stating that it is a positive move towards the improvement of the human rights situation in the country. Through a press statement released on 16 April 2012, it welcomed the replacement legislation SOSMA, while noting that some of the provisions are consistent with its recommendations in its report Review of the Internal Security Act 1960 published 2003.²⁷ Nevertheless, during ERA Consumer's meeting with Suhakam, the Commission highlighted some of their concerns regarding SOSMA. These concerns include the power of arrest and detention under Clause 4 of the Act, which does not provide for judicial oversight in the extension of detention period of up to 28 days, and while Clause 5 allows for notification to the next-of-kin when a person is arrested and detained, the police have the power to deny him immediate access to legal representation for a period of up to 48 hours. Furthermore, Clause 4(6) provides the police with the power to intercept communications, which could potentially infringe personal liberty and the right to privacy. The Commission is of the opinion that this power should be exercised through a court order.

²⁶ <http://www.mysinchew.com/node/63767>

²⁷ <http://www.themalaysianinsider.com/malaysia/article/suhakam-joins-call-for-review-of-isa-replacement-law/>

The ACJ's Final Report on Right to Education made a number of recommendations on Malaysia. Among the recommendations are for the Malaysian government to consider ratifying the ICESCR, CERD and the UNESCO Convention Against Discrimination in Education. Suhakam has on annual basis through its Annual Report, press statements and internal meetings, urged the Malaysian government to ratify all core human rights treaties. However, the government has yet to positively respond to these recommendations.

The ACJ also recommended for the need to allocate resources to improve education infrastructures and facilities especially for those in the rural and remote areas. This also includes the need to improve the availability of effective and safe transport options for those children. Children, especially from indigenous communities living in remote areas face great difficulties attending school as transportation is often unavailable, dangerous, or unaffordable. The Commission has had several dialogues on this issue with government agencies such as the Indigenous Peoples Welfare Department (JAKOA) and the Ministry of Education. This has been reported in Suhakam's Annual Report.²⁸

The ACJ also pointed out that the Malaysian school infrastructures are not disabled-friendly. Most schools do not have toilets, classrooms, canteens and other facilities which are accessible to children with disabilities. In relation to this, Suhakam held a roundtable discussion on disabled-friendly environment with the local authorities in 2011, although this discussion was not specific to schools.²⁹

Undocumented Malaysian and migrants born in Malaysia are frequently denied their rights to schooling in Malaysia although Article 13 of the Federal Constitution guarantees the right to education as a fundamental right for all those born in Malaysia. To deal with this issue, Suhakam has had several discussions with the Ministry of Education and schools to allow undocumented children to attend school, as primary education is compulsory under the Education Act and the Child Rights Convention to which Malaysia is a signatory.

Finally, on the issue of environment, Suhakam only met government agencies once in 2011, in November, to discuss on the issue of climate change.

²⁸ SUHAKAM (2012) 2011 Annual Report, Kuala Lumpur: Report of the Education and Promotion Working Group (pg28)

²⁹ SUHAKAM (2012) 2011 Annual Report, Kuala Lumpur: Report of the Economic Social and Cultural Rights Working Group (pg86)

V. Consultation and Cooperation with Civil Society

Formal Relationships with Civil Society

There is no specific rule or law to formalize the relationship between Suhakam and civil society organisations in Malaysia. However, the Commission is generally open in its engagement with civil society groups in Malaysia.

In the past, there was considerable reluctance on the part of civil society to engage with Suhakam because of the general perception of Suhakam's ineffectiveness in promoting and protecting human rights. This was most notable when 42 organisations boycotted Suhakam's 10th year anniversary on 8 September 2009. However, such strained relationship between Suhakam and NGOs in Malaysia has improved vastly since the appointment of the new set of Commissioners, who have adopted a more inclusive rather than exclusive approach. Although the concerns regarding the Commission's effectiveness in promoting and protectin human rights in Malaysia, its appearance of being more inclusive has resulted in greater support for its work from NGOs in Malaysia.

Many NGOs and civil society groups now work with Suhakam on a project basis and sit in various working committees of the Commission.

In addition, in its first ever "National Inquiry into the Land Rights of the Indigenous People in Malaysia", Suhakam has actively engaged the Indigenous People (IPs), NGOs and the media, as well as other stakeholders, including government agencies to ensure full participation and inclusiveness of the process.

Meanwhile, a series of consultations on the issue of business and human rights were organised by Suhakam in 2011. These consultations, which involved government agencies, non-governmental agencies (NGOs), community based organisations (CBOs) as well as the business sector, were organised by the Economic, Social and Cultural Rights Working Group (ECOSOCWG) of Suhakam to discuss the emerging issues pertaining to business and human rights and to highlight the importance of having a national policy or guidelines on business and human rights in Malaysia.

VI. Recommendations

To the Government

- To implement recommendations made by Suhakam, especially on the ratification of the remaining six core human rights treaties;
- To ensure more transparent and inclusive process in future appointments of Commissioners;
- To ensure that Commissioners serve on a full time basis;
- To give Suhakam more powers to conduct spot checks in places of detention;
- To give Suhakam more independence by taking it out from the purview of the PM's department;
- To act on findings made by Suhakam in the National Inquiry and Public Inquiries;
- To meaningfully consult with Suhakam before presenting draft legislations which has potential impact on human rights to the Parliament.

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;
- To push for further amendments to Act 597, Act A1353 and Act A 1357 to give the Commission wider mandates, especially in the protection of human rights.

To Suhakam

- To be more vocal in issues related to human rights;
- To organize public campaigns especially on issues that the government has continuously failed to act on;
- To increase its outreach to address perceptions of Suhakam being an elitist organization;
- To continue its role as an intermediary between the government and civil society by promoting meaningful and inclusive dialogues and consultations between all relevant stakeholders.

Maldives: The Need for Tactful and Timely Intervention

Maldivian Democracy Network¹

I. General Overview

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 created 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, won by the then opposition Maldivian Democratic Party (MDP) who came to power on a coalition platform. However, in March 2009, the Dhivehi Rayyithunge Party (DRP) gained a majority in the parliamentary elections. The country has also made its first foray into decentralisation with local councils elected at the island, city and atoll level for the first time in February 2011.

The political situation in the Maldives took a huge turn following the extrajudicial arrest of the Chief Judge of the Criminal Court, Abdullah Mohamed by the Maldives National Defense Force (MNDF) on 16 January 2012. The then opposition parties protested continuously for 22 days following the arrest. The protests resulted in the resignation of President Mohamed Nasheed – the country's first democratically elected president – on 7 February 2012. Vice President Dr Mohamed Waheed was sworn in as president just hours later.

On 8 February, Nasheed announced publicly that he had resigned under duress following a mutiny by the security forces. This prompted MDP protesters to take to the streets of Male. State buildings, courts and police stations on some of the islands were burned down, allegedly by supporters of MDP. Excessive force and mass arrests were made relating to this incident. MDP has continuously carried out protests, calling for both early elections and the resignation of top

¹ Prepared by Fathimath Ibrahim Didi, the interim Executive Director of Maldivian Democracy Network.

state officials. To investigate the allegations of a coup and police mutiny, President Waheed constituted a Commission of National Inquiry (CoNI).

This change is perceived as a huge setback for the consolidation of democracy in the Maldives; it has fuelled doubt in the minds of the people about the very concept of democracy. The alleged mutiny has created an atmosphere of hatred and mistrust towards security forces. Dialogue between political leaders is severely limited and the high level of polarisation among the public has made the situation even more difficult.

Thus the Maldives is a young and fragile democracy grappling with severe civil, political, economic and social problems against a backdrop of raised expectations and political polarisation.

II. Independence

A. Law or Act

The Human Rights Commission of the Maldives (HRCM) is both a Constitutional and a statutory body, although it was first established by a presidential decree in 2003, a law was passed in 2005 ensuring the permanency of the Commission and stipulating its objectives, responsibilities and powers. This law was amended in 2006,² and it is the current Human Rights Commission Act which now defines the functions and powers of the HRCM.

B. Relationship with the Executive, Legislature, Judiciary and other Specialised Institutions in the Country

The Constitution states: “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: “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.”

² Law No: 6/2006

³ Section (b), Article 189

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 the Parliament to either dismiss or suspend the said member. A two-thirds majority is required in the Parliament to carry through this motion. Remuneration to Commission members is decided by the Parliament but cannot be altered until their tenure is over.

The HRCM is accountable to the 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 the government. However, as per the Article 69 (b)⁴ of parliamentary regulations, members or staff of independent institutions can be summoned for questioning through the relevant Parliamentary Committees. The HRCM was summoned to the Committee on Independent Institutions in the Parliament for the first time on 31 January 2012, in order to clarify the actions taken by the Commission in relation to the extrajudicial detention of the Chief Judge of the Criminal Court.

However, given the strong emphasis on independence in the legislative framework of the Commission and the background of the current Commissioners, the Maldivian Democracy Network (MDN) does not believe that independence from the Executive, the Parliament or the Judiciary is an issue.

In 2011, the HRCM sent recommendations on ten draft bills to parliament.⁵ There is no restriction on attendance at the Parliamentary Committee discussions on these bills. However, the HRCM has not taken the initiative to appear at the Committee stage nor at the later stages of the bills to lobby for amendments proposed by the Commission.

The Parliament reached a deadlock twice in 2011. MDN would like to note that the Commission had issued a press statement calling on the Parliament to work in such a way that the parliamentary sessions are not interrupted. The Commission raised these concerns with the political parties as well.

⁴ Parliament regulation 2010

⁵ HRCM Annual report 2011, p26

A total of 625⁶ cases were submitted to the HRCM in 2011. 21 cases among them were initiated by the Commission. The Commission was able to finish the investigations of 106 cases. The HRCM does not have a direct working relationship with the court. Instead, the allegations of criminal investigation reports are sent to the Prosecutor General's (PG) Office for referral.

How the Commission responded to the political crisis

Following the extrajudicial arrest of the Criminal Court Chief Judge Abdullah Mohamed, the Commission met with him twice while he was kept under military detention. In a press statement on 24 January 2012, the HRMC called for the release of the judge, arguing that his continued detention was in contravention of the Maldivian Constitution, laws and other international treaties. The HRCM initiated an investigation into the human rights violations of the arrest, at a time when the PG had also called for an independent investigation of the arrest.⁷ A report was submitted to various authorities including the PG after the investigation.

As noted earlier, protests were held for 22 days following the arrest of the Judge. During this time the HRCM issued several statements condemning the violence and damage to public property and news reporters. The Commission started monitoring the on the ground situation during protests in a systematic manner, with further assistance from the Office of the United Nations High Commissioner for Human Rights (OHCHR) and Amnesty International.

The HRCM called for all-party talks following the arrest of the Judge. These were scheduled to take place on 7 February 2012. However, given the situation that day, the HRCM-initiated talks did not materialise. The Commission did however meet political parties separately to raise their concerns and discuss a way forward.

The HRCM initiated investigations into the events following the arrest of the Judge,⁸ as well as the events of the 6-8 February.⁹ Two of the reports on these investigations were issued to the relevant stakeholders on 29 May 2012, and the three reports were made public in August 2012.

⁶ HRCM Annual Report 2011, p28, p29

⁷ <http://www.haveeru.com.mv/dhivehi/news/115714>

⁸ <http://hrcm.org.mv/publications/otherreports/AbdullahGhaazeeCaseFinal21Aug2012.pdf>

⁹ <http://hrcm.org.mv/publications/otherreports/February8th%20Report21Aug2012.pdf>,
<http://hrcm.org.mv/publications/otherreports/February6thn7thReport21Aug2012.pdf>

The HRCM did however face criticism from both sides of the political divide for the delay in concluding their investigations.

The HRCM initiated a movement to call for peace and reconciliation. Meetings were held with the Executive, political parties, police as well as civil society to promote the campaign. However, no other major steps have been taken with regards to this campaign.

MDN would like to note that during meetings with both the President and the CoNI, both parties independently confirmed that the HRCM was asked to participate in the CoNI investigations. However the HRCM declined the request, stating that they will conduct its own investigations.

C. Membership and Selection

3.1 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 committee shall be formed in the Parliament to review the nominees, interview candidates and prepare recommendations to the Parliament.¹¹ This same procedure is followed for the appointment of a President and Vice-President of the Commission from amongst its members.

The enabling legislation does not require the President of the Republic or the 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 President's Office nor the Parliamentary Committee consulted with civil society on the nominations to the HRCM. The previous Commission had been appointed in 2006. Since each Commission has tenure of five years,¹² the current Commission's term should have expired in 2011. However, since the Commission was appointed prior to the ratification of the 2008 Constitution, it was deemed an 'interim institution' following Article 297 of the Constitution. This meant that its members

¹⁰ Constitution of the Republic of Maldives, Article 190

¹¹ Human Rights Commission Act, Article 5

¹² Human Rights Commission Act, Article 7

would have to be re-appointed within two years after the new Constitution took effect on 7 August 2008. Accordingly, new Commission members were appointed in the year 2010. A president from amongst the members was appointed in September 2010; however, the Vice President post was vacant until December 2011. The Parliament approved Commission member Ahmed Tholal's name was passed from the Parliament as the Vice President of the Commission on 27 December 2011 and was appointed to the post by the President of the Republic on 2 January 2012.

MDN would like to note that the first nominee for the post of Vice President of the HRCM made by President Mohamed Nasheed was Ms Jeehan Mahmood. However, the Parliament rejected Ms Mahmood, on the basis that the president of the Commission was also a woman and that it would be unfair for two women to fill the posts of President and Vice President.

In no circumstances was the independence of the members challenged by the government. However, the HRCM was the subject of a high level of criticism in social media; this public criticism centred on its functionality and promptness in responding to the situation of national crisis.

D. Resourcing of the NHRI

The financial independence of the Commission remains one area of concern. Article 30 of the 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."

For the fiscal year 2011, the Parliament awarded the HRCM MVR 23,780,489, about 95% of the requested amount of MVR 25,200,513. The sum was the result of negotiations between the HRCM and the Ministry of Finance and Treasury (MoFT). For the fiscal year 2012, the HRCM proposed MVR 30,710,816. This proposed amount was reduced down to MVR 26,232,442 at a meeting held with the MoFT. The MoFT further deducted 5.2% of the revised budget; the budget amount approved by the MoFT was therefore MVR 24,872,677. The Parliament finally approved MVR 22,711,075, about 91% of the amount requested to it. 13% of this amount was again

deducted during the month of August, leaving a total of MVR 19,758,635 for the expenses for the year 2012.

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 MoFT. The Commission further noted that though they were advised to prepare their financial statements in accordance with the International Public Sector Accounting Standards, it was compelled to prepare their own format to comply with this one as none of the other state institutions had adopted this method so far.¹³

II. Effectiveness

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

A separate investigation department was established at the HRCM to investigate the complaints filed with the Commission. Each case received at the Commission is screened and categorised according to the area of violation and an officer is assigned to each area. The cases received are routed to the officer investigating that particular area of violation. The investigating officer discusses the case with other investigating officers, the director of the department and the Commission member designated to oversee the department. An update of the status of the cases lodged is presented at the Commission meeting each week. A triangulation process is followed during the investigation into each alleged violation. A case report is prepared after analysing the information gathered and this report is tabled for the upcoming Commission meeting for deliberations and actions. Depending on the Commission's decision, the case is either closed or designated for periodic monitoring, or forwarded to the relevant authority for action. The Commission monitors the implementation of the recommendations by the state.

Though there are no regional offices of the HRCM outside the capital, the Commission operates a toll free number through which complaints can be filed to the Commission. In 2011, the Commission received 1017 calls and 74 new cases via this number.¹⁴

¹³ Annual Report of the HRCM 2011, p101

¹⁴ Annual report of the HRCM, p.33

In 2011, the HRCM received a total of 625 complaints. Among them, 21 cases were initiated by the HRCM. Of the 625 cases submitted, investigations of 359 cases remain ongoing. In addition to investigations, the Commission conducted monitoring of 14 cases.

In a written response to MDN, the HRCM clarified the reasons for the prolongation of the investigation process:

- *Cases that have been submitted simultaneously by the complainant to other relevant authorities, causing the HRCM considerable delay in awaiting a decision or response by the concerned authority;*
- *Some cases require in-depth analysis which calls for documents or other evidence. Such cases are delayed by the lack of adequate and timely support from concerned authorities, possibly due to political reasons, budget constraints and insufficient human resources in the relevant authorities;*
- *Difficulties in getting independent professional assistance in drawing conclusions in cases requiring specialist input, such as cases involving medical issues;*
- *Depending on the type of allegation, some cases require more time to complete the various phases of the investigation process;*
- *Some cases are delayed or unable to be continued due to failure on the part of the complainant to provide full and accurate information and evidence;*
- *Political tensions leading to events such as sustained protests demand considerable time from the limited human resources, thereby slowing down the progress of some inquiries and investigations.*

The Commission used its subpoena powers in several cases in order to collect evidence from relevant authorities. These cases fall into the category of social protection to children, the right to education, the right to electricity, and the right to medical care.

IV. Thematic Focus

Human Rights Defenders and Women 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:

“Discussions are underway at the commission level about setting up human rights defenders mechanism at HRCM but means is yet to be finalised. HRCM has also worked at the ‘Youth challenge 2011’ to compile human rights defenders registry. Although we do not have a dedicated desk for human rights defenders, HRCM has been continuously working with human rights defenders in helping them out with any human rights related issues.”

The threats faced by human rights defenders in the Maldives might not be comparable to those faced by their counterparts in other Asian countries. However, there were two remarkable instances where two prominent human rights advocates suffered knife-related murder attempts in January 2011 and June 2012. The victim of the second stabbing incident was also confronted by a group of people on Human Rights Day 2011 for organising a gathering calling for freedom of religion, in which he suffered head injuries. It is disappointing that the HRCM did not take any action, or even voice the Commission’s concerns regarding these incidents.

It is important to note that there are no mechanisms that provide the legal, physical and financial support required by a human rights defender under threat. Hence it is of utmost importance to have a dedicated desk or other such mechanism within the National Human Rights Institution that would ensure that human rights defenders are given adequate support and protection.

Interaction with International Human Rights Mechanisms

Submissions by the HRCM

The HRCM submitted a shadow report on the country's compliance of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to the treaty body on 4 August 2011. Some of the recommendations proposed by the Commission in the report include:¹⁵

- To pass laws in accordance with the spirit of the Convention on eliminating racial discrimination. This includes laws to stop the spread of hatred through the internet as well as eradicating cyber-crimes.
- To establish a mechanism to identify and eliminate racial discrimination against migrant workers. The Commission also suggested taking action to change the public's perception
- Regarding expatriate workers and to conduct research and monitoring regarding the same.
- To expedite the process of incorporating the topic of human rights into the school curriculum.
- To establish a toll free number to provide counseling support to victims of discrimination.
- To conduct an advocacy campaign to create awareness of the issue.

The HRCM made its submission for the List of Issues for the International Covenant on Civil and Political Rights (ICCPR) and submitted its shadow report in 2011. Additionally, the Maldives underwent the Universal Periodic Review (UPR) process in 2010; the report compiled based on this review was accepted by the Human Rights Council in March 2011 during its 16th session. Significantly, the government of the Maldives has accepted most of the recommendations proposed in the report. The standing committee established by the Ministry of Foreign Affairs (MoFA) for the UPR process was handed the responsibility to assess the implementation of these recommendations. Both the HRCM and MDN are members of the

¹⁵ The Annual Report of HRCM 2011, p.55, 56, 57

committee. However, it is important to note that this process has yet to generate any constructive work.

Reporting by the State

The Maldives is overdue on several of its reporting obligations to treaty bodies whilst others have been submitted late.¹⁶

The State report under the Convention against Torture (CAT) was due in May 2005, and has not 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 All Forms of Discrimination against Women (CEDAW) was due in July 2010 and has not been submitted at the time of this report. The previous 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 has 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 three years after it was due.

In a written response to MDN on the matter, the HRCM stated that:

“As in every year, regular meetings were held and letters exchanged with regard to timely reporting to the treaty bodies in 2011 with the relevant stakeholders of the state who are responsible for reporting to the treaty bodies.”

¹⁶ <http://www.unhchr.ch/tbs/doc.nsf/NewhvVAIISPRByCountry?OpenView&Start=1&Count=250&Collapse=106#106>

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.

NHRI's implementation of references developed by the Advisory Council of Jurists (ACJ):

The ACJ reference on the Rule of Law in Combating Terrorism¹⁷:

In a written response to MDN on the matter, the HRCM stated that:

"HRCM has noted the comments made by ACJ and pursued to advocate those recommendations proposed by ACJ with competent authorities. Among these recommendations, HRCM has commented on several bills which were drafted to address increasing violence. They include, the "Aniyaa Manaa Kuruma Huttuvumuge Bill" (Bill on Prohibiting and Prevention of Torture), the "Jinaai Ijraathuge Bill" (Criminal Procedure Code), the "Kuh Kurun Huttuvumahtakai Khaassa Fuyavalhu Thakeh Elhumuge Bill" (Bill on Special Provisions to curb crimes), the "Hekka Behey Bill" (Bill on Evidence) and the Penal Code.

In many instances, the Commission has intervened in ensuring legal assistance for detainees under Police custody and when alleged victims are detained for prolonged periods without judicial review. Commission has communicated to the concerned authorities the importance of informing the detainees the reasons of their arrest and to provide it in writing."

It is crucial that the above-mentioned bills be in place for the Judiciary to function in the most effective manner without delaying justice. MDN would like to highlight that these bills have been pending in parliament for a long time. Accordingly, the HRCM needs to begin lobbying for the passage of these pieces of legislation. As mentioned in the general recommendations of ACJ, the HRCM should take an active role in educating all sectors of the community, including lawyers, journalists, doctors, police, the military and legislators on the meaning and application of international human rights law and general principle of the rule of law. This would be in addition to reporting on a regular basis to the Officer of the Commissioner for Human Rights in

¹⁷ <http://www.asiapacificforum.net/support/issues/acj/references/acj-references-terrorism-and-rule-of-law>

incidences of failure in complying with international human rights law in cases of Counter Terrorism.

The ACJ reference to the Right to Education¹⁸

In a written response to MDN on the matter, the HRCM stated that:

“The Commission compiled and submitted a policy review report focusing on the policies pursued by the government in relation to education, including a review of the Bill on Education and the related laws and regulations applicable to the sector.”

As mentioned in the HRCM’s response, MDN would like to highlight the HRCM’s attempt to ensure that the Legislature and the Executive comply with the international obligations in the field of education. MDN would like to mark the importance of lobbying for the Bill on Education that is pending in parliament. While lobbying for such a bill, it is imperative to ensure that the government acknowledges that the right to education includes promotion of and respect for human rights as recommended by the ACJ reference. This includes:

- Ways to enable the full development of each individuals potential and the complete enjoyment of all of his or her rights
- Ensure the full realisation of the right to education of marginalised, vulnerable and disadvantaged groups with a particular focus on people with special needs
- Planning, implementation and evaluation of human rights education in the education system, in particular promoting respect for religious, cultural and linguistic diversity.

Primary and secondary education is a constitutionally-guaranteed right under Article 36. The state and the parents have the responsibility to fulfill this obligation. However, whilst violations of this right are dealt with by the Ministry of Gender Family and Human Rights, the Ministry of Education and the HRCM, there are no specific mechanisms for addressing these violations.

¹⁸ <http://www.asiapacificforum.net/support/issues/acj/references/right-to-education>

The ACJ reference on the Right to Environment (2002)¹⁹

Human Right to Environment

In a written response to MDN on the matter, the HRCM stated that:

“The Commission has noted the comments and recommendations and have consulted concerned State authorities and advocated early implementation of these recommendations.

A workshop on environment climate change was conducted for the staff of the Commission in 2012.

Information on climate change and environment has been included in the human rights training manual of HRCM.”

a. Advocate the adoption and implementation of a specific right to an environment conducive to the realisation of fundamental human rights.

As per the Articles 22 and 67 (h) of the Maldivian Constitution, the state and its citizens are mandated to protect and preserve the natural environment for future generations and shall undertake and promote desirable economic and social goals through ecologically balanced sustainable development. Though protection of the environment is guaranteed in the Constitution, the HRCM’s work in this area is limited to specific issues related to the right. MDN believes that for the full realisation of this right the HRCM needs to adopt a holistic approach.

b. Consider how environmental issues impact the realisation of other human rights.

In a written response to MDN on the matter, the HRCM stated that:

“Commission received complaints regarding land allocation and erosion which have been brought to the attention of the concerned authorities in order to resolve the issue.

Commission has also looked into the issues regarding safety measures, environmentally hazardous substances. Example: building boats using fibre glass.”

¹⁹ <http://www.asiapacificforum.net/support/issues/acj/references/right-to-environment>

The HRCM has addressed specific cases where other basic rights were infringed due to environmental crises. Since the Maldives is an environmentally vulnerable country with few means for disaster management, it is vital that the HRCM takes proactive measures in preventing violations of other rights arising from environmental disasters.

c. Advocate for broader rights relating to environmental protection and the implementation of existing international laws on the environment.

Whilst the Maldives is party to key conventions that protect the environment, MDN would like to note that the Maldives has not signed any conventions related to the protection of occupational health and safety.²⁰ As there are a large number of migrants working in hazardous conditions without proper safety mechanisms in the Maldives, MDN believe that it is important for the country to become party to these conventions.

Implementation of the right

d. Encourage their states to accede to the Aarhus Convention or to develop a similar legal framework for participatory rights at either the domestic or regional level.

The Aarhus Convention entered into force on 30 October 2001. It is important to highlight that none of the member states of Asia Pacific Forum has acceded to this convention. The HRCM had not encouraged acceding this convention at any point of time. In many cases involving violations of environmental laws and regulations, the Executive and the Judiciary have failed to penalise and take actions against the offenders.

Environmentally displaced and affected people

e. Encourage their states to develop and strengthen humanitarian principles and values, disaster response, disaster preparedness, and health and care in the community.

²⁰ Human Rights and Environment, Final report and recommendations, Asia Pacific Forum, P 57.

“The Commission was also involved in resolving the issues related to temporary shelters allocated to tsunami victims of 2004. Commission monitored the status of the internally displaced persons (IDPs) and consulted the relevant authorities advocating provision of permanent housing to the victims.”

MDN acknowledges the Commission’s efforts with regard to resolving issues relating to the tsunami. MDN believes that there is greater need to strengthen preventative as well as response measures by the relevant authorities.

Every year, some of the islands suffer from shortage of water at certain periods. Since 2009, the HRCM has had *ad hoc* consultations with the Ministry of Environment and the Disaster Management Center regarding this issue and has been assessing the situation and monitoring the actions taken by the authorities to address the situation. However none of the relevant authorities has yet, initiated any systematic measures to overcome this issue.

V. Consultation and Cooperation with Civil Society

Formal relationship with civil society in general

The HRCM is mandated to assist and support NGOs working towards the promotion and protection of human rights under the Article 2 (c) of its act. To this end, an NGO network was established by the Commission. Given that NGOs are spread throughout the atolls and that the HRCM has no branches outside the capital, it was believed that human rights issues could be dealt with more closely through an NGO network.

The Commission has provided support to NGOs financially, thereby enhancing the role of NGOs in protecting, monitoring and advocating for human rights in a more sustainable manner. Four NGOs received financial aid under this project this year.

Consultations were conducted by the Commission with NGOs on various instances regarding the work of the Commission. However, MDN would like to note that consultations were limited to just a few NGOs. MDN believes that the HRCM should be more proactive in building alliances within civil society in its efforts to lobby the government to implement its recommendations

since this would mainstream efforts currently being made by disparate actors and improve effectiveness.

Follow-up on some select recommendations made in the 2011 ANNI report

- a) 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.**

In a written response to MDN on this matter, the HRCM stated:

“Discussions are underway at the Commission level about setting up a human rights defenders mechanism at HRCM but means is yet to be finalised. HRCM has also worked at the ‘Youth challenge 2011’ to compile a human rights defenders registry.”

While it is a good initiative to establish such a registry at the Commission, MDN would like to note that no further work has been done by the Commission regarding this matter.

- b) Take steps to ensure the speedy formulation and implementation of “whistleblowing” legislation in the Maldives.**

In a written response to MDN on this matter, the HRCM stated:

“The Human Rights Commission of the Maldives works very closely with state, government and other relevant stakeholders to implement its legislative initiatives. The Commission advised and recommended to formulate and implement “whistle-blowing” legislation, and as such the Commission would essentially work with the Attorney General’s Office in the drafting of such legislation and advocate for its approval by the majlis.”

No such legislation has been submitted to the Parliament yet. MDN would like to re-emphasise the importance of such legislation as this would help to expose corruption, organised crime, illegal or underhand practices and other kind of malpractices.

- c) 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 Sharia jurisprudence which many Islamic countries, including the Maldives, have cited for the non-implementation of the death penalty.

In a written response to MDN on this matter the HRCM stated:

“In view of the fact that the current judicial system is under review, given that the death penalty may not be implemented in the most just manner without the adequate mechanism and system requirements in place, the stance taken by the Commission has been made clear in a letter sent to the President and the commission still holds this position on the issue.”

Though the Commission has taken a stand on the issue and communicated their position to the president, the public has not been informed of the Commission’s position, even at the time of this report. MDN believes that it is crucial to do so given that the demand to implement the death penalty in the Maldives has increased since the murder of a renowned lawyer in June 2012 and government officials have openly made statements in favour of the death penalty several times in the media.

d) Redouble efforts to encourage the Maldivian State to speedily sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW)

This was a recommendation accepted by the government under the UPR process and the HRCM is a representing member in the committee established to implement the recommendations from the UPR. However, the Commission noted that this committee has come to a standstill. The Commission inquired about this matter from the government while drafting the ICCPR shadow report. The government’s response to this between 2008 and 2011 was that this convention is mostly ratified by the *sending countries* and never by the *receiving countries*. In 2012, the government stated that they are trying to ratify this convention with reservations.

e) Encourage the Maldivian State to sign the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

In a written response to MDN on this matter the HRCM stated:

“HRCM is undertaking an assessment on human trafficking in Maldives, and this would be one of the recommendations of the assessment report. Consultations were held with HRCM during the drafting stages of the bill on human trafficking and people smuggling, carried by the state in collaboration with the Australian Attorney Generals Department. HRCM also sent its comments to the draft bill.”

MDN would like to note that the Maldives has been kept under Tier 2 watch list for three consecutive years by the US State Department’s report on trafficking in persons. MDN believes that significant work has to be done by the state as well as the HRCM in this field.

Recommendations

- Establish a systematic way to work with the Parliament in times of parliamentary deadlock.
- Be proactive in lobbying for the recommendations of the HRCM on human rights-related bills in the Parliament and take the initiative to participate in Parliament Committee meetings.
- Take proactive measures to implement the recommendations accepted by the government under the UPR review process.
- Publish the assessment report on human trafficking in the Maldives without further delay.

- Encourage the state to review the national laws and policies as appropriate in order to recognise and guarantee the right to an environment of a particular quality as a human right as proposed by the ACJ.
- Assess the impact of environmental issues on the realisation of other human rights as per the recommendation proposed by the ACJ.
- Advocate for broader rights relating to environmental protection and implementation of existing international laws dealing with the environment.

- Apply greater efforts to ensure the issue of water shortage in some islands are dealt in a systematic manner by the relevant authorities.
- Take an active role in educating all sectors of the community on the meaning and application of the international law of human rights and general principle of the rule of law.
- Promote appropriate mechanisms for the redress of the violations of the right to education.
- Apply greater efforts to encourage government to devise, adopt and implement strategies to ensure the right to education for marginalised, vulnerable and disadvantaged groups.
- Report on a regular basis to the Officer of the Commissioner for Human Rights in incidences of failure in complying with international human rights law in cases of counter terrorism.

Recommendations repeated from the 2011 ANNI report

- 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.
- 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.
- 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.
- Take immediate steps to encourage the State to use existing laws and mechanisms to protect and help the victims of trafficking in the Maldives.
- Institutionalise 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 the Maldivian society.

Nepal: Prolonged Transitional Period Warrants Challenges for National Human Rights Commission

Informal Sector Service Centre (INSEC)¹

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

Five years since the signing of the Comprehensive Peace Agreement (CPA) have yielded very few positive developments in Nepal. The ongoing peace process continues to be hampered by constant political disputes. Several significant aspects related to the peace process remained unresolved at the end of 2011. Agreements were signed but they all failed because of their lack of implementation.

In 2008, the Constituent Assembly (CA) was tasked with writing a new constitution and would act as the interim legislature for a term of two years. However, the unstable politics and frequent changes of the Prime Ministers overshadowed the tasks of the CA. The ongoing peace process and constitution drafting process did not lead towards any satisfactory stages due to power struggles and indifferences among the political parties in the governments. The frequent reshuffle and formation of the government resulted in a political stalemate. The term of the CA was extended by one year on 28 May 2010. It was extended by three months, and again on 31 August 2011 by another three months. The fourth and final six months term extension of the CA expired on 27 May 2012. The political leaders seemed engrossed in power politics while the constitution drafting process was given very low priority. Sensitive issues to be included in the new constitution were sidelined until the last moment. The CA did identify the knotty issues of the constitution writing process, but it could not make any progress in writing a new constitution during its tenure. In 2012, due to the intentional dilly-dallying, the CA found itself in a situation where the term of the CA needed to be extended again.

Heavy disputes started over the jurisdiction of political parties and the Supreme Court when the latter ruled against another term extension of the CA. This decision of the court roused Nepalese politics. Political parties had mixed reactions. The Chairperson of the CA and the Prime Minister

¹ Prepared by Bijay Raj Gautam, Executive Director, INSCEC

went to the Supreme Court to file a petition against the decision. The Supreme Court rejected the petition. At the same time, many welcomed the decision of the Supreme Court denying a six months term extension of the CA and decided that the failure to finalise a new constitution, would result in the automatic termination of its term and thus go for a plebiscite or a new election.

The peace process was troubled by a conflict of interests between the major political parties in the CA and the developing tendency of the parties to use governance for the fulfilment of their interests. In 2011, Jhalanath Khanal and Dr. Baburam Bhattarai were both elected for the post of Prime Minister by the Legislative-Parliament. When PM Baburam Bhattarai formed an unprecedentedly oversized Council of Ministers and made a governmental decision to recommend to the President to grant official pardon to Bal Krishna Dhungel who had been sentenced to life in prison by the Supreme Court, he faced heavy criticism. Furthermore, the issue of returning lands, homes and properties captured by the United Communist Party of Nepal-Maoist (UCPN-M) during the armed conflict, remained unresolved. The Bhattarai government made a proposal to legalise the land deals. The Supreme Court stayed the government's decision.

In the past year, the National Human Rights Commission of Nepal (NHRC) was involved in broad range of human rights issues including impunity, security, transitional justice etc.² For instance, on 15 February 2011, the NHRC concluded the exhumation mission upon finding the remains of the total five dead bodies on the banks of Kamala River in Godar VDC-3 of Dhanusha district. After the complaint was lodged at the Commission about the disappearance of Sanjeev Kumar Karn, Durgesh Laav, Jitendra Jha, Pramod Narayn Mandal and Shailemdra Yadav, the NHRC investigation had unveiled the fact that the victims were buried at the bank of Kamala river in Godar VDC of Dhanusha district after they were allegedly killed by the security forces in October 2003. The Commission had decided to exhume the dead bodies at the suspected burial site on 12 August 2010.³

The NHRC has at many occasions, cautioned the government against withdrawing criminal cases which the government had claimed as being political ones. The Chairperson of NHRC formally

² NHRC E-Bulletin, Vol. 6, Issue 10 pg. 1

³ NHRC E-Bulletin, Vol. 6, Issue 8, pg. 1

drew the attention of the Prime Minister to take substantial steps forward in the peace process, to not withdraw the case of political crimes of criminal nature and to have the governance comply with the rule of law.

II. Independence

In 2010, there were prospects that the NHRC would be downgraded to status 'B' by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC-NHRI). Serious concerns were raised after the newly amended and much criticized NHRC Act was passed. Finally, the Sub-Committee on Accreditation (SCA) of ICC-NHRI accredited the NHRC of Nepal with status 'A'. It is reported that the ICC-NHRI's SCA lauded the NHRC's "past advocacy efforts" and "readiness to implement earlier recommendations". Also, considering the Commission's crucial role in monitoring human rights issues in Nepal's ongoing transition to peace, the SCA recommendation to accredit the NHRC with status 'A' has indicated that it is satisfied with the NHRC's efforts to address the concerns raised.⁴

After a long impasse, the NHRC Act was passed by the CA in the capacity of the Legislature-Parliament pursuant to Article 83 of the Interim Constitution. The NHRC Bill had been tabled four years ago but passed only in January 2012. Many provisions in the new NHRC Act run contrary to the spirit of the Constitution and in some cases directly constrain constitutionally-guaranteed freedoms. The NHRC's independence and autonomy are not guaranteed under the new Act and, in fact, already look to be under threat. Financial control of the Commission is in the hands of the government: all expenses must be approved by the government, all checks will be issued by the government, and the NHRC cannot alter budget headings without government approval. Furthermore, if the NHRC wants to expand its presence and outreach into new geographic areas, it needs to consult with and gain approval from the Ministry of Finance. The NHRC's organogram must be approved by the government, making it difficult to add staff if the situation demands. Even travel to the regions and associated expenses, for instance, in case of an

⁴ NHRC E-bulletin Vol. 6. Issue 12. pg. 1

urgent assessment of human rights violations, may well require prior approval from government.⁵

Being a constitutional body, the NHRC is recognized as an autonomous body. The mandate can be changed only with the two-third majority in the Parliament. The new Act has recognized the NHRC as an independent and autonomous body.⁶

Membership and Selection

Article 131 of Part 15 of the Interim Constitution mentions that the NHRC will consist of one retired Supreme Court justice as the Chairperson and four Commissioners from amongst those persons who have provided outstanding contribution or have been actively involved in the field of protection and promotion of human rights or social work. There is no open call for Commissioners of the NHRC. The Prime Minister appoints the Chairperson and the Members of the NHRC on the recommendation of the Constitutional Council. Both the Chairperson and the Commissioners need to have minimum of a bachelors' degree and high moral character.⁷ The Secretary of the Commission is appointed as an administrative head of the Commission and is appointed by the government of Nepal on the recommendation of the Commission. A joint work carried out by NHRC and Office of the High Commissioner for Human Rights-Nepal (OHCHR-Nepal) suggested that tertiary education should not be made a condition and quotes the ICC-NHRI, saying that appointments made by the executive-dominated body have the potential to undermine the independence of a national human rights commission. This should be seriously taken into account in the drafting of the new Constitution.⁸

The Interim Constitution stipulates the inclusion of people from all fields in the Commission⁹ and sets the qualification of the Chairperson as being retired Chief Justice or Judges of the Supreme Court or a person who holds a high reputation and has significantly contributed in the

⁵ Abrahams, Pema. *New Act a Blow to Human Rights in Nepal*. <http://asiafoundation.org/in-asia/2012/03/14/new-act-a-blow-to-human-rights-in-nepal/>

⁶ Section 4 (c) of the National Human Rights Commission Act, 2068 mentions that the Commission shall be independent and autonomous in fulfilling the work of ensuring respect, protection and promotion of human rights.

⁷ Article 131 (6) of the Interim Constitution of Nepal 2007

⁸ National Human Rights Commission-Nepal and OHCHR-Nepal Observations on the National Human Rights Commission Bill 2009, pg. 4

⁹ Article 131 (2) of the Interim Constitution of Nepal 2007

field of human rights.¹⁰ The present composition of the NHRC meets this provision. Justice Kedar Nath Upadhyaya, formerly the Chief Justice of the country, heads the Commission. Justice Ram Nagina Singh, formerly a judge of the Supreme Court and Senior Advocate, comes from Tarai (The Southern Plains). Mr. Gauri Pradhan is a prominent human rights activist who was involved in many NGOs including leading Child Workers In Nepal (CWIN). He belongs to a minority ethnic group called Newar. Dr. Leela Pathak, an agro-economist and retired senior government officer who worked with Transparency International after her retirement, is the only women member of the Commission. Dr. K.B. Rokaya, formerly a University Professor and active human rights defender who was associated with a number of voluntary organizations dedicated to human rights and social services, comes from remote part of the western hilly region. He belongs to the Christian minority in Nepal.

The term of the office for both Chairperson and the members of the NHRC is six years from the date of appointment.¹¹ The NHRC Secretary says it is quite a long term for such a responsible position and that it should be four or five years and not more.¹² The Chairperson or the members can be removed from their offices on the same ground and manner as has been set forth for removal of a Judge of the Supreme Court.¹³ The constitutional provision for removal of the Supreme Court Judge is that either the Chief Justice submits his/her resignation to the Council of Ministers or a Judge submits his/her resignation to the Chief Justice or he/she attains the age of 65 or the Legislature-Parliament passes a resolution of impeachment or if he/she dies. According to Article 105 (2) of the Interim Constitution, a proposal of impeachment may be presented before the Legislature-Parliament against the Chief Justice or any other Judges on the ground that they are unable to perform their duties for the reasons of incompetence, misbehaviour, failure to discharge the duties of his/her office in good faith, physical or mental condition, and if by a two-thirds majority of the total number of its members existing for the time being passes the resolution, he/she shall *ipso facto* be relieved from his/her office. Clause (3) of same Article says that the Chief Justice or the Judge, against whom impeachment proceedings are being initiated pursuant to clause (2) above, shall not perform the duties of his/her office until the proceedings are final.

¹⁰ Article 131 (1) (a) of the Interim Constitution of Nepal, 2007

¹¹ Article 131 (4) of the Interim Constitution of Nepal 2007

¹² Interview with NHRC Chairperson Bishal Khanal at his office in Lalitpur on 15 June 2012

¹³ Article 131 (4) of the Interim Constitution of Nepal 2007

Staffing has remained a problematic issue for the NHRC for years. The NHRC claims that a human resource crisis has crippled the Commission's overall performance, giving rise to some managerial disputes as well.¹⁴ After being upgraded to a constitutional body, the government wanted the staff of the NHRC to be appointed in the same manner as staff of other ministries and constitutional bodies, i.e. through Public Service Commission (PSC). NHRC maintains that this requirement would jeopardize its status as being against the Paris Principles and has proposed a specialized process like that of judicial service.¹⁵ The impasse around this issue of appointment of staff has been going on for years now. As a mid-way solution, an Ordinance Bill in early June of 2012 would allow for recruitment of the staff through PSC but the decisions related to the promotions and transfers of staff members would be handled internally. The Ordinance Bill remains under consideration at the time of writing of this report. The NHRC has been working with very low number of workforce because the staff find themselves in an unsecure job situation since the government is yet to decide on the NHRC's staffing policy. This delay has contributed to a staff turnover rate of 33%. This certainly hampers the performance of the organization.

Resourcing of the NHRC

The government provided USD\$2,115,870 to the NHRC in the fiscal year 2010/2011. Being a constitutional body, the budget is allocated directly to the NHRC. Although it is the lowest budget compared to other constitutional bodies, according to the NHRC Secretary, the budget is sufficient enough to implement the planning.¹⁶ The total budget has not been spent due to several difficulties including delayed passing of the Budget Bill and political instability hampering NHRC to conduct the trainings or travelling plans.

Besides the government budget, the NHRC can accept outside funding with the permission of the government. The permission might be delayed at times due to government's lesser priority but so

¹⁴ Under-staffing woes: NHRC in 'deathbed' as staff contract expiring, The Kathmandu Post, 30 May 2012, <http://www.ekantipur.com/the-kathmandu-post/2011/05/30/metro/under-staffing-woes-nhrc-in-deathbed-as-staff-contract-expiring/222286.html>

¹⁵ Gauri Pradhan, Govt, NHRC at odds over staff recruitment, <http://www.thehimalayantimes.com/mobile/fullNews.php?headline=Govt%2C+NHRC+at+odds+over+staff+recruitment&NewsID=265434>

¹⁶ Interview with NHRC Secretary Bishal Khanal at his office in Lalitpur on 15 June 2012

far, there has been no opposition from the government. At present, the NHRC is running an annual project called ‘Strengthening the Capacity of NHRC (SCNHRC) with the funding of USD\$1.9 million by UNDP. This project runs for the period between August 2009 and December 2012 and aims to enable the Commission to promote and protect socio-economic, political and civil rights, including opposing caste, gender, and ethnic and religion-based discrimination.¹⁷ On children's rights, the NHRC has a support of €200,000 funded by Save the Children.

The NHRC can accomplish its planned activities within the limits of the budget and can seek for additional budget if necessary. The government’s financial rules to spend, tender call and auditing are applicable to the NHRC as with any other constitutional body. The NHRC depends on the government’s priorities for the budget. The Interim Constitution has granted larger independence to the Commission, including financial autonomy as well. According to Article 92 (b) (7) of the Interim Constituting, the salary and benefits of the Commissioners of the NHRC shall be charged to the Consolidated Fund of the State. In addition, Article 92 (c) of the Interim Constitution provides that the administrative and logistic costs, that include expenses for salary and benefits of NHRC staff and operational cost, shall also be charged to the Consolidated Fund. The Consolidated Fund is the national coffer, and only Parliament is authorised to allocate and disburse this fund. The administrative and program cost of NHRC has been directly allocated by the Parliament in order to avoid potential control and interference of government through funding or financial arrangements.

III. Effectiveness

The NHRC was established in 2000 as per the Human Rights Commission Act 1997. The NHRC has five Regional Offices established in Biratnagar, Janakpur, Pokhara, Nepalgunj and Dhangadhi. In addition to this, the Commission has three sub-regional offices in Khotang, Jumla and Butwal. The regional offices were established at a time human rights violations were severe during the armed conflict. The Sub-regional offices were established as contact offices. The Janakpur sub-regional office was upgraded to regional office. The strategic objectives for year 2011-2014 include a plan to add three more sub-regional offices.

¹⁷ Strengthening the Capacity of the National Human Rights Commission (SCNHRC), UNDP
<http://www.undp.org.np/democratic-governance/program/scnhrc-22.html>

Under part 15 of the Interim Constitution, the NHCR was upgraded to a constitutional body making a new Act necessary to meet the Commission's new status. Article 132 (2) (f) of the Interim Constitution recognizes its power to review prevailing laws relating to human rights on a periodic basis and to make recommendations to the Government of Nepal on necessary reforms and amendments. The Interim Constitution has set the Commission's mandate as to ensure the respect for and protection and promotion of human rights and its effective implementation. As per the Article 133 (1) of the Interim Constitution, the NHRC has to submit its annual report to the Prime Minister on the works it has performed and the Prime Minister makes arrangement to submit the reports before the Legislature-Parliament.

The NHRC has a complaints-handling mechanism and a complaint can be filed with the NHRC central, regional or sub-regional offices. The Commission can also take *suo motu* action. The complaint form is available at the offices of NHRC or can be downloaded from the NHRC website. The complaint can be filed through email, telephone calls or fax. The NHRC has to accept complaints from anyone, regardless of the perpetrator's status or position. After registering and vetting the information, the staff at the concerned offices, investigation officers investigate the case and report to the Commissioners. The Commissioners are authorized to make recommendation to the government or other concerned authority. The NHRC Act sets out that the case should be decided within six months. In many cases, preparing recommendation takes time as the investigation officers are not authorized to make recommendation. The NHRC can repeal or hold off the complaint if it finds the complaint or information baseless or out of its jurisdiction.¹⁸ Concerns exist about the deadline for registering a complaint with the NHRC. The NHRC Act 2012 mentions that the victim should lodge a complaint with the Commission within six months from the date on which the incident took place or within six months from the date on which a person, under control of someone else, got released and became public. Depriving the Commission of entertaining the complaints older than six months is a serious curtailment of its mandate and a great challenge in tackling the impunity and ensuring justice to the victims.¹⁹

A total of 345 complaints were filed at the NHRC in the fiscal year 2010/11 or the period between 17 July 2010 and 16 July 2011. The NHRC made 179 field visits and investigations into

¹⁸ Section 13, National Human Rights Commission Act, 2012

¹⁹ Aryal Om. *Rastriya Manav Adhikar Ayog: Nyayik Prakritka Sakshanta Tatha Sifarisharu (National Human Rights Commission: Effectiveness and Recommendations of Judicial Nature)*, DRHRI: 2012. pg 11

Staffing has remained a problematic issue for the NHRC for years. The NHRC claims that a human resource crisis has crippled the Commission's overall performance, giving rise to some managerial disputes as well.¹⁴ After being upgraded to a constitutional body, the government wanted the staff of the NHRC to be appointed in the same manner as staff of other ministries and constitutional bodies, i.e. through Public Service Commission (PSC). NHRC maintains that this requirement would jeopardize its status as being against the Paris Principles and has proposed a specialized process like that of judicial service.¹⁵ The impasse around this issue of appointment of staff has been going on for years now. As a mid-way solution, an Ordinance Bill in early June of 2012 would allow for recruitment of the staff through PSC but the decisions related to the promotions and transfers of staff members would be handled internally. The Ordinance Bill remains under consideration at the time of writing of this report. The NHRC has been working with very low number of workforce because the staff find themselves in an unsecure job situation since the government is yet to decide on the NHRC's staffing policy. This delay has contributed to a staff turnover rate of 33%. This certainly hampers the performance of the organization.

Resourcing of the NHRC

The government provided USD\$2,115,870 to the NHRC in the fiscal year 2010/2011. Being a constitutional body, the budget is allocated directly to the NHRC. Although it is the lowest budget compared to other constitutional bodies, according to the NHRC Secretary, the budget is sufficient enough to implement the planning.¹⁶ The total budget has not been spent due to several difficulties including delayed passing of the Budget Bill and political instability hampering NHRC to conduct the trainings or travelling plans.

Besides the government budget, the NHRC can accept outside funding with the permission of the government. The permission might be delayed at times due to government's lesser priority but so

¹⁴ Under-staffing woes: NHRC in 'deathbed' as staff contract expiring, The Kathmandu Post, 30 May 2012, <http://www.ekantipur.com/the-kathmandu-post/2011/05/30/metro/under-staffing-woes-nhrc-in-deathbed-as-staff-contract-expiring/222286.html>

¹⁵ Gauri Pradhan, Govt, NHRC at odds over staff recruitment, <http://www.thehimalayantimes.com/mobile/fullNews.php?headline=Govt%2C+NHRC+at+odds+over+staff+recruitment&NewsID=265434>

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311 cases. It made recommendations on 146 complaints and 569 cases were closed, 7 were dismissed and 13 were adjourned.²⁰ Many of the complaints are related to the violation or abuse occurring during the conflict period. According to information provided by PMO on 26 May, 121 (28 %) recommendations were implemented completely, 236 (55 %) were implemented partially and 79 (17 %) left unimplemented.

The NHRC has the right to full cooperation of the public authorities and at large has not encountered any problems with regards to the cooperation. The NHRC can visit any place without any prior notice where some kind of violation is occurring or has a potential of occurring. The Constitution guarantees free access for the NHRC to visit detention centres and other government institution. However, during these visits little frictions can occur, but that is mainly due to personal or technical issues.

According to the NHRC Secretary Bishal Khanal, the NHRC has not faced any interference from the government concerning the execution of its mandate.²¹ However, the government does not take the NHRC recommendations seriously as only the minor issues have been addressed but not a single person has been prosecuted.²² The fourth yearly report (2010-2011) of the NHRC showed that the government has failed to implement NHRC recommendations in taking action even in cases of serious human rights violations. The report revealed that it recommended the government for action, compensation and relief packages in 146 cases but only 40 cases were fully addressed while 55 percent of the recommendations have been partially dealt with.²³ One NHRC commissioner has publicly expressed dismay over the poor implementation of its

²⁰ NHRC Annual Report 2010/11, Pg 16

²¹ An interview with NHRC Secretary Bishal Khanal in Lalitpur, 14 June 2012

²² NHRC Gauri Pradhan quoted in newspaper article, ANNUAL report: NHRC recommendations largely unimplemented, <http://www.ekantipur.com/2011/12/08/top-story/annual--report-nhrc-recommendations-largely-unimplemented/345151.html>

²³ ANNUAL report: NHRC recommendations largely unimplemented, Ekantipur, 8 December 2011, www.ekantipur.com/2011/12/08/top-story/annual-report-nhrc-recommendations-largely-unimplemented/345151.html

VI. Conclusion

The NHRC is marred by its statute which stipulates that no Commissioner can be removed without a two third majority vote in Parliament. As there are two Commissioners who are currently not contributing anything to the NHRC, by keeping the post of Commissioner occupied, they hamper the effectiveness of the NHRC. Involved stakeholders need to be more proactive to resolve such issues.

As many of the recommendations made by the NHRC to the government remain unimplemented, the Commission should work with national and international NGOs to exert pressure on the government to act on the recommendations.

Finally, many provisions of the new NHRC Act have been labelled as insufficient and NHRC itself is not satisfied with the new NHRC Act. A steady campaign and awareness raising should be part of the NHRC's plan to correct these provisions.

Republic of Korea: Endless Despair

Korean House for International Solidarity (KHIS)¹

I. General View

Since the current government came into power in 2008, the human rights situation in the Republic of Korea has steadily retrogressed. President Lee Myung-Bak, who is afraid of human rights matters, has been fearful that the NHRCK would be faithful in its duty to promote and protect human rights. Thus, he had tried to weaken the NHRCK and curtail its resources even before his inauguration. After his inauguration in 2008, he amended the NHRCK Act, cut staff numbers and reduced the organization. Moreover, he appointed unqualified jurists and scholars as the chairperson and commissioners, although they had no knowledge of international human rights standards and even disregarded human rights.

According to the NHRCK Act, the chairperson should “possess professional knowledge of and experience with human rights matters and have been recognized to be capable of fairly and independently performing duties for the protection and promotion of human rights.” However, Hyun Byung-Chul, current chairperson of NHRCK, totally falls short of the requirements of chairperson as demanded by the Act. He was merely a professor of civil law, who didn't have human rights-related experiences at all. In fact, he confessed, “I have little acquaintance with human rights things and the NHRCK,” during an interview right after his appointment. With their power, the chairperson and the commissioners rejected the appeals of victims whose rights had been violated and barred the NHRCK from recommending policies based on international human rights standards. The NHRCK, which started as the ideal model of an NHRI, is now continuously being deteriorated by a human rights-hating president as well as human rights-ignoring chairperson and commissioners.

At the center of the NHRCK's deterioration – and the continued violations of human rights – is the chairperson, Hyun Byung-Chul. Since his appointment in 2009, he has kept silent on

¹ Prepared by Prof. Dr. Kyung Soo Jung, Seoul

human rights violations committed by the government. By insisting on the prosecution's investigation on PD Note's libel case, rejecting the National Intelligence Services charging Mr. Park Won-Soon with libel, and rejecting the submission of a request to rule whether the ban on night protest is in line with the Constitution, he offered indulgence to the government, which curtailed the freedom of expression. Moreover, he refused bail to Ms. Kim Jin-Sook, who was staging a sit-in to demand the retraction of the layoffs by Hanjin Heavy Industries & Construction. Hyun also disregarded the unlawful inspections of civilians by the Office of the Prime Minister.

In addition, Hyun refused to renew the employment contract of an experienced human rights investigator, Ms. Kang. She had been working for the NHRCK for more than nine years and had played an important role in human rights investigations, in particular those relating to women's rights. One reason that her contract was not renewed was that she was a leader of the labor union of the NHRCK, which had criticized Hyun's arbitrary management of the NHRCK. In addition, he punished employees of the NHRCK who held one-man demonstrations against it. As a result, more than sixty current staff members of the NHRCK issued a statement and demonstrated against this unjustified dismissal. They did not disclose their real names, however, as the action might negatively affect their labor conditions. This shows that Hyun is not being supported by the staff members of the NHRCK.

To protest the malfunction of the NHRCK, three commissioners including two standing commissioners and 61 members of the special committee, advisory committee and consultation committee resigned from their post. Fifteen former commissioners, nineteen former staff members of the NHRCK, approximately 600 NGOs and more than 300 law professors and attorneys-at-law made a statement of protest.

The NHRCK has annually given awards to those who contribute to human rights by holding a competition for human right essays, videos and pictures. However, some winners refused to receive their award as a way of protesting against Hyun. They were Mr. Somuttu, a director of Migrant Worker Television (MWTV), winner of the Chair's Commendation of the Korean Human Rights Award, Ms. Kim Eun-Chung, a high school student and the winner of the grand prize for Human Rights Essay, the Solidarity for LGBT Human Rights of Korea, winner of the excellence award for human rights essay, Mr. Sun Chul-Kyu, who is working for 'Sound for the Disabled' (Jeonju Video Group) and was the winner of the Grand Prize for

human rights video, and lastly Mr. Lee Sang-Yoon, a law school student and the winner of the first Excellence award for human rights essay.

In spite of these strong protests against Hyun, he and the Lee Government and have not ceased their efforts to impair the independence of the NHRCK. Unfortunately, we must report that the NHRCK now lacks the independence required by the Paris Principles. Not only human rights NGOs but also the opposition parties are now worrying about the current state of the NHRCK. Even staff members who had remained silent began to protest Hyun's poor handling of the NHRCK.

In these circumstances, the Lee Government is trying to extend Hyun Byung-Chul's term by another three years. Human rights organizations are vehemently opposing this extension, and many media outlets are insisting on the withdrawal of the appointment. Mr. Jang Ju-Young, a commissioner of the NHRCK, resigned in objection to Hyun's reappointment. According to a survey, 90% of employees of the NHRCK oppose Hyun's reappointment. It is not acceptable to reappoint Hyun, who is criticized both inside and outside of the NHRCK.

South Korean human rights activists are opposing the reappointment of Hyun. Many human rights NGOs have been campaigning for his resignation, deeming him to be unqualified and having been responsible for the NHRCK's loss of organizational credibility and independence.

II. Independence

The NHRCK was criticized by Frank La Rue, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for the way that it has worsened the human rights situation in ROK:

“[T]he 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/1/27/Add.2)

After this, the NHRCK has tended to avoid issues which are uncomfortable to the government and to focus instead on issues such as 'Business and Human Rights' and 'Human Rights in North Korea'. For instance, for the issue of 'Business and Human Rights', the NHRCK hosted the Asia Pacific National Human Rights Institutions Regional Conference on 12-13 October 2011, during which the topics of business and human rights, and strengthening national human rights institutions were discussed. Because of the conference, there were some fruits such as the NHRCK's recommendation for the NCP to amend the rules in order to improve the capacity to prevent human rights violations and provide assistance for victims of violations.

However, in spite of the improvements, Korean civil society strongly criticized the conference. This is because the NHRCK neglected and kept silent about corporations' human rights abuses.

Last year, Korean Railroad Corporation (President Heo Jun-Yeong) monitored and inspected workers who were participating in unions by following them or using phone-tapping to monitor their daily lives. The NHRCK rejected the petitions of workers with the reason that these were beyond its mandate, as Railroad Corporation is not a national institute. Also, when protesters at Duriban building requested emergency help, claiming that their safety was being threatened by the discontinuation of electricity by the construction company, the NHRCK dismissed the request on the same grounds. The NHRCK has been continuously criticized for its lack of interest in important human rights and workers' rights issues.

When Hanjin Heavy industry discontinued the electricity supply of union activist Kim Jin-Sook, who had been staging a demonstration on a crane in protest against the massive layoffs, the NHRCK refused to express its opinion. Three commissioners, including standing commissioner Jang Hyang-Sook, proposed a resolution criticizing Hanjin for violating its promise to provide food, clothes, and cell phone battery for Ms. Kim; however, the plenary committee did not pass this resolution. Amnesty International issued a press release raising concern about possible human rights violations against Ms. Kim, but the NHRCK chose to keep silent. It is more alarming that the NHRCK refused to pass this resolution on the grounds that Ms. Kim's protest was illegal and thus protecting her would damage the NHRCK's status.

Chairman Hyun, without expressing his opinion, concluded this committee session by stating that they did not have enough facts to pass this resolution.

These deceitful and hypocritical actions were intended to cover up its anti-human rights behavior. The NHRCK’s desire to avoid upsetting the government has resulted in controversy and complaints instead of success.

2.1 Law of Act

The NHRCK made amendments on its Act on 21 March 2012:

	Amendments
Article 5 section 3	The president of the ROK shall appoint the chairperson of the commission, but should conduct hearings in the National Assembly.
Article 25 section 3	The heads of related entities receiving recommendations should give notice of the implementation plan of the recommendations within 90 days of its submission.
Article 30 section 1	Educational facilities and public enterprises are included in the NHRCK’s petition boundary.

The UN Special Representative of the Secretary General on business and human rights, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) carried out an ‘Investigation on National Human Rights Institution and Human Rights in Business’. The investigation found that the NHRCK was authorized to investigate only “specific violations such as discrimination and sexual harassment at all kinds of enterprises.” This scope of activity was similar to those of Australia, Canada, Denmark, Mauritius, the Netherlands, New Zealand, Slovakia and Sweden. However, after the amendment, the scope was extended to “all kinds of infringement on rights at Public enterprises.” This meant that it became possible to reinvestigate cases concluded or rejected before the amendment. Although the amendment is meaningful, it seems hard for the NHRCK to make further significant changes on the human rights situation in regard to its

current circumstances.

For instance, the NHRCK investigated alleged human rights violations by the Korean marine products corporation Sajo Oyang of foreign crews in New Zealand waters. On 19 June 2011, 32 Indonesian crewmembers who had been working on Oyang75 in New Zealand waters got off the ship when the ship was docking because of violence by Korean crewmembers and delayed payment of wages by the company. After that, a study by the University of Auckland on human rights abuses on Korean deep-sea fishing vessels was announced and this was splashed across news headlines throughout New Zealand.

The Sajo Oyang investigation is a good case in considering whether the NHRCK has the will and concern for the issue area of ‘Business and Human Rights’. Before then, the NHRCK was not authorized to investigate cases of human rights violations committed in foreign countries. However, in this case, national flagships were counted as national territory and the NHRCK could investigate it.

However, the NHRCK didn’t carry out the investigation fairly and rejected the petition. The NHRCK’s reason for the dismissal was: “there’s no objective evidence to prove sexual harassment and the problem of multiple employment contracts is not within bounds of the committee’s investigation.” Finally, in early March 2012, after the announcement of a New Zealand government study showing that Korean vessels were the only ones to have problems among foreign vessels, the Korean government and the NHRCK quit sitting silent and organized a team to start the investigation.

The Korean government and the NHRCK – which should have managed and supervised the vessels – looked at this situation with their arms folded and organized the belated investigation team only after the New Zealand government announced the study paper and the Ambassador-at-Large Luis CdeBaca, the Director of the Office to Monitor, and Combat Trafficking in Persons showed his concern about the matter. Why wouldn’t the NHRCK take prompt action? It is disgraceful that the Korean government and the NHRCK tend to become concerned only after they have created diplomatic problems.

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

2. 2.1 Executive Body: One step behind investigation on illegal surveillance

On 16 April 2012, the NHRCK belatedly decided to conduct an ex officio investigation into the illegal surveillance of civilians by the Office of the Prime Minister. The fact that the Blue House – the office of the Korean President – was involved in illegal surveillance made headlines.

All 11 of the NHRCK’s commissioners, including the chairperson Hyun Byung-Chul, three standing commissioners and seven non-standing commissioners attended the closed meeting. An official from the NHRCK said, “We decided to conduct an ex officio investigation due to the suspicion that wide, illegal surveillance of civilians was committed and the doubts of the public were not resolved in spite of the Prosecution’s strong willingness to pursue the investigation.”

However, there were suspicious glances inside and outside of the NHRCK over the effectiveness of the investigation. In July 2010, Kim Jong-Ik (former president of the financial company KB Hanmaum) complained to the NHRCK, stating that he was as a victim of illegal surveillance. However, after six months of consideration, the NHRCK didn’t investigate for the reason that “investigating cases could be dismissed.” Also, even though the case of the Office of the Prime Minister’s surveillance of the Federation of Korean Trade Unions and the information agency’s surveillance of civilians was on the agenda at the committee, it was rejected because of commissioners who opposed the investigation.

As shown above, the NHRCK is not carrying out its duties sufficiently. Instead, it is trying to support the government.

2.2.2 Legislative Body: Confirmation Hearing

Hyun Byung-Chul was the chairperson of the NHRCK’s first confirmation hearing with the National Assembly on 16 July 2011. Until that time, the Saenuri Party had supported Hyun due to his considerable achievements on North Korean human rights. However, as the confirmation hearing approached, there were some negative vibes concerning Hyun’s reappointment even in the Saenuri Party.

Lee Han-Gu, the floor leader of the Saenuri Party told the Hankyoreh on 8 July: “There’s a broad spread of opinions in the party” and “We should review his qualifications as the chairperson. There’s no reason for us to support him unconditionally.” This could be interpreted that there were some dissenting opinions on Hyun’s reappointment in the party and they would take an objective view.

Also, leaders of the party showed negative attitudes concerning Hyun’s reappointment with comments such as “Why should we support him?” or “It is unfair to be on his side just because it is the Blue House’s will.” Other party executive said “We know that there are lots of complaints about this. We will examine it thoroughly.”

2.2.3 Result of the Confirmation Hearing

At the confirmation hearing with the National Assembly on 16 July – the first confirmation hearing of the chairperson of the NHRCK since it was founded – voices demanding Hyun Byung-Chul’s resignation flooded in. There were various suspicions about Hyun concerning not only his qualifications but also the plagiarizing of papers, real estate speculation and embezzlement. However, Hyun responded to the questions with one answer: “I don’t know.”

The following are examples of his false testimony. (Reference: The Report of the Proceedings of the Confirmation Hearing by the Democratic United Party)

1. Pressure toward demonstrators

Facts	At a sit-in in December 2010, an activist died of acute pneumonia, brought about by cutting off the electricity. Hyun Byung-Chul’s testimony contradicted the statements of activists at the demonstration and the officers of the NHRCK, who knew that elevators and heating was restricted. According to assemblyman Jang Ha-Na’s investigation, it was possible to control the electricity and heating on each floor. Also, an ‘Audit Report for November 2009’ noted the self-assessment of the committee that “Sit-ins and demonstrations were ill-treated” and principles such as “water supply is limited to the minimum level, no food, no internet, use no facilities.” This is despite the fact that the NHRCK’s manual for demonstrations has rules that “provide facilities, restrict water, food, computer, internet, electric heater and phone.”
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Q (Lawmakers)	Is it true that there was great deal of trouble in using the electricity, elevator and restroom when the severely disabled were staging a sit-in at the NHRCK building? Did you do so [restrict access to these services] deliberately?
A (Hyun Byung-Chul)	The restriction of the elevator had been just for two hours and the secretary general apologized for it. And it is untrue that we had cut off the electricity. Also, it was impossible for us to control the electricity because the building was rented.

2. The Yongsan Incident

Facts	According to a lawyer Lee Sang-Sook, who was an investigator of the incident, Hyun Byung-Chul forced commissioners not to submit the bill with the words “You should stop the bill at all costs.” The Yongsan incident was submitted to the whole committee directly by three commissioners and six commissioners agreeing to it on 28 December 28 2009. However, in spite of the agreements, the bill couldn’t pass and the commissioners strongly complained about it. It shows Hyun’s scheme to stop the bill despite sufficient agreement. Also, there was a happening of non-standing commissioner Kim Tae-Hoon (recommended by the ruling party), who testified that “the bill wasn’t passed because less than half commissioners agreed” and after being rebutted with evidences, changed his statement.
Q (Lawmakers)	Did you interrupt the passage of the bill on the Yongsan incident?
A (Hyun Byung-Chul)	I’m the one who encouraged the bill. I was preparing it but the commissioners submitted it to the committee before I finished the work.

As shown above, false testimony at the confirmation hearing evoked considerable opposition from civil society and Hyun became an object of ridicule. Also, the ruling party – which has the majority of seats – agreed with the opposition party not to submit a report on the hearing. The Blue House even subjected him to ridicule again by using sophistry, stating

that it would not reappoint him immediately because it wanted to let him have time for self-restraint and self-reflection.

2.3 Membership and Selection

2.3.1 Reappointment: Efforts on North Korean Human Rights?

This is the first time that the chairperson of the NHRCK was reappointed for another three-year term. A striking point of Hyun's NHRCK which the current government addresses is the issue of North Korean human rights.

From the beginning of his first term, Hyun Byung-Chul's 'qualification' for the role was a point of contention. However, President Lee Myung-Bak believed him to have special command of the issue of 'North Korean human rights', which Hyun possessed without question. The Lee administration decided to extend Hyun's term in 'recognition' of his efforts to raise global awareness of human rights violations in North Korea.

Progressive groups, on the other hand, have criticized him for being "indifferent and ignorant" toward local human rights issues. He has marred the reputation of the NHRCK as he has been taking regressive or even repressive measures against local victims for the past three years. Giving another term to Hyun would create an obstacle for our people and our civil liberty.

The NHRCK is the NHRI of ROK, not of the DPRK (Democratic People's Republic of Korea). According to Article 4 of the NHRCK Act on 'Scope of Application', the range is "all citizens of the Republic of Korea and all foreigners residing therein." Also, Article 2 regulates 'Definition': "The term 'human rights' means any rights and freedoms, including human dignity and worth, guaranteed by the Constitution and Acts of the Republic of Korea, recognized by international human rights treaties entered into and ratified by the Republic of Korea, or protected under international customary law." The human rights of North Koreans are basically not within the bounds of the NHRCK Act.

Besides, Hyun even threatened the human rights of North Koreans in his attempt to leave a legacy of achievements. He violated the Privacy Act and Law to Protect and Support North Korean Defectors by illegally sending letters that encouraged reporting human rights

violations in North Korea without the consent of Ministry of Unification and Foundation to Support North Korean Defectors. Also, he threatened their safety by detailing the personal data of North Korean defectors and of their relatives in North Korea in the ‘Casebook of Human Rights Violations in North Korea’ published by the NHRCK. A chairperson without basic human rights knowledge and sense brought about these circumstances.

Hyun even failed to recognize the alleged illegal surveillance of citizens by the Office of the Prime Minister this year. Speculation has risen that President Lee was involved in the scheme to keep an eye on anyone critical of him and his administration. Hyun said that the NHRCK would look into the case but civilian groups claim that he has failed to take efforts to clarify the suspicions. All he did was sit in his office and skim through the documents, proving nothing.

Of course, it is important to pay particular attention to the problem of human rights in North Korea. However, politicizing it is another matter. It is totally wrong for the NHRCK to take advantage of the North Korean problem for political gain. The Lee administration called it an “achievement”, but it would be better to call it a “shame” when it is achieved without sincerity.

2.3.2 Kim Young-Hye: Qualified to be a member of the standing committee?

Korean human rights and civil organizations urged Kim Young-Hye to resign from the position of NHRCK standing committee member. It is a position that is appointed by the president. In the communiqué ‘Urgent Movement of Human Rights and Civil Society Calling for resignation of Hyun Byung-Chul from the Chairperson of the NHRCK’, a group of organisations announced that “Kim is unqualified to be a member of the standing committee for she has nothing to do with human rights movements and is too close to the current government.” They continued, “Given the present situation of the government having appointed an unqualified person as the chairperson of the NHRCK, it would worsen the situation if Ms. Kim accepts the position [of standing committee member].” In concluded: “She should refuse it.”

Kim Young-Hye also made some ignorant statements during an interview with the Indonesian crews of Sajo Oyang and other NGOs. The followings are parts of the written

interview.

Kim Young-Hye (Kim)	Didn't you receive the English translation of the NHRCK's written judgment?
NGO	Just briefly.
Kim	We had made the sentence and gave it to the company and the government. If you didn't receive it, I would let you know. We dismissed the petition according to the NHRCK Act; however, we pronounced our opinion that there are some kinds of problems and that precautions are needed. Given these efforts, what is your complaint?
NGO	We know there is not sufficient evidence, but it is true that the crews suffered from it.
Kim	It is important to verify facts and relevance. Anyway, I can't see what the purpose of your visit today might be. Do you want to complain about our judgment? Or would you praise us?

As shown above, Young-Hye Kim is unqualified to be a member of standing committee.

III. Resourcing and Effectiveness

3.1 Budget

The total budget of the NHRCK increased by 4.4% (22,079-23,005) for the first time after 2009. However, budgets for following points decreased even though the NHRCK announced that these would be priority tasks of the NHRCK in 2012.

Priority Tasks	Detail	Ratio
Human rights education and public promotion	Strengthening anti-discrimination policies and remedies that pertain to socially vulnerable groups	Decreased by 10.1% (298-268)
	Advocating for the Fundamental Human Rights Education Act	Decreased by 11% (537-478)

Human rights protection for socially vulnerable groups	Advancing the rights of persons with disabilities including the mentally disabled	Decreased by 25.5% (593-442)
	Promoting the rights of socially and economically vulnerable groups	Decreased by 14.7% (694-592)
International cooperation	Bolstering the Commission’s role and standing of national human rights institutions in international organizations	Decreased by 10.3% (146-131)

Despite these cutbacks, the budgets for North Korean defectors and Human Rights in North Korea increased by 39.5%(200-279).

3.2 Effectiveness

3.2.1 Rapid Decrease of Accepted Complaints

Accepted complaints to the NHRCK in 2011 decreased by about 20% from the previous year. According to the analysis of officials from humanitarian organizations, this is because “the NHRCK lost the public’s confidence.”

The NHRCK stated on 5 February that 7350 complaints were accepted in 2011. The figure represents a decrease of 19.8% compared to the previous year’s 9168. The cases of complaints has steadily increased, except for a temporary decrease in 2006 when the manner of classification was changed. An official from the NHRCK said, “Actually, it is the first case of decrease of complaints since the foundation of the NHRCK.”

Kim Hyung-Wan, the chairperson of the Korean Human Rights Policy Institute said, “As international humanitarian organizations are concerned about Korea’s human rights conditions, the decrease of complaints means that people do not expect the NHRCK to settle their problems.” He added, “the NHRCK hasn’t done its role to preoccupy humanitarian agenda and extend it as social one to expand the human rights prospect.”

An official from the NHRCK said, “In general, complaints increase when the NHRCK gives socially meaningful recommendations. However, there weren’t any recommendations to pay social attention to last year.”

In ‘Public Action To Find NHRCK’s Rightful Place’, activist Myung Sook argues that “humanitarian organizations have the same concerns and even if we complain en masse, the NHRCK would neither investigate fairly nor recommend” and that “people who inquire into helpful measures hesitate to complain because of the negative image of Chairperson Hyun’s system.”

3.2.2 Crisis of North Korean Defectors Being Sent Back

The release and flight of North Korean defectors to South Korea has become a problem due to the public announcement of the NHRCK (Chairperson Hyun Byung-Chul) about the arrests. The Chinese government has a strict attitude when the public is notified of the problem of North Korean defectors because of its relations with North Korea. Representatives of the South Korean government and humanitarian organizations who negotiated this problem with the Chinese government in secret are now strongly complaining.

Kim Hee-Tae, the director of an organization for North Korean defectors – the Group for Improvement of North Korean Human Rights – claimed that “the NHRCK, which presents itself as the guardian of human rights, placed the human rights of North Korean defectors in trouble.” He added that “two youths among them who fled for their lives are now in danger of being sent back to North Korea because of the NHRCK’s amateurism.”

According to his announcement, ten North Korean defectors were arrested by a Chinese public security officer in Sunyang on 8 February. They had been taking a southbound bus toward a ‘stopover’ third country in order to flee to South Korea with the help of a broker. He said: “After hearing from the broker that they had been arrested, I sent a fax to the Ministry

of Foreign Affairs and Trade, the Blue House and the NHRCK.”

Five days later, on 13 February, the problem came up. Yonhap news reported that “arrested North Korean defectors requested emergency rescue to the NHRCK.” Park Sun-Young, a member of Liberty Forward Party, announced that there were 24 additional North Korean defectors who were arrested and forcibly sent back.

The NHRCK, however, noted that “We haven’t received any emergency rescue request by either fax nor phone call.” According to an official from the NHRCK, the statement of Commissioner Kim (“I heard that North Korean defectors were arrested by Chinese public security officer, why don’t we discuss it?”) was wrongly interpreted in the media as constituting an “emergency rescue request.”

The Ministry of Foreign Affairs and Trade made a strong protest to the NHRCK. Director Kim said: “We carried forward a scheme of releasing secretly and some progresses was made in fact” and “I didn’t even imagine that the NHRCK would publicize this.” With regards to this, an official from the NHRCK defended the body by stating: “We already knew that security is important in the North Korean defectors’ matter and it was kind of happening.”

IV. Consultation and Cooperation with Civil Society

Hyun Byung-Chul, the chairman of the government-funded NHRCK is facing mounting pressure to give up his bid for a second three-year term and step down immediately.

Members of a civic group forcibly evicted Hyun from a movie theater on Wednesday. The theater was screening a documentary on the deaths of tenants who were resisting eviction from an area up for redevelopment in Yongsan, central Seoul. Hyun was watching the film with his aides at the theater in Jongno, downtown Seoul, when ten activists including members of the Sarangbang Group for Human Rights burst in.

The independent film, titled ‘2 Doors’, features a violent clash in January 2009 between the tenants and riot police in a shopping district in Yongsan that the government had designated for redevelopment. Five tenants and a police officer were killed in the clash. Police were blamed for the crackdown on the tenants, who had been staging a sit-in protest against the

redevelopment project on the rooftop of a building that was set ablaze.

The activists denounced Hyun for turning down their requests to take action against the police for allegedly violating the rights of the tenants in the tragedy, and for making little effort to deal with frequent infringements of human rights in society. The audience joined forces and asked Hyun to leave. He first refused to do so but was forced out in the end.

Activists guessed that the reason he came to watch the film was that it formed part of his preparations for the Assembly hearing to make himself look good. In fact, he was completely ignorant on human rights issues. They added that the group was against him even before the government appointed him as the rights panel chief three years ago.

On the same day, a group of 20 activists held a rally in front of the NHRC headquarters in Jung-gu, Seoul. The protesters called for Hyun's resignation, claiming that the commission had failed in its duties under an "unqualified" chairman. "The NHRCK has been completely ignoring sensitive issues, and also has been reluctant to touch on other matters," an activist said. They also entered the building after the press conference and continued their protest inside the building. The protest came after more than 90 private human rights groups formed an emergency committee to protest against President Lee's decision to extend Hyun's term.

The groups pointed out that the chairman failed to address the issue of the illegal surveillance of citizens by the Office of the Prime Minister. They also denounced him for rejecting a request for an investigation into labor rights violations at local firms by Kim Jin-Sook, an activist who staged a months-long strike on a high-altitude crane in 2011. She was protesting the firm's decision to lay off employees.

Also, Kim Mi-Hwa, a famous comedian, talk show host and the honorary ambassador of the NHRCK resigned from her position, criticizing the NHRCK's malfunction. She had sent a letter to Hyun to demand the NHRCK's prompt action against the police use of water cannon on protesters.

V. Conclusion and Recommendations

On 31 July 2012, the Saenuri Party decided to convey to Blue House its policy of objecting to the reappointment of Hyun Byung Chul as Human Rights chairman. The decision seemed

to have been due to the worsening public opinion toward Hyun Byung-Chul's reappointment and the pressure of the upcoming presidential election in December. In the survey done last week by Youido Institute², 60% of participants answered that they knew about the issue of the reappointment of Chairperson Hyun, and 80% amongst them answered that they disagreed with the reappointment.

Commenting on the survey's result, the Supreme Council of Saenuri Party (the party's highest deliberative and executive organ) stated that its main opinion was that that the party has to show its stance of criticizing the Blue House even if the party cannot prevent Hyun's reappointment, since only the president has authority on the matter. It was told that all the participants in the Supreme Council agreed on the policy to object to candidate Hyun's reappointment. In spite of these negative voices, the Blue House seems intent on pushing ahead in its decision.

The NHRCK was known as an ideal model of NHRI when it was first established. However, in recent years, it has been harshly criticized and has become the center of controversy and rumors. The NHRCK was formed for the purpose of protecting and enhancing human rights. These days, instead, it refuses to help those who need its aid and even received a 'Human Rights Collapse Prize' from civilian organizations. It seems to be fundamentally far away from where it is supposed to be.

It is not just an internal problem. As shown above, it has not only been the incorrect management of human resources but the Government's involvement that has driven the situation further. A real solution to this matter can be found by instituting a proper process of appointment for the commissioners and the chairperson. For this to happen, it is necessary to pay particular attention to the upcoming presidential election. A new administration with the right human rights awareness and responsibility can help the NHRCK to regain its status as a guardian of human rights.

² The Youido Institute is the policy research institute to be established by the Grand National party. The Grand National Party is a previous name of Saenuri Party.

Sri Lanka: Embedded in the State:

The National Human Rights Commission of Sri Lanka in 2011

Law & Society Trust, Sri Lanka¹

This annual report is a critical assessment of the effectiveness and performance of the Human Rights Commission of Sri Lanka (HRCSL) in the protection and promotion of human rights, mainly between January and December of 2011 but with select reference to crucial events in early 2012. It focuses on the full compliance of the HRCSL with the international standards for national human rights institutions – the ‘Paris Principles’ – and draws attention to selected issues of concern to human rights defenders in Sri Lanka.

I. General Overview

In 2011, the litany of human rights violations² were the familiar ones of extra-judicial killings; enforced disappearances and missing persons;³ arbitrary detention;⁴ custodial torture; violence against media personnel and organisations; criminal activities by pro-government paramilitaries; non-conformity of the returns and resettlement process of

¹ Prepared by B. Skanthakumar, Head of the Economic, Social and Cultural Rights (ESCR) programme at the Law & Society Trust, Sri Lanka. The contribution of the writer’s colleagues in the ESCR programme, and the comments received from Ruki Fernando are gratefully acknowledged. All matters of law and fact are as at 23 July 2012.

² Amnesty International, ‘Sri Lanka’ in *Annual Report 2012*, London 2012, pp. 314-316, http://files.amnesty.org/air12/air_2012_countryreports_en.pdf; Human Rights Watch, ‘Sri Lanka’ in *World Report 2012*, New York 2012, pp. 388-393, http://www.hrw.org/sites/default/files/related_material/srilanka_2012.pdf; Minority Rights Group International, *State of the World’s Minorities and Indigenous Peoples 2012*, London 2012, pp. 142-143, <http://www.minorityrights.org/11374/state-of-the-worlds-minorities/state-of-the-worlds-minorities-and-indigenous-peoples-2012.html>; US Department of State, *Country Reports for Human Rights Practices 2011: Sri Lanka*, Washington DC 2012, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=186475#wrapper.

³ The International Committee of the Red Cross (ICRC) reported handling 15,780 cases of missing persons as at the end of 2011, see *ICRC Annual Report 2011*, Geneva 2012, p. 256, <http://www.icrc.org/eng/assets/files/annual-report/current/icrc-annual-report-asia-and-pacific.pdf>. One official source estimates that there were 4,156 ‘untraceable’ persons in the Northern Province alone between 2005 and 2009: Department of Census and Statistics, *Enumeration of Vital Events 2011 – Northern Province*, Colombo 2011, at p. 20, http://www.statistics.gov.lk/PopHouSat/VitalStatistics/EVE2011_FinalReport.pdf.

⁴ Amnesty International, *Locked Away: Sri Lanka’s Security Detainees*, ASA 37/003/2012, London 2012, <http://files.amnesty.org/archives/asa370032012eng.pdf>.

internally displaced persons with international standards;⁵ displacement from homes, lands and livelihoods through ‘high security zones’;⁶ and conflict-related accountability issues centred on the final phase of the war.⁷

There were also variations on these themes: the killings of suspects who allegedly tried to escape while in custody; the obstruction, harassment and temporary arrest of dozens of human rights defenders for participating in a peaceful protest that was organised in Jaffna to mark international human rights day on 10 December 2011,⁸ and interference and curbs on the new media through the blocking of unregistered news websites.⁹ Community-based organisations reported overt surveillance of their public activities and periodic visits and telephone calls from police intelligence. The accelerated grabbing of state and private lands by state and private actors, and forced evictions in urban and rural communities, including loss or threats to livelihoods, was an emerging issue.¹⁰

While sexual harassment and violence against women are by no means new concerns, in addition to increased reports of domestic violence and sexual assaults, there was a spate of

⁵ Tamil National Alliance, *The Resettlement Report (October-December 2011)*, Research Series Vol. 1.2, Colombo 2011, archived at http://dbsjeyaraj.com/files/TNA_Resettlement_Report_1211.pdf.

⁶ The government claims to be scaling back the (unknown) extent of high security zones but some areas are simply re-designated as ‘cantonments’, while elsewhere new areas are coming under military occupation. In the Jaffna peninsula alone, some 26,000 people displaced by forced acquisition of their lands have yet to be resettled (“26,000 not resettled due to HSZ”, *BBC Sinhala.com*, 28 December 2011, http://www.bbc.co.uk/sinhala/news/story/2011/12/111228_jaffna_hsz.shtml). See generally, Bhavani Fonseka and Mirak Raheem, *Land in the Northern Province: Post-War Politics, Policy and Practices*, Centre for Policy Alternatives: Colombo 2011, esp. pp. 153-157, <http://cpalanka.org/wp-content/uploads/2011/12/Land-Issues-in-the-Northern-Province-Post-War-Politics-Policy-and-Practices-.pdf>.

⁷ Amnesty International, *Sri Lanka: The Need to Address Persistent Impunity for Violations and Abuses of International Human Rights and Humanitarian Law*, ASA 37/002/2011, 24 February 2011, <http://www.amnesty.org/en/library/asset/ASA37/002/2011/si/71979dfb-57ef-47a8-94d4-8299e33e3770/asa370022011en.pdf>.

⁸ ‘Watchdog’ (pseud.), “42 Political Activists and HRDs Detained and Prevented from Participating in Peaceful Protest in Jaffna Town on Human Rights Day”, *groundviews.org*, 14 December 2011, <http://groundviews.org/2011/12/14/42-political-activists-and-hrds-detained-and-prevented-from-participating-in-peaceful-protest-in-jaffna-town-on-human-rights-day/>.

⁹ See generally, Centre for Policy Alternatives, *Freedom of Expression on the Internet in Sri Lanka*, Colombo 2011, <http://cpalanka.org/wp-content/uploads/2011/11/FOE-REPORT-NOV-2011-FINAL-CPA.pdf>.

¹⁰ “*Sri Lanka: Land grabbing and development induced displacement*”, Written statement submitted by the Asian Forum for Human Rights and Development (FORUM-ASIA) on behalf of the National Fisheries Solidarity Movement (NAFSO), the Praja Abilasha Network (PAN) and the Law & Society Trust (LST) to the 19th regular session of the UN Human Rights Council, A/HRC/19/NGO/64, 22 February 2012, <http://daccess-dds-nv.un.org/doc/UNDOC/GEN/G12/107/18/PDF/G1210718.pdf?OpenElement>.

reports of men with blackened or camouflaged faces attacking women in various parts of the island.¹¹

These incidents also occurred in the highly militarised North and East, where the high concentration of state security personnel – one for every five civilians in the Northern Province claims one analyst¹² – has not reduced incidents of violent crime but rather contributed to the perception of impunity for those who wield weapons and restrictions on basic freedoms of expression, association and assembly. The compulsory ‘leadership training’ programmes conducted for state university entrants by the military in its camps gave rise to widespread concern.¹³

Raised expectations at the end of two and a half decades of armed conflict, two years before, of a sharp improvement in the environment for human rights protection and promotion were not to be realised. Instead there were “strong continuities between the ‘war for peace’ and the ‘post-war’ periods”,¹⁴ while the role of the defence ministry and the military in civil administration and in economic activities in direct competition with civilians was enhanced.¹⁵

There were three welcome developments in the course of the year: the lifting of the island-wide state of emergency in August 2011;¹⁶ the public release of the final report and

¹¹ Women’s Action Network, *Statement by women on the recent attacks on women, impunity and the lack of the rule of law*, 22 August 2011, archived at <http://dbsjeyaraj.com/dbsj/archives/2714>; International Crisis Group, *Sri Lanka: Women’s Insecurity in the North and East*, Brussels, 20 December 2011, <http://www.crisisgroup.org/~media/Files/asia/south-asia/sri-lanka/217%20Sri%20Lanka%20-%20Womens%20Insecurity%20in%20the%20North%20and%20East%20KO.pdf>.

¹² ‘A Correspondent’ (pseud.), “Notes on the Military Presence in Sri Lanka’s Northern Province”, *Economic & Political Weekly* (Mumbai), Vol. XLVII, No. 28 (14 July 2012), pp. 34-40 at p. 36, <http://www.epw.in/system/files/Notes%20on%20the%20Military%20Presence%20in%20Sri%20Lanka%20Northern%20Province.pdf>.

¹³ Friday Forum, “Leadership Training for University Entrants”, *The Island* (Colombo), 12 June 2011, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=27550.

¹⁴ Jonathan Goodhand, “Sri Lanka in 2011: Consolidation and Militarization of the Post-War Regime”, *Asian Survey* (Berkeley, CA.), Vol. 52, No. 1 (January/February 2012), pp. 130-137 at p. 130; also see Jayadeva Uyangoda and Pradeep Peiris, “The Way We Were: Politics of Sri Lanka – 2011, Part I” and “The Way We Were: Politics of Sri Lanka – 2011, Part II” in *Polity* (Colombo), Vol. 6, No. 3 & 4 and Vol. 6, No. 5 respectively.

¹⁵ See for instance, M. A. Sumanthiran MP, *Situation in North-Eastern Sri Lanka: A Series of Serious Concerns* (tabled in Parliament on 21 October 2011), archived at <http://dbsjeyaraj.com/dbsj/archives/2759>.

¹⁶ Political Editor, “Lapses in lifting of Emergency”, *The Sunday Times* (Colombo), 4 September 2011, <http://sundaytimes.lk/110904/Columns/political.html>.

recommendations of the Lessons Learned and Reconciliation Commission (LLRC)¹⁷ in December 2011; and cabinet approval for the National Human Rights Action Plan¹⁸ in September 2011, and curiously once again in December 2011, only after which it was ‘leaked’ (never formally released) and haphazardly circulated.

Disappointingly, the Human Rights Commission of Sri Lanka made no public comment on any of these events; the value and actual benefit of which remain untested because of the dominant political culture of state authoritarianism, the intransigence of powerful actors, and the weakness of countervailing social and political movements.

Thus, even in the absence of the state of emergency, arbitrary arrest and prolonged detention without trial is permissible under the Prevention of Terrorism Act (PTA), while new regulations¹⁹ were introduced to substitute for the end of emergency rule. In fact, as of November 2011, some 893 persons were in custody under the PTA’s provisions.²⁰

To the LLRC’s own dissatisfaction in its final report, there was desultory action taken in the implementation of even its modest interim recommendations (from September 2010). The interim recommendations spanned issues of long-term ethnic Tamil detainees; the government’s policy on use of private lands in the North and East; law and order in conflict-affected areas; language of administration; and livelihood issues.²¹ Unfortunately, there is also opposition within the ruling coalition, and at the highest level, to some of the recommendations in its final report.

¹⁷ The LLRC Report discussed: the breakdown of the ceasefire agreement; actions of the military in the final phase of the war; international humanitarian law; human rights; land; restitution; and reconciliation; see *Report of the Commission of Inquiry on Lessons Learned and Reconciliation*, November 2011, http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf.

¹⁸ The Human Rights Action Plan makes recommendations on: civil and political rights; economic, social and cultural rights; prevention of torture; rights of women; labour rights; rights of migrant workers; rights of children; and rights of internally displaced persons; see *Sri Lanka: National Action Plan for the Protection and Promotion of Human Rights (2011-2016)*, http://www.hractionplan.gov.lk/posters/National_action_plan_for_the_protection_and_promotion_of_human_rights_2011_2016_English.pdf.

¹⁹ “The Government is so open about what they propose doing. Remove the Emergency but invoke PTA to continue with the Emergency”, argued human rights lawyer J. C. Weliamuna, “Lifting of the Emergency: Exposing the sham exercise”, *Daily FT* (Colombo), www.ft.lk/2011/09/17/lifting-of-the-emergency-exposing-the-sham-exercise/.

²⁰ Saman Indrajith, “PTA detainees number 893”, *The Island* (Colombo), 23 November 2011, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=39614.

²¹ “LLRC: Interim Report to Government”, *groundviews.org*, 11 November 2010, <http://groundviews.org/2010/11/11/lrc-interim-report-to-government/>.

The Human Rights Action Plan initially suffered for want of an institutional patron (following the dropping of human rights as a ministerial subject in 2010), but after determined efforts of a few within government engaged in defending its human rights record abroad, its implementation has now been entrusted to a task force which requires political conviction or will and inter-ministerial support and coordination for progress on its mostly modest targets.

Some of the issues that were brought to the notice of the Human Rights Commission in the period under review include:²² the killing of Roshen Chanaka in a workers protest against the government's proposed private sector pension scheme; detainees in long-term custody; 'grease devil' (*thel yaka/kreese pootham*) attacks on women; unlawful arrest and torture of villagers in Navanthurai, Jaffna;²³ livelihood and social issues of ex-LTTE women combatants; deprivation of migratory fisher communities especially access to education; social ostracism of two Muslim girls by their own community;²⁴ the sale of sub-standard petrol by the state-owned Ceylon Petroleum Corporation; accessibility of public buildings to persons with physical disabilities;²⁵ monitoring of local government elections in the conflict-affected Northern province; non-implementation of Tamil as an official language;²⁶ and land-grabbing by state agencies including the security forces.²⁷

There were also *suo moto* ('own action') inquiries conducted – including on the serial killing of elderly pavement dwellers; mobility for the visually and hearing impaired students of the Ratmalana Deaf and Blind school; and compulsory registration of Tamils in Killinochchi among others – with recommendations made to relevant state authorities.

Methodology

²² For more details see Human Rights Commission of Sri Lanka website, <http://hrcls.lk/english/?cat=1>.

²³ 'Watchdog' (pseud.), "Jaffna: Brutal Assault of Civilians in Navanthurai", *groundviews.org*, 25 August 2011, <http://groundviews.org/2011/08/25/jaffna-brutal-assault-of-civilians-in-navanthurai>; "Court takes up NE Citizens rights petition against Military, Police", *Sunday Times* (Colombo), 2 October 2011, http://sundaytimes.lk/111002/News/nws_013.html.

²⁴ Riffhi Ali, "Two girls accused of misconduct exonerated by mosques", *Daily Mirror* (Colombo), 20 January 2012.

²⁵ "Accessibility, inherent right of everyone", *Daily News* (Colombo), 13 March 2012, <http://www.dailynews.lk/2012/03/13/news31.asp>.

²⁶ "The language of harmony", *Daily Mirror* (Colombo), 28 April 2012, <http://www.dailymirror.lk/opinion/18235-the-language-of-harmony.html>.

²⁷ Maryam Azwer, "Human Rights Commission to Investigate Ashraf Nagar Issue", *The Sunday Leader* (Colombo), 8 April 2012, <http://www.thesundayleader.lk/2012/04/08/human-rights-commission-to-investigate-ashraf-nagar-issue/>.

This country report is structured according to the guidelines of the 2012 ANNI regional report. It draws upon written responses and supplementary information from the HRCSL to a detailed questionnaire prepared by the Law & Society Trust; information on the website of the HRCSL; newspaper articles; interactions with HRCSL members and senior staff in Colombo and with coordinators and other staff in several regional offices visited in 2011 and 2012; international and national human rights reports; and the observations of human rights organisations and defenders in Colombo and in other districts. An advance version of this report was shared with the members and senior executive officers of the HRCSL to receive their comments, but none was forthcoming at time of publication.

II. Independence of the Human Rights Commission

The *Human Rights Commission Act*, No. 21 of 1996, which is the legal framework for the national human rights institution and prescribes its functions and powers, has been discussed previously and found to be wanting.²⁸ The HRCSL recognises that there are deficiencies in its enabling law that have impeded its effectiveness, particularly in enforcement of its orders, and it proposes to prepare and submit suitable amendments to lobby the government. However, there was no progress on this in 2011, nor were there any initial public consultations with civil society organisations and other interested parties, specifically on this matter.

The National Action Plan for the Protection and Promotion of Human Rights (2011-2016), has promised the following amendments to the enabling act:²⁹ (i) expansion of the mandate of the HRCSL to include not only fundamental rights explicitly protected in the Constitution but also any other human rights that are justiciable under national laws;³⁰ (ii) require the HRCSL

²⁸ B. Skanthakumar, ““Window-Dressing”? The National Human Rights Commission of Sri Lanka”, *Law & Society Trust Review* (Colombo), No. 262 (August 2009), pp. 5-22 at pp. 6-8 and 16-19, <http://www.lawandsocietytrust.org/PDF/nhrc%20report%202009.pdf>.

²⁹ *Sri Lanka: National Action Plan for the Protection and Promotion of Human Rights (2011-2016)*, http://www.hrctionplan.gov.lk/posters/National_action_plan_for_the_protection_and_promotion_of_human_rights_2011_2016_English.pdf, at pp. 13, 14 and 20.

³⁰ While, this is an improvement, its ambition is extremely disappointing as the remit of a national human rights institution is the protection and promotion of *all* human rights, including those guaranteed in international human rights treaties and conventions ratified or acceded by the state party, but which may not be found in national laws. For example, as state party to the International Covenant on Civil and Political Rights (ICCPR), Sri Lanka recognizes the right to life; however, there is no constitutional or statutory provision to this effect in its domestic legal system including in the enactment (Act No. 56 of 2007) to give effect to “certain articles” in the ICCPR. For discussion see Rohan Edrisinha and Asanga Welikala, “GSP Plus and the ICCPR: A Critical

to publish an annual report within the first quarter of every year documenting the status of human rights in Sri Lanka in the preceding year, action taken on inquiries, and findings from its research; (iii) empowering HRCSL to refer non-implementation of its recommendations to the Attorney-General's department for action in the provincial high courts on behalf of the aggrieved party; (iv) all arrests to be notified to the HRCSL. The time-frame for the execution of these activities is one-year, which at most would be the end of 2012.

Membership and Selection

The appointment and composition of the members of the HRCSL, with effect from 18 February 2011, followed an interregnum of almost two years. The selection process was the subject of adverse comment by the UN Committee Against Torture which, *inter alia*, observed that the “new appointment process set out by the 18th Amendment to the Sri Lankan Constitution (September 2010), which ends Parliament's role in approving appointments, undermines the independence of the HRCSL”; and which recommended that the State Party “establish a transparent and consultative selection process to guarantee its full independence in line with the Paris Principles”.³¹ This shortcoming was one of the main reasons for the downgrading of the HRCSL to ‘B’ status in 2007 by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).

The Commissioners themselves are untroubled by the manner of their appointment and appear surprised that it is a source of controversy in certain quarters within and outside the country. The ad-hoc commissions of inquiry which have been created in abundance in post-colonial Sri Lanka are all appointed by “executive fiat”,³² and the ethos of the retired public officers drawn upon as members of the Human Rights Commission is one of adaptation and not antagonism to the prevailing constitutional (and also political) culture – hence the selection process is not seen as out of the ordinary or objectionable *per se*.

Appraisal of the Official Position of Sri Lanka in respect of Compliance Requirements”, in Centre for Policy Alternatives and Friedrich Ebert Stiftung (eds.), *GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues*, Colombo 2008, http://library.fes.de/pdf-files/bueros/sri_lanka/08684.pdf.

³¹ *Concluding observations of the Committee against Torture: Sri Lanka*, Forty-Seventh session (31 October – 25 November 2011), CAT/C/LKA/CO/3-4, 8 December 2011, Para 17 on p. 7, http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.LKA.CO.3-4_en.pdf.

³² Kishali Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977*, International Commission of Jurists, Bangkok 2010, at p. 107, http://www.icj.org/dwn/database/Sri%20Lanka_final.pdf.

Before appointment to the HRCSL, most members are unfamiliar with the unique character and normative standards of national human rights institutions. Even after their appointment, some may believe that knowledge of the enabling law that established the Commission, and of the fundamental rights chapter of the Constitution of Sri Lanka, is sufficient in the interpretation of their mandate. Although members are to be chosen from among persons “having knowledge of, or practical experience in, matters relating to human rights”,³³ there is no procedure in the selection process to ascertain their human rights expertise and assess their familiarity with the international human rights system.

Further, the view of the current crop of Commissioners is that their independence from the Executive is guaranteed by the legal provision³⁴ that limits the power of the President to remove them from office. However, this argument does not address the concern raised by the flawed process of nomination and appointment of members to the Human Rights Commission; and it sidesteps the fact that it is the prerogative of the President alone whether to extend or terminate their appointment at the end of their term.

To be sure, members may be selected in a method that is procedurally sound, but may thereafter exhibit political bias; and conversely, though having been appointed in an unsatisfactory process, may demonstrate in the course of their duties the requisite integrity and freedom from political manipulation that is anticipated from the leadership of a national human rights institution. Therefore, the real test of independence from government is the actual performance of the members: their words and deeds or acts and omissions when confronted with concrete situations of human rights violations and concerns. Nevertheless, transparency and broad participation in the selection process, offers the best possible means to establish the competence, suitability and autonomy of Commissioners.

In February 2012, perhaps the most dynamic member of the Commission Dr. Ananda Mendis, resigned in frustration having completed one year in office. He complained of

³³ S. 3 (1), *Human Rights Commission Act*, No. 21 of 1996, <http://hrsl.lk/english/ACT/english.pdf>.

³⁴ The grounds for dismissal by the President as set out in s. 4 (1) (a), *Human Rights Commission of Sri Lanka Act*, No. 21 of 1996 are: insolvency; paid employment outside of the Commission that conflicts with the duties of a member; infirmity of mind or body; deemed by judicial determination to be of unsound mind; conviction of an offence involving “moral turpitude”; and absence without permission from three consecutive meetings of the Commission. Any member of the Commission may also be removed by parliamentary procedure – on the ground of “proved misbehaviour or incapacity” – that has the support of the majority of the legislature, see s. 4 (1) (b) & (2), <http://hrsl.lk/english/ACT/english.pdf>.

“inefficiency” in the workings of the Commission; of sub-standard crime scene investigations; and of “interference” by a senior executive officer.³⁵

The last reference is to the Additional Secretary (Legal) Nimal Punchihewa, who was a human rights lawyer before he joined the Commission after its establishment in 1997. His lengthy association with the HRCSL and familiarity with its workings and its cadre has given him an authority, exceeding the ordinary terms of reference of his position, among past and present members of the Commission as well as its staff at the head and regional offices.

Of greatest controversy is the Additional Secretary’s concurrent appointment as Chairman of the Land Reform Commission (LRC), which is an office in the gift of the President. While there are no claims of conflict of interest, *prima facie* this dual role poses an immediate challenge to the independence of the HRCSL; as one of its senior officers is also attached – through political patronage – to the government. The LRC, no different to other state corporations or departments of state, has been used by the government of the day to reward its supporters and to harvest votes in elections.³⁶

The vacancy created by Dr. Mendis’ resignation was promptly filled by the appointment of Dr. Prathiba Mahanamahewa, who is Dean of the Faculty of Law at a military academy (Kotelawala Defence University). The new member has been associated with the HRCSL in the capacity of a human rights expert and speaker at some of its public events. However, he is a controversial choice because of his public identification with government policy in frequent television appearances on state broadcasting channels and in op-ed articles for newspapers. It should be acknowledged that he was critical of the selection process for the Human Rights Commission and sceptical of the suitability of some of its members and hinted at his

³⁵ Dinidu de Alwis, “I leave HRC with a clear conscience”, *Ceylon Today* (Colombo), 5 February 2012; Manori Kalugampitiya, “Why did I resign from the Human Rights Commission?” (in Sinhala), *Samabima* (Colombo), 13 February 2012 <http://www.samabima.info/?p=1949>; and “Why did he resign from the Human Rights Commission?” (in Sinhala), *Lankadeepa* (Colombo), 13 March 2012.

³⁶ “The Land Reform Commission was (sic) organised a program to distribute 5,000 Ranbima land title deeds among landless people in the Hambantota District to mark President Mahinda Rajapaksa’s swearing-in for the second term of office, said LRC Chairman Nimal G. Punchihewa”, see “Five thousand Ranbima land deeds”, *Daily News* (Colombo), 18 November 2010, <http://www.dailynews.lk/2010/11/18/news43.asp>. Meanwhile, the Executive Director of the LRC was a general election candidate for the governing United Peoples Freedom Alliance coalition in 2010, when he was also the Colombo district electoral organiser for the Sri Lanka Freedom Party (that dominates the ruling coalition) and legal adviser to the Ministry of Defence. This example illustrates the nexus between those appointed to senior positions in the LRC and the Executive.

dissatisfaction with the ramifications of the 18th Amendment to the Constitution for ‘good governance’.³⁷

Following his own appointment as a member of the HRCSL, Dr. Mahanamahewa was a virulent critic of the resolution tabled at the 19th regular session of the UN Human Rights Council in March 2012 that called upon the GoSL to begin implementing the recommendations of its own Lessons Learned and Reconciliation Commission and to avail itself of the technical assistance of the UN Office of the High Commissioner for Human Rights (OHCHR) in this regard.³⁸

While there could be opposed views within the human rights community as to the desirability and likely consequences of that resolution, it was surely inappropriate for a member of the Human Rights Commission of Sri Lanka to publicly involve himself in the GoSL’s political and media campaign, and to contribute to the disinformation propagated concerning the resolution and its effects.

Relationship with the State

Within weeks of the reconstitution of the Commission in February 2011, the Chairman embarked on a series of media interviews which made clear his sympathy for the government’s privileging of counter-terrorist measures over human rights standards in its handling of the secessionist campaign of the Liberation Tigers of Tamil Eelam (LTTE); and his identification with the State in its outright opposition to international demands for accountability flowing from allegations of gross violations of international humanitarian law and human rights law in the decisive conclusion of the war.

“I cannot believe that there is a basis for any of these accusations [of human rights violations from international actors]. This is a country which protects human rights and adheres to the same”, said Justice (Retd.) Priyantha Perera. “The International Community and International Organisations have forgotten the fact that this country was facing a war with a fascist terrorist

³⁷ Prathiba Mahanamahewa, “Should the 18th Amendment be tainted by unwanted appointments?” (in Sinhala), *Irida Lankadeepa* (Colombo), 6 March 2011.

³⁸ UN Human Rights Council, *Promoting Reconciliation and Accountability in Sri Lanka*, A/HRC/RES/19/2, 22 March 2012, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/126/71/PDF/G1212671.pdf?OpenElement>; Friday Forum, “The wise give up the idea of victory and defeat”, *The Island* (Colombo), 16 April 2012, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=49616.

organisation for thirty years. The [LTTE] never gave a thought to human rights...It is surprising that some people discuss only about [LTTE leader] Prabhakaran's human rights."³⁹

The HRCSL Chairman has refused to criticise the non-conformity of the Prevention of Terrorism Act (PTA) with Sri Lanka's international human rights obligations, claiming that since the end of the war it was a "dead letter". In fact, the PTA was strengthened after the lapse of the state of emergency in August 2011; and continues to be invoked to detain persons without charge, as 241 persons were arrested under this law in 2011 alone.⁴⁰

The former Supreme Court Justice would not be drawn on the maintenance of the island-wide state of emergency that severely restricted civil liberties and fundamental rights; pronouncing its continuance to be "a matter for the government".⁴¹ In a later interview, he went even further, when claiming that "at present there is no abuse of emergency regulations."⁴² It is unclear on what basis this opinion was formed. Indeed, the stock response from the Chairman to any such queries over state policy and practices is that, these are "matters that go beyond the purview of the HRCSL Act".⁴³ To the contrary, public positions for reform or repeal of laws that violate human rights are entirely germane to the mandate of the Commission as explicitly provided in section 10⁴⁴ of its enabling law.

Elsewhere, in an interview granted upon his return after attending the 24th annual meeting of the International Coordinating Committee of National Institutions for the Promotion and

³⁹ Uditha Gunawardena, "No basis for Human Rights Violations accusations made by the international community", *Dinamina* (Colombo), 5 March 2011 (in Sinhala), <http://www.dinamina.lk/epaper/?id=08&tday=2011/03/05&x=x>.

⁴⁰ "There are no political prisoners in custody", *Daily News* (Colombo), 24 May 2012, <http://www.dailynews.lk/2012/05/24/pol02.asp>.

⁴¹ Wilson Gnanadass, "I will ensure impartiality, says SLHRC chief", *The Nation* (Colombo), 6 March 2011, <http://www.nation.lk/2011/03/06/newsfe2.htm>.

⁴² Dianne Silva, "No abuse of emergency regulations: HRC Chairman", *Daily Mirror* (Colombo), 11 June 2011, archived at http://sriilog.com/no-abuse-of-emergency-regulations-hrc-chairman_1098.html; also see video interview at <http://dailymirror.lk/video/11857-justice-priyantha-perera-on-hot-seat.html>.

⁴³ Chairman of the Human Rights Commission of Sri Lanka, *HRCSL Response to Law & Society Trust Letter and Discussion [at Civil Society Forum on 11 July 2011]*, 23 November 2011 (on file). The LST letter dated 2 August 2011 is online here:

<http://www.lawandsocietytrust.org/PDF/ruki%20letter%20to%20hrc%20chair-02august2011-follow%20up%20to%20civil%20society%20forum.pdf>.

⁴⁴ S. 10 (d), *Human Rights Commission of Sri Lanka Act*, No. 21 of 1996: "to 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", <http://www.hrsl.lk/PFF/HRC%20Act.pdf>.

Protection of Human Rights (ICC) in May 2011, Mr. Justice (Retd.) Perera claimed that there had been heavy criticism of the island’s human rights record, but assured that he was “able to pacify the detractors and put the correct picture of Sri Lanka before them”.⁴⁵

Sri Lanka was not an agenda item at ICC-24, and presumably the Chairman was referring to issues raised during bilateral discussions and in informal conversations with delegates. Nevertheless, his remarks indicate that he perceived his role there as being an ambassador for the state of Sri Lanka – engaged in defending its human rights record – rather than as the head of the institution that is supposed to monitor, chastise and correct the state when violations of human rights occur or are imminent.

In a strange episode, a circular (dated 8 March 2012) purportedly issued by the Ministry of Public Administration and Home Affairs was sent to Secretaries of Ministries and Provincial Councils, Heads of Departments and Chairmen of State Corporations and statutory agencies to the effect that recommendations of the HRCSL were without legal effect. Soon after this came to notice, the Minister concerned acted swiftly to clarify that the circular was a forgery and to order a police investigation. The Secretary to the Ministry issued a circular clarifying that recommendations of the HRCSL had to be adhered to by government agencies.⁴⁶

Resourcing

The cramped premises of the head office have been faulted in the past for impeding the performance of the HRCSL. In 2011, spacious premises in an accessible location were identified for rent and refurbished before occupation in November of that year. There was 184 staff excluding those working on contract for donor-funded projects. Some regional offices lacked the designated number of cadre, including the crucial complement of Investigating Officers and Legal Officers. There are allegations that staff recruitment has not always been merit-based but rather through canvassing by family members or friends already employed in the Commission.

⁴⁵ Sandun A. Jayasekera, “Govt. to start fresh probe on HR violations”, *Daily Mirror* (Colombo), 26 May 2011, <http://www.dailymirror.lk/news/11593-govt-to-start-fresh-probe-on-hr-violations.html>.

⁴⁶ Don Asoka Wijewardena, “Bogus Circular sent with forged signature of Public Admin Ministry Secy.”, *The Island* (Colombo), 14 March 2012, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=47399.

While there is a statutory requirement for pluralism in the composition of members, no such stricture exists as regards the selection of the staff that is overwhelmingly of Sinhala Buddhist background. In 2011, only one senior officer (the Secretary) was of ethnic minority origin. By necessity there are Tamil and Muslim staff in the majority Tamil-speaking North and East regional offices of the Commission. However, there is under-representation of Tamil-speakers in its offices in majority Sinhala-speaking areas, and of Sinhala-speaking officers in some regional offices in the North and East.

In 2011, many staff of the Commission, including some regional coordinators, who had been in temporary employment for as long as 10 years since their recruitment, were confirmed in their posts, that is, made permanent. Also, Commission staff in permanent service were conferred the right to a state pension by the Ministry of Public Administration and Home Affairs at the end of 2011,⁴⁷ which had not been previously enjoyed.

While both measures will understandably be welcomed by the employees concerned, reservations have also been voiced. It can be argued that when the differentiation between terms of employment of the national human rights institution and departments of government is blurred, that this may reinforce the already strong identification of many staff with the public administrative service and therefore the State. It is speculated that these measures may also allow the transfer of the cadre of the HRCSL elsewhere, and likewise the transfer of staff from government departments into the Commission over which it will have little control.

Some regional offices cover a large geographical area that crosses provincial boundaries. These offices complain that they lack the required number and type of vehicles as well as adequate fuel allowance for even routine police station visits, leaving aside field investigations. Also, to economise on their fuel allowance, neighbouring police stations are inspected at the same time, instead of random visits. A former member of the Commission alleged that the shortage of transport prevented members from carrying out their duties outside of the head office as well as from visiting the regional offices.⁴⁸

⁴⁷ “Declaration of Posts as Pensionable Posts”, *Gazette of the Democratic Socialist Republic of Sri Lanka*, No. 1741, 13 January 2012, at pp. 29-30, <http://documents.gov.lk/gazette/2012/PDF/Jan/13Jan2012/I-I%28E%292012.01.13.pdf>.

⁴⁸ Dr. Ananda Mendis: “Even being the Commissioners, we did not have a vehicle when needed to make an inspection visit at the time of the Katunayake incident, or much less to inspect the locations where detainees

The HRCSL’s budget in 2011, including supplementary allocations in the course of the year, was Rs134, 644, 100. This is an increase from the 2010 allocation that was around Rs112 million.⁴⁹ In addition, the Commission received higher external funding (from three UN agencies: UNDP, UNICEF and UNFPA) in comparison to the previous year when donors were averse to resourcing the Commission as it had not been properly constituted. For the 2012 financial year, the Treasury has allocated Rs128, 394, 000 which is a reduction from the previous year. However, the HRCSL has requested additional funding of Rs8, 900, 000 towards utility bills and building rent at its head office.⁵⁰

III. Effectiveness of the Human Rights Commission

In 2011, according to one newspaper report, the Human Rights Commission received 6,700 complaints; of which 3,428 were lodged at the head office in Colombo, while the remainder (3,272) were received at its ten regional offices.⁵¹ Of this number, only 1,430 complaints had been disposed in the same year; including 401 where there was no violation of human rights; 260 complaints that were referred to other institutions; 230 that were categorised as “inactive”; 213 that were deemed to be irrelevant; 87 where cases were before the courts; 73 which were withdrawn by the complainant; 54 where relief was granted; 32 where settlement was reached; 23 which were conciliated; 35 which were excluded as received after the three-month time-bar; and 22 where recommendations were made.

An analysis of these statistics reveals that only a fraction of complaints (under 10 percent) were actually handled and resolved by the HRCSL, whether through mediation, conciliation or inquiry. Further, the grounds for exclusion of some complaints are quite troubling as, for example, the time-bar has no legal foundation and is entirely a policy decision of the HRCSL; while there should not be any impediment to a complainant filing cases in both the HRCSL and in the courts because the former is not a judicial body, and its remedies will differ, and a

were held” (in Sinhala), see Manori Kalugampitiya, “Why did I resign from the Human Rights Commission?”, *Samabima* (Colombo), 13 February 2012 <http://www.samabima.info/?p=1949>.

⁴⁹ Human Rights Commission of Sri Lanka, *2010 Annual Report*, Colombo 2012, p. 16, http://hrcsl.lk/PFF/annual_report_2010/english.pdf.

⁵⁰ Human Rights Commission of Sri Lanka, Administration and Finance Division response to ANNI 2012 Country Report Questionnaire prepared by the Law & Society Trust, 11 June 2012 (on file).

⁵¹ Ranjan Kasthuri, “Out of 6700 human rights complaints, 5270 still not resolved”, (in Sinhala), *Lankadeepa* (Colombo), 7 February 2012.

national human rights institution should have a more expansive view, more flexible procedures, cheaper and speedier process than legal tribunals.

In correspondence with the Law & Society Trust, the HRCSL reported receiving a higher number of 7,475 complaints in total in 2011: 4075 at its head office, and 3400 at its regional offices. Complaints were categorised as follows – personal liberty (torture/arrest/detention); death in custody/missing persons; inaction; employment; education (school admission and examinations); social service and state welfare; women’s rights; child rights; infrastructure facilities; language rights; migrant workers rights; voting rights; land and property rights; and environmental rights.

The disaggregated number of complaints (by category) received at the head office for the entirety of 2011 is not available. However, based upon the information available for the first seven months of last year, most of the complaints taken up in Colombo relate to employment cases; followed by torture; inaction (by the police and other authorities); illegal arrest and detention; education; harassment (of complainants by the police) and so on, in descending order.

Most human rights violations that are the subject of complaints, at least since 2009, are directed against the police department; followed by the education department; the armed forces; the pensions department; the University Grants Commission (higher education admissions); and the public administration ministry in that order, according to an answer to a question asked in parliament by an opposition legislator.⁵²

It was alleged by an opposition parliamentarian⁵³ that the Human Rights Commission had mishandled its inquiry into the police killing of a twenty-two year old free trade zone worker

⁵² Government Chief Whip replying to Hon. Dayasiri Jayasekera, “Violation of Human Rights: Complaints”, *Official Report of Parliamentary Debates (Hansard)*, 21 July 2011, Col. 1186-1193 at Col. 1190 (in Sinhala); Kelum Bandara and Yohan Perera, “2,691 HR violation complaints against police”, *Daily Mirror* (Colombo), 22 July 2011, archived at <http://www.tisirilanka.org/?p=8188>; “HRC received over 11,000 complaints from 2009 till 2011”, *The Sunday Leader* (Colombo), 24 July 2011, <http://www.thesundayleader.lk/2011/07/21/hrc-received-over-11000-complaints-from-2009-till-2011/>.

⁵³ Dayasiri Jayasekera MP: “...a recommendation has been given to find a solution, conciliation, through discussion... I would like to ask how the Human Rights Commission of this country can give a recommendation to resolve a serious issue such as murder through discussion... Roshen Chanaka was murdered and compensation of Rs1 million was paid. Is it as recompense that the Human Rights Commission recommended that this matter be subject to settlement?”, “Violation of Human Rights: Complaints”, *Official Report of Parliamentary Debates (Hansard)*, 21 July 2011, Col. 1186-1193 at Col. 1190 and 1192 (in Sinhala).

(Roshen Chanaka),⁵⁴ by seeking conciliation between the family of the victim and the officers involved in his shooting, instead of recommending their prosecution.

Thirty-nine complaints of enforced disappearances were lodged with the HRCSL in the first quarter of 2012, including eighteen cases reported to its regional offices in the conflict-affected Northern and Eastern provinces. The HRCSL noted that the police authorities had made “no justifiable (sic) progress in respect of investigations” and called upon state officials to take immediate action to prevent disappearances in the future.⁵⁵

A large backlog of cases had accumulated in the period of almost two years when the HRCSL was not properly constituted and its authority was in doubt,⁵⁶ and were inherited by the incoming members. The Chairman created an ad-hoc panel of five former senior judicial officers to expedite and clear the backlog within six months beginning in June 2011;⁵⁷ drawing on members of the Retired Judges Association which he also heads. Complaints originating from the conflict-affected North and East, and particularly from internally displaced persons were to be prioritised, and were estimated to be around 1,000 in number. However, in the previous year, according to the HRCSL’s then Secretary, some 5,500 cases were pending.⁵⁸ There was no information publicly available as to how many ‘old’ cases had been cleared as at the end of the year, and what remedy had been recommended for complainants.

One opposition parliamentarian who has been consistently critical of the functioning and performance of the Human Rights Commission claimed that there were around 15,000 recommendations issued since its establishment, that were ignored by state authorities.⁵⁹ This

⁵⁴ Dinidu de Alwis, “How protests in FTZ turned into mayhem”, *The Nation* (Colombo), 5 June 2011, <http://www.nation.lk/2011/06/05/newsfe1.htm>.

⁵⁵ Human Rights Commission of Sri Lanka, “*The Human Rights Commission of Sri Lanka Concern About Disappearances*”, 18 April 2012, <http://hrsl.lk/english/?p=1940>.

⁵⁶ B. Skanthakumar, “Atrophy and Subversion: The Human Rights Commission of Sri Lanka”, *Law & Society Trust Review* (Colombo), No. 274 (August 2010), pp. 1-12 at p. 7, http://www.lawandsocietytrust.org/PDF/Atrophy%20and%20Subversion_The%20Human%20Rights%20Commission%20of%20Sri%20Lanka.pdf/

⁵⁷ Sandun A. Jayasekera, “Govt. to start fresh probe on HR violations”, *Daily Mirror* (Colombo) 26 May 2011, <http://www.dailymirror.lk/news/11593-govt-to-start-fresh-probe-on-hr-violations.html>. The title of the article is misleading as this mechanism was initiated by the Human Rights Commission and not the Government of Sri Lanka.

⁵⁸ B. M. Murshideen, “HR cases stuck”, *Daily Mirror* (Colombo), 26 August 2010, <http://www.dailymirror.lk/news/6106-hr-cases-pending.html>.

⁵⁹ Yohan Perera, “HRC recommendations ignored – Kiriella”, *Daily Mirror* (Colombo), 5 March 2011.

figure was disputed by an unidentified source in the HRCSL, who admitted however that there were a large (undisclosed) number that had not been followed.

The non-implementation of key recommendations from as long ago as 2004⁶⁰ – regarding the unlawful detention of women on whom no indictment has been served or who have completed their sentences but have no family or friends to be released to – is a case in point. As the HRCSL undertook to monitor the implementation of its recommendations in 2005,⁶¹ and reports conducting surprise visits to the Methsevena Detention Centre for Women at least into 2010,⁶² it is puzzling as to why it only summoned the relevant state authorities after April 2011 in response to a complaint from a non-governmental organisation.⁶³ Even since, the relevant state agencies have been uncooperative, and the human rights of women in that facility continue to be violated.

The only sanction available to the HRCSL in the event of its recommendations being disregarded or laggard or partial implementation, is for it to compile a report on the matter for the attention of the President, who “shall” place it before Parliament.⁶⁴ This has been done over the years but its impact appears to be negligible in terms of deterring state institutions and public officers from similar conduct. There are practical difficulties faced by the HRCSL in using this mechanism, including the human resources for preparation of the report; its translation and printing in Sinhala, Tamil and English before being tabled in parliament; the inability to compel the President to submit the report to the legislature; and the inability to ensure that parliamentarians consider such a report, leave alone take any action that may be within their power.

Since his appointment, the Chairman has applied himself to this problem of the weak enforcement authority of the Commission. Where the respondents have not cooperated with

⁶⁰ Human Rights Commission of Sri Lanka, *Methsevena State House of Detention, Gangodawila*, Colombo 2004,

<http://hrsl.lk/PFF/Human%20Rights%20Report%20Methsevana%20State%20House%20Detention%20Gangodawila.pdf>.

⁶¹ “Discussion on Methsevena House of Detention, Gangodawila”, *The Island* (Colombo), 4 July 2005, <http://www.island.lk/2005/07/04/news14.html>.

⁶² Human Rights Commission of Sri Lanka, *Annual Report 2010*, Colombo 2012, p. 13, http://hrsl.lk/PFF/annual_report_2010/english.pdf.

⁶³ Jeewan Thiyagarajah, “Law and Gurus of Sleep”, *Daily Mirror* (Colombo), 10 July 2012, <http://www.dailymirror.lk/opinion/172-opinion/20145-law-and-gurus-of-sleep.html>.

⁶⁴ S. 15 (8), *Human Rights Commission of Sri Lanka*, Act No. 21 of 1996, <http://hrsl.lk/english/ACT/english.pdf>.

the HRCSL in its inquiries and investigations, the Commission now issues an “order” to implement the recommendation, informing that action may be taken against them for an offence of contempt (identical to an offence committed against the Supreme Court).⁶⁵ This tactic has been successful, including in instances where officers of the Commission have been obstructed from performing their ordinary duties, for e.g. when access to injured free trade zone workers was denied by the Ragama government hospital authorities⁶⁶, and when Trincomalee prison officials refused to accept a communication from the HRCSL requesting information on those incarcerated there.

Where recommendations of the Commission are ignored, the Chairman has summoned the concerned parties and sought through conciliation to secure its implementation. If there is still recalcitrance, then the Commission can “make an order—that the recommendation must be carried out, and if they act in violation of that order we can report this to the Supreme Court as a matter of contempt.”⁶⁷ The nature and limitations of these stratagems, including delay and frustration to the victim, underscore the urgency of legal reforms to strengthen the authority and enforcement powers of the HRCSL.

One of the core functions of the Human Rights Commission of Sri Lanka is to inspect all places of detention to ensure that the rights of inmates are respected. In addition to routine visits to police stations with remand cells, the Commission also inspected the condition of prisoners in the custody of the Terrorist Investigation Division and the Criminal Investigation Department. Issues that have been identified by the Commission include assault in custody; arrest without prior investigation; arrest on suspicion alone with no clear offence or charge; delays in production of the detention register; overcrowding of cells; and unsanitary conditions in cells.⁶⁸

⁶⁵ Bigun Menake Gamage, “Supreme Court informed if Human Rights Commission Recommendations not complied with” (in Sinhala), *Lankadeepa* (Colombo), 9 June 2011.

⁶⁶ Manopriya Gunasekera, “HRC summons Ragama Hospital directors”, *The Sunday Times* (Colombo), 05 June 2011, http://sundaytimes.lk/110605/News/nws_04.html.

⁶⁷ Dianne Silva, “No abuse of emergency regulations: HRC Chairman”, *Daily Mirror* (Colombo), 11 June 2011, archived at http://sriilog.com/no-abuse-of-emergency-regulations-hrc-chairman_1098.html.

⁶⁸ Human Rights Commission of Sri Lanka, *Annual Report 2009*, p. 135, http://hrcsl.lk/PFF/annual_report_2009/english.pdf.

For example, acting on a tip-off, the HRCSL inspected the remand cells at a police-station in Mount Lavinia, south of Colombo.⁶⁹ Some suspects had been detained for more than seven days without having been produced before a magistrate; others showed signs of having been tortured in custody; none of the detentions had been informed to the HRCSL. Two women and several men, who had been wrongfully arrested and imprisoned, were subsequently freed.

Fifteen years since its establishment, the HRCSL began night visits and also out-of-office hours' visits to certain police stations in 2011. These are the hours when suspects are most vulnerable to inhuman or degrading treatment. In the past, the Commission has pleaded that it lacks the transportation and staff for night visits. However, its officers are still unable to freely inspect the police barracks and other out-buildings without prior notice, which if given, would defeat the point of surprise inspections. Some Officers-In-Charge of police stations are obstructive of monitoring visits.⁷⁰

Officers of the HRCSL were initially denied access to the closed facilities where ex-LTTE combatants and surrendees are detained,⁷¹ as the military authorities in charge claimed that the centres are not places of detention but are classified as “protective accommodation and rehabilitation centres”. The HRCSL rightly disagreed; and following discussion with the Commissioner-General of Rehabilitation, was able to commence monitoring visits to these facilities by the Anuradhapura, Jaffna and Vavuniya regional offices from February 2012.⁷²

In its negotiations with the authorities, the Commission drew on the concluding observations of the UN Committee Against Torture that recommended the HRCSL “receives the necessary resources” to fulfil its mandate including to “initiate as well as carry out independent investigations into alleged and possible cases of torture and ill-treatment, including those

⁶⁹ Human Rights Commission of Sri Lanka, “The Commission summoned the Mount Lavinia Police to Inquire into Violation of the Law Related to Arrest and Detention”, 29 August 2011, <http://hrctl.lk/english/?p=1741>.

⁷⁰ “Senior Jaffna cop falls foul of HRC”, *The Island* (Colombo), 9 April 2012, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=49323.

⁷¹ The Government of Sri Lanka in its submission during the 20th regular session of the UN Human Rights Council in June 2012, said that only 629 ex-combatants remained under ‘rehabilitation’, while 10,949 persons including 594 child soldiers had been released and reintegrated, and 403 are in remand or being investigated for prosecution, see “SL marching forward with post-conflict development”, *Daily News* (Colombo), 21 June 2012, <http://www.dailynews.lk/2012/06/21/news20.asp>.

⁷² Human Rights Commission of Sri Lanka, “HRCSL Resumes Monitoring of Rehabilitation Centres”, 28 February 2012, <http://hrctl.lk/english/?p=1865>.

concerning military premises, as well as ‘rehabilitation centres’ and other government-controlled facilities such as ‘welfare centres’, and to publish the results”.⁷³

The UN Committee Against Torture regarded allegations of secret detention centres run by military intelligence and paramilitary groups “where enforced disappearances, torture and extrajudicial killings” are perpetrated as being credible.⁷⁴ The HRCSL has made no public comment on this matter. When a complaint was made acting on a media report⁷⁵ that two political activists who had been abducted were being held in the Police Welfare building in central Colombo (not a gazetted place of detention), the Commission visited the premises⁷⁶ and found no one there. However, the police authorities had been informed of their interest the day before, and conceivably, could have removed anyone who was in their unlawful custody there.

Any arrest or detention under the provisions of the Prevention of Terrorism Act or under the provisions of the Public Security Ordinance should be informed to the HRCSL⁷⁷ which maintains a registry of detention orders. In 2011, some 507 such detentions were registered by the Commission. It is more likely than not that not all detentions are informed by the relevant authorities. When detainees are transferred between remand centres and prisons, this information which must by law be disclosed to the HRCSL, has also not been immediately communicated until and unless the Commission makes direct and specific enquiries.

At the end of April 2012, there was a mass arrest of a large number of Tamil men and women in the Trincomalee district on suspicion of having past association with the banned Liberation Tigers of Tamil Eelam. The HRCSL regional office was initially not informed of the arrests and the identity of those arrested and their place of detention by the Terrorist Investigation

⁷³ *Concluding Observations of the Committee Against Torture: Sri Lanka*, Forty-seventh session (31 October—25 November 2011), CAT/C/LKA/CO/3-4, 8 December 2011, http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.LKA.CO.3-4_en.pdf, Para 17 on p. 7.

⁷⁴ *Concluding Observations of the Committee Against Torture: Sri Lanka*, Forty-seventh session (31 October—25 November 2011), CAT/C/LKA/CO/3-4, 8 December 2011, http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.LKA.CO.3-4_en.pdf, Para 8 on p. 3.

⁷⁵ “Lalith and Kugan at the Police Welfare building”, *Lanka News Web*, 13 April 2012, http://www.lankanewsweb.com/english/index.php?option=com_content&view=article&id=1714:lalith-and-kugan-at-the-police-welfare-building&catid=1:general&Itemid=29. This website is blocked within Sri Lanka.

⁷⁶ Chris Kamalendran, “HRC officials check police building for Lalith and Kugan”, *Sunday Times* (Colombo), 15 April 2012, http://sundaytimes.lk/120415/News/nws_04.html.

⁷⁷ S. 28(1), *Human Rights Commission of Sri Lanka Act*, No. 21 of 1996, <http://hrcls.lk/english/ACT/english.pdf>.

Division. Only subsequent to making inquiries from the police, was the HRCSL sent a list with those details, but only of thirty-nine persons, whereas some media alleged that as many as between 150 and 220⁷⁸ were in custody.

The Human Rights Commission of Sri Lanka conducted an important study on remand prisoners awaiting trial or sentence for long periods.⁷⁹ It was revealed that of a total of 13,196 on remand; around 33.9% had been imprisoned for longer than six months and 15.4% of that number for longer than eighteen months. The HRCSL inquired into cases of those remanded for longer than three years and found all of them to be young men of Tamil ethnicity: including one in custody pending trial since 1996 for alleged terrorist activities.

The common cause for these violations of the right to a speedy and fair trial were the sheer disinterest of the police and the Attorney-General's department to promptly produce evidence and frame charges; delays in receiving forensic reports from the government analyst's department; regular postponement of court hearings through unpreparedness of the prosecutor; delays in translation of indictments into Tamil; and unavailability of Tamil interpreters in court.

The Commission also concluded that the conditions in prisons, including through overcrowding, failed to meet the UN Standard Minimum Rules for the Treatment of Prisoners. Other issues that have been identified in the monitoring visits to prisons include the right to health of prisoners; restricting their access to family members; and their personal security.⁸⁰

NPDS Project

In December 2011, the National Protection and Durable Solutions for Internally Displaced Persons (NPDS) project of the Human Rights Commission of Sri Lanka shut down. The 'IDP unit' as it was mostly known, had regional offices in Batticaloa, Jaffna, Puttalam, Trincomalee and Vavuniya in addition to its head office in Colombo.

⁷⁸ "Fears for Tamil detainees in Sri Lanka", *BBC News*, 4 May 2012, <http://www.bbc.co.uk/news/world-asia-17958616>; and "220 Tamils arrested in SLA combing in Trincomalee", *TamilNet*, 26 April 2012, (archived at <http://www.tamilnewsnetwork.com/2012/04/26/220-tamils-arrested-in-sla-combing-in-trincomalee/>).

⁷⁹ Human Rights Commission of Sri Lanka, Monitoring and Review Division response to ANNI 2012 Country Report Questionnaire prepared by the Law & Society Trust, 11 June 2012 (on file).

⁸⁰ Human Rights Commission of Sri Lanka, *Annual Report 2010*, Colombo 2012, p. 11, http://hrcsl.lk/PFF/annual_report_2010/english.pdf.

It was well regarded for the professionalism of its management and its dynamic regional coordinators; its rapid response to complaints and protection concerns relating to IDPs; training and networking of volunteer human rights defenders in affected communities; mobile clinics to replace lost or missing documentation of IDPs such as birth certificates and national identity cards; research studies on health, education and property issues; and information-sharing through its web portal.⁸¹

The winding-up of the project was only known to the staff concerned one month before, with no absorption into the cadre of the Commission itself. This development was also unforeseen and unwelcome to civil society organisations working with IDPs, as despite the massive reduction in their numbers, there are many who continue to be displaced from their original homes and unable to return across the North and East regions and in adjacent districts, while there are also duties towards those who have returned or resettled elsewhere as explained in the *UN Guiding Principles on Internal Displacement*.⁸²

The HRCSL has made no public comment on the closure of its IDP project and the desirability of its extension. The decision, it says, was that of the donors (mainly the UN High Commissioner for Refugees) and not of the HRCSL; and that the NPDS case-load has been shifted onto the Commission's regional offices in those districts.

However, silence may be interpreted as acquiescence in the government's intention to claim in the near future that there are no remaining IDPs in Sri Lanka,⁸³ not through the end of the condition of displacement and problems of the displaced, but rather through statistical subterfuge and state diktat.

The regional offices in the conflict-affected areas are often under-staffed and are coping with difficulty with their existing case-load, let-alone follow-up on old complaints. Further, the staff in the regional offices cannot be assumed to know and understand the human rights standards for internally displaced persons and lack the specialised training and knowledge of

⁸¹ National Protection and Durable Solutions for Internally Displaced Persons Project, Human Rights Commission of Sri Lanka website: <http://www.idpsrilanka.lk/index.php>.

⁸² United Nations *Guiding Principles on Internal Displacement* online at <http://www.unhcr.org/43ce1cff2.html>.

⁸³ Mirak Raheem, "The End of Displacement in Sri Lanka?", *groundviews.org*, 10 August 2010, <http://groundviews.org/2010/08/10/the-end-of-displacement-in-sri-lanka/>.

their former colleagues in the IDP unit. The closure of the unit is a serious setback to the protection and promotion of the rights of internally displaced persons.

Other issues

In its annual report prepared for the Asia-Pacific Forum's 16th annual conference in September 2011, the administrative and financial systems of the Commission were reported as having been in "disarray"⁸⁴ in the period when no members had been appointed.

The 24-hour telephone hotline for communication of urgent complaints, such as torture, illegal arrest and detention, was out of operation between August 2010 and May 2011. One human rights organisation working with victims of torture alleged that the duty officers are not sensitive to the trauma of the victim or the anxieties of the person who telephones on the victim's behalf; and seek to counsel the caller, rather than take appropriate action including giving clear information as to relief and redress and professionally handling the complaint.⁸⁵

On the invitation of the Human Rights Commission of Sri Lanka, there was a joint capacity-assessment mission⁸⁶ coordinated by the Asia-Pacific Forum in March 2012 and including the former chair of the ICC, members of other NHRIs in the region and representatives of the UN Office of the High Commissioner for Human Rights (OHCHR). The members of the mission also received the views of some human rights defenders with experience of engagement with the HRCSL.

A fabricated and malicious news-item was planted to the effect that this was a United Nations (UN) mission engaged in clandestine information-gathering on the human rights situation in Sri Lanka in the run-up to the 19th regular session of the UN Human Rights Council in March 2012.⁸⁷ It was nothing of the sort, and focused entirely on identifying areas and issues for the

⁸⁴ Human Rights Commission of Sri Lanka, *Report to the 16th annual meeting of the Asia-Pacific-Forum of National Human Rights Institutions*, Bangkok, Thailand, 6-8 September 2011, <http://www.asiapacificforum.net/about/annual-meetings/16th-thailand-2011/downloads/apf-member-reports/sri-lanka>, p. 2.

⁸⁵ Janasansadaya, *Present Plight of the National Human Rights Commission of Sri Lanka*, Panadura, April 2012, pp. 7-8 and p. 40, <http://www.janasansadaya.org/uploads/files/HRC%20-%20REPORT.pdf>.

⁸⁶ For the background and methodology see APF-UNDP-OHCHR, *Capacity Assessment Project*, 15th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Bali, Indonesia 3-5 August 2010, <http://www.asiapacificforum.net/news/support/capacityassessment/downloads/resources/apf-undp-ohchr-capacity-assessment-project-apf-15-annual-meeting-2010>.

⁸⁷ "UN men in mystery visit to Colombo", *The Nation* (Colombo), 11 March 2012, <http://www.nation.lk/edition/latest-top-stories/item/3780-un-men-in-mystery-visit-to-colombo.html>.

strengthening of the Commission in accordance with the Paris Principles. The findings and recommendations of the needs assessment have since been presented to the members of the HRCSL, but have not been released by the HRCSL to the public.

IV. Thematic Issues

The thematic issues identified for the 2012 ANNI Report are: (a) the relationship between the Human Rights Commission of Sri Lanka and human rights defenders and women human rights defenders; (b) the interaction between the HRCSL and international human rights mechanisms; (c) the HRCSL's implementation of three references developed by the Advisory Council of Jurists; and (d) the status and function of other specialised institutions in the protection and promotion of human rights.

Human Rights Defenders and Women Human Rights Defenders

In 2011, the HRCSL claimed to have established a separate complaints desk for vulnerable groups identified as women, children, elders, persons with disabilities, human rights defenders; and for priority actions such as complaints of torture and disappearance.⁸⁸

However, no complaints were recorded in 2011 as relating to human rights defenders.

This is puzzling as there were several cases in this category, including that of death threats to media freedom and democratic rights activist Dharmasiri Lankapeli (HRC Ref No: 3940/2011),⁸⁹ and the abduction and enforced disappearance of Lalith Weeraraj and Kugan Muruganadan in Jaffna on 9 December 2011 (HRC Ref Nos: 3852/2011 and 3934/2011).⁹⁰

⁸⁸ Human Rights Commission of Sri Lanka, *Report to the 16th annual meeting of the Asia-Pacific-Forum of National Human Rights Institutions*, Bangkok, Thailand, 6-8 September 2011, <http://www.asiapacificforum.net/about/annual-meetings/16th-thailand-2011/downloads/apf-member-reports/sri-lanka>, p. 3.

⁸⁹ Reporters without Borders, "*Sri Lanka: Government-Orchestrated Threats against Exile Journalists*", 23 March 2012, <http://en.rsf.org/sri-lanka-government-orchestrated-threats-23-03-2012,42179.html>.

⁹⁰ 'Watchdog' (pseud.), "Disappearance of Human Rights Defenders and Political Activists Lalith Kumar Weeraraj and Kugan Murugan on 9th December 2011", *groundviews.org*, 19 December 2011, <http://groundviews.org/2011/12/19/disappearance-of-human-rights-defenders-political-activists-lalith-kumar-weeraraj-and-kugan-murugan-on-9th-december-2011/>.

This indicates that the HRCSL has still not internalised the conception of a human rights defender and scope of the UN *Declaration on Human Rights Defenders*,⁹¹ nor trained its investigating officers in the identification of their complaints (aside from expediting their complaints); and therefore has not made the necessary changes to its database.

Of even greater consequence is the manner in which the HRCSL handles complaints from vulnerable groups and individuals. Sandhya Eknaligoda is a woman human rights defender who has been campaigning for justice following the abduction of her husband Prageeth who was a journalist and cartoonist. When a public official claimed at the UN Committee Against Torture review on Sri Lanka, to have information on Prageeth Eknaligoda's whereabouts, Mrs. Eknaligoda wrote to the Commission requesting that this individual be summoned for an inquiry.

The HRCSL – probably deferring to the status of the official as the former Attorney-General and current Legal Adviser to the President and his Cabinet – meekly opted to invite him instead to submit an affidavit. In a firm but polite letter Mrs. Eknaligoda explained the mental trauma affecting her two sons and herself since Prageeth's disappearance and urged that the official concerned be summoned and questioned as is the usual procedure. In contrast to the non-response to previous letters to the Commission, Mrs. Eknaligoda promptly received a letter from the Chairman, which made no apology for its course of action or inaction; but rather, curtly informed her that the HRCSL does not act on advice proffered by parties to an inquiry and instructed her “to refrain from giving such advice to [the] Human Rights Commission in future”.⁹²

The Eknaligoda case is a classic ‘high-profile’ case based upon the seriousness of the abuse (an enforced disappearance), as well as its notoriety within Sri Lanka and international visibility (most recently receiving the support of the US State Department). However, the HRCSL has never recognised this nor handled the complaint made by Sandhya Eknaligoda appropriately. Now its Chairman has rebuked when he should have sympathised with a

⁹¹ *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN GAR A/RES/53/144, 8 March 1999, <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>.

⁹² Chairman of the Human Rights Commission of Sri Lanka, *Letter to Ms. Sandya Eknaligoda Ref No: HRC 369/10: Inquiries under the Human Rights Commission of Sri Lanka – Act No 21 of 1996*, 15 February 2012 (on file).

complainant who – from being the representative of a victim – is now a woman human rights defender supporting other individuals and families across the island and at great personal cost and risk.

Several human rights defenders (HRDs) were subject to reprisals through an orchestrated smear campaign in the state media for lobbying during the March 2012 session of the Human Rights Council in Geneva. The Office of the High Commissioner for Human Rights issued a public statement commenting on the “unprecedented level of threats, harassment and intimidation” directed at those HRDs and called on the Government of Sri Lanka: to ensure their protection; disassociate itself from the hate campaign; and uphold the right of its citizens to engage in international debate on Sri Lanka’s human rights record.⁹³ Disappointingly, the Human Rights Commission of Sri Lanka made no such statement nor expressed any solidarity with Sri Lankan HRDs.

In response to one of the recommendations to the HRCSL in the 2011 ANNI Report, one of its members has been nominated as its focal point for human rights defenders. There has been no public announcement to this effect as yet, nor have there been any meetings with human rights organisations to gather ideas on the operation of the mechanism. For reasons relating to this member’s public positions on certain human rights issues, as well as proximity to the state security apparatus, it is doubtful whether the most vulnerable human rights defenders will have confidence in Dr. Mahanamaheewa.

Interaction with International Mechanisms

In 2011, the government of Sri Lanka reported to two international treaty bodies – the Committee on the Elimination of Discrimination against Women, and the Committee against Torture. The Human Rights Commission of Sri Lanka did not participate in this process, for example through submission of information in its own name.

However, the HRCSL has made a stakeholder submission to the Universal Periodic Review (second cycle) of Sri Lanka (due in November 2012). It organised separate consultations with state agencies and with non-governmental organisations (on 18 and 19 April 2012

⁹³ Office of the High Commissioner for Human Rights, *Briefing Note on Sri Lanka / Human Rights Defenders*, 23 March 2012, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12008&LangID=E>.

respectively), to receive submissions on the themes identified by the HRCSL for its report. As the deadline for submission was 23 April, there was no opportunity for public scrutiny and comments on the draft report itself.

The Chairman's understanding of the relationship between the national legal system and international human rights obligations is a matter for concern. According to him, "as far as the international treaties are concerned, the state must cooperate with such treaties provided the provisions in the treaties do not come into conflict with the policies of the state."⁹⁴

In fact, the reverse is true, it is the responsibility of the state party to harmonise national laws and practices with the international human rights standards that bind the state through its voluntary accession and ratification of those conventions and treaties. Further, the Human Rights Commission of Sri Lanka is charged under its own enabling legislation: "to make recommendations to the Government regarding measures which should be taken to ensure that national laws or administrative practices are in accordance with international human rights norms and standards"⁹⁵.

Implementation of References developed by Advisory Council of Jurists

The References of the Advisory Council of Jurists (ACJ) – the body of independent experts constituted by 'A' status members of the Asia-Pacific Forum – are intended to guide national human rights institutions in Asia in the interpretation and implementation of their mandates.

The HRCSL's reception of the first three ACJ references: *Child Pornography on the Internet* (2000); *Death Penalty* (2000); and *Trafficking* (2002), was reviewed last year,⁹⁶ and found to range from ignorance to indifference.

⁹⁴ Wilson Gnanadass, "I will ensure impartiality, says SLHRC chief", *The Nation* (Colombo), 6 March 2011, <http://www.nation.lk/2011/03/06/newsfe2.htm>.

⁹⁵ S. 10 (d), *Human Rights Commission of Sri Lanka Act*, No. 21 of 1996, <http://www.hrsl.lk/PFF/HRC%20Act.pdf>. This clause is based on one of the *Paris Principles* ('Competence and Responsibilities': s. 3b), wherein one of the functions of a national human rights institution is "to promote and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation", <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/116/24/PDF/N9411624.pdf?OpenElement>.

⁹⁶ B. Skanthakumar, 'Silent and Powerless: The Human Rights Commission of Sri Lanka in 2010' in Edgardo P. Legaspi, Sarah Baes, Cecile Barcenas Gaa and Toru Hisada (eds.), *2011 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, Asian Forum for Human Rights and Development (FORUM-ASIA), Bangkok 2011, pp. 234-261 at pp. 254-258, <http://forum-asia.org/documents/ANNIReport2011.pdf>.

However, in 2011, the HRCSL renewed its call to the government for the abolition of the death penalty;⁹⁷ which is timely as some 750 prisoners are now on death row. Unfortunately, there was no attention to the recommendation to advocate with the government for ratification of the 2nd Optional Protocol to the International Covenant on Civil and Political Rights; nor in taking forward recommendations contained in the other two references.

This report discusses three subsequent references – on counter-terrorism; torture; and education – and the response of the HRCSL to these expert recommendations.

Rule of Law in Combating Terrorism (2004): Counter-terrorism measures must be enacted and administered within a culture of legality and must comply with international human rights law and standards, is one of the central conclusions of the Advisory Council of Jurists (ACJ) reference in this area.

Almost all the general issues of concern on “unacceptable practices” by states are applicable to the Sri Lankan experience including prolonged detention without trial; over-broad definitions of terrorism; misuse of anti-terrorism legislation to suppress legitimate activities etc.⁹⁸ The ACJ makes three specific observations on the Sri Lankan legislation in line with its general concerns: (i) that derogation from constitutionally guaranteed rights “be exercised in very limited circumstances”; (ii) that the definition of ‘terrorism’ in the Prevention of Terrorism Act (PTA) may unintentionally include someone who has committed a minor offence; and (iii) that the provisions of the PTA infringe the rights of detainees and contravene the International Covenant on Civil and Political Rights as well as customary international law.⁹⁹

Meanwhile, national human rights institutions are recommended:

⁹⁷ Pabodha Hettige, “HRC wants death sentence abolished”, *The Island* (Colombo), 30 December 2011, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=42151.

⁹⁸ For critique written before emergency rule was lifted on 25 August 2011, see B. Skanthakumar, “An Unending ‘War on Terror’: Counter-Terrorism, Democracy and Human Rights in Sri Lanka” in SDMA (ed.), *War on Terror and Asian Democracy – 10 Years after 9-11: Is Asia a Safer and Better Place?*, Solidarity for Democratisation Movements in Asia: Gwangju, Korea 2011, pp. 29-39, <http://www.lawandsocietytrust.org/PDF/Counter-Terrorism,%20Democracy%20and%20Human%20Rights%20in%20Sri%20Lanka%20July%2020%202011.pdf>.

⁹⁹ Advisory Council of Jurists (2004), *Reference on the Rule of Law in Combating Terrorism* at pp. 30-31, <http://www.asiapacificforum.net/support/issues/acj/references/acj-references-terrorism-and-rule-of-law/downloads/reference-on-terrorism-and-the-rule-of-law/final.pdf>.

- i. To take cognisance of unacceptable counter-terrorist measures in the performance of their functions including complaints-handling;
- ii. To report regularly to the UN Office of the High Commissioner for Human Rights (OHCHR) on the shortcomings of counter-terrorism measures against international human rights law;
- iii. To influence legislators and inform public debate on the human rights implications of counter-terrorism measures and the legal obligations of States;
- iv. To educate all sectors of the community including lawyers, judges, journalists, doctors, police, the military and legislators on the application of the international law of human rights and the general principle of the rule of law.

According to the HRCSL, it has not “studied in-depth” the conformity of the Prevention of Terrorism Act with international human rights standards and therefore not been in communication with OHCHR. It has also not lobbied parliamentarians on this issue. However, it proposes to discuss this question within the Commission, before it begins any public engagement including with legislators. This is rather late in the day as the PTA has been on the statute books and in force for the entirety of the HRCSL’s existence.

Reference on Torture (2005): The ACJ observes that there is an “absolute prohibition on torture under international law”.

The Human Rights Commission of Sri Lanka is recommended to urge the Government of Sri Lanka, *inter alia*:

- i. To become party to the Optional Protocol to the Convention against Torture (OPCAT); the Convention relating to the Status of Refugees; the three Additional Protocols to the Geneva Convention; and the Rome Statute of the International Criminal Court;
- ii. To remove inconsistencies in the domestic legislation on torture with the Convention against Torture;

- iii. To amend section 17 of the Prevention of Terrorism Act which renders confessions extracted by torture or while in custody as admissible;
- iv. To tackle judicial delays in the Supreme Court concerning allegations of torture;
- v. To institute witness protection programmes etc.

According to the HRCSL, it has raised these issues in the drafting process of the National Action Plan for the Protection and Promotion of Human Rights (2011-2016). However, none of the above is subject to binding commitment in the National Action Plan, beyond the evasive and dilatory undertaking of “appointing a committee to review” or “commissioning a study to recommend” etc.

In its 2000 report on the ‘Angulana case’ concerning the custodial torture and killing of two youth by the local police, the HRCSL recommended enactment of the draft 2008 Assistance and Protection to Victims of Crime and Witnesses Bill.¹⁰⁰ It is doubtful that the HRCSL has recently recommended ratification of the Rome Statute or amendments to the Prevention of Terrorism Act, considering the extreme hostility of the government to countenance such measures, and its own diffidence on these questions.

Reference on the Right to Education (2006): The right to education, observes the ACJ, is a fundamental human right; and all individuals, without discrimination, are entitled to a basic education.

Among the specific recommendations to the Human Rights Commission of Sri Lanka, is to urge the Government of Sri Lanka:

- i. To address regional imbalances in school facilities and to improve the quality and availability of teachers and support staff;
- ii. To eliminate the use of corporal punishment in schools and other educational institutions and to encourage alternative non-violent forms of discipline;

¹⁰⁰ Human Rights Commission of Sri Lanka, *Death in Custody at Angulana Police Station* (in Sinhala), Colombo 2009, p. 46, http://hrsl.lk/PFF/Angulana_final_report_sin.pdf. The text of the 2008 draft Bill can be found in *Law & Society Trust Review* (Colombo), Vol. 18, Issue 246 & 247 (April & May 2008), pp. 1-29. For a recent discussion including critique of proposed amendments see Susan Appleyard, “Witness Assistance and Protection in Sri Lanka”, *Law & Society Trust Review* (Colombo), Vol. 21, Issue 286 & 287 (August & September 2011), pp. 1-36.

- iii. To incorporate human rights education into the national curriculum;
- iv. To provide educational opportunities for working children, including young mothers;
- v. To improve access to special education schools and programmes, especially for students with disabilities.

According to the HRCSL, it has asked the government to consider all of the above, excepting that of access to education for working children and young mothers.¹⁰¹ There is no indication that any of its urgings have been taken heed of by government.

Other Specialised Institutions

There are a number of specialised institutions which may directly or indirectly support the promotion and protection of human rights. However these agencies have had weak powers and limited mandates from their inception, been denied appropriate human, financial and infrastructural resources, and following the enactment of the Eighteenth Amendment to the Constitution are now beholden to the Executive for appointment of their members.

The National Child Protection Authority (NCPA) was established in 1998 and most of its members are directly appointed by the President.¹⁰² One of its aims is to coordinate policy within government on promotion and protection of child rights. It is empowered to receive complaints regarding allegations of child abuse and to refer such complaints to relevant authorities. The NCPA is obliged to monitor the progress of all investigations and criminal proceedings relating to child abuse. It has its own Special Police Investigations Unit. It monitors religious and charitable organisations providing child care services.¹⁰³ The NCPA

¹⁰¹ On the HRCSL's own human rights education activities see Shirani Rajapaksa, "Human Rights Commission of Sri Lanka: Human Rights Education Mandate" in Asia-Pacific Human Rights Information Centre (ed.), *Human Rights Education in Asian Schools – Volume Twelve*, Osaka 2009, pp. 17-26, <http://www.hurights.or.jp/archives/pdf/education12/hreas-12-03-srilanka.pdf>.

¹⁰² For an overview of the functions and powers of the NCPA, see Charika Marasinghe, *An Independent Monitoring Mechanism for Child Rights*, pp. 47-57, Colombo 2011, http://www.savethechildren.lk/update/images/stories/Final_An_Independent_Monitoring_Mechanisms_Sri_Lanka.pdf.

¹⁰³ The NCPA Chairperson claims that child abuse is rampant in most homes for children: Saroj Pathirana, "Sri Lanka Children's homes should be 'shut down'", *BBC News*, 9 September 2011, <http://www.bbc.co.uk/news/world-south-asia-14857783>.

received 3,811 complaints via its telephone hotline in 2010 as compared to 1,391 in the previous year.¹⁰⁴

The Commission to Investigate Allegations of Bribery and Corruption (CIAOBC) was established at the end of 1994. It was not properly constituted between March 2010 and May 2011. There was a backlog of 2,700 complaints in the intervening period. The CIAOBC has since taken action to arrest forty-eight persons, including fourteen police officers.¹⁰⁵ The Commission lacks the power to investigate on its own initiative and can only act once a complaint is received. It relies on the police department for secondment of its officers to them, who are under the effective control of their department and not the Commission.¹⁰⁶

The National Police Commission (NPC) was established in 2002 to inquire into complaints from the public regarding individual police officers or the police service.¹⁰⁷ The NPC was not constituted between April 2009 and February 2012, and has received 224 complaints since its new members took office.¹⁰⁸ The reconstituted Commission has admitted that its powers are limited as it cannot take direct action against errant officials.¹⁰⁹ Recently it has opened eleven provincial and district offices to improve its accessibility to the public.¹¹⁰

The Parliamentary Commissioner for Administration (or Ombudsman) is uniquely a constitutional office to investigate complaints of violations of fundamental rights and other injustices by public officials, employees of public corporations and local authorities among other state institutions.¹¹¹ The Ombudsman is appointed by the President and can continue

¹⁰⁴ Olindhi Jayasundere, “Complaints on NCPA hotline sees sharp increase”, *Daily Mirror* (Colombo), 1 February 2012, <http://www.dailymirror.lk/news/16442-complaints-on-ncpa-hotline-sees-sharp-increase-.html>.

¹⁰⁵ Ranil Wijayapala, “Crackdown on bribery and corruption intensifies”, *Sunday Observer* (Colombo), 19 February 2012, <http://www.sundayobserver.lk/2012/02/19/new04.asp>.

¹⁰⁶ Kishali Pinto-Jayawardena and Jayantha de Almeida Guneratne, “Bribery and Corruption Control in Sri Lanka”, *article2.org*, 29 March 2010, <http://www.article2.org/mainfile.php/0901/366/>.

¹⁰⁷ J. C. Weliamuna, “The National Police Commission” in Elizabeth Nissan (ed.), *Sri Lanka: State of Human Rights 2004*, Law & Society Trust, Colombo 2004, pp. 159-184.

¹⁰⁸ Rasika Somarathna, “NPC assures public of justice”, *Daily News* (Colombo), 24 May 2012, <http://www.dailynews.lk/2012/05/24/sec01.asp>.

¹⁰⁹ Madura Ranwala, “NPC a watchdog not hound”, *The Island* (Colombo), 25 May 2012, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=52809.

¹¹⁰ Hemantha Randunu, “Police Commission devolves its functions to provinces”, *The Island* (Colombo), 14 July 2012, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=56741.

¹¹¹ Deepika Udagama, “A Case Study of the Office of the Ombudsman” in Kanagananda Dharmananda and Lisa M. Kois (eds.), *Sri Lanka: State of Human Rights 1997*, Law & Society Trust, Colombo 1997, pp. 113-37.

until s/he reaches the age of 68. The scope of authority excludes members of the armed forces and the police as well as the transfer, dismissal or disciplinary control of public officers.

One thousand three hundred and eighty-six (1,386) petitions were received in 2011, of which the largest number were against the education department followed by the public administration ministry. The subject of the complaints ranged from appointments, terminations, promotions, salary anomalies, salary increments and arrears, misuse of powers, pensions, provident fund payments and illegal constructions.¹¹² The ombudsman has no power to directly compel public officials to follow her/his recommendations.

Sri Lanka lacks a specialised institution to promote and protect the rights of women. Although successive governments have assured international human rights mechanisms that the establishment of such an institution is imminent, none has ever materialised. Drafts of bills to establish such an institution have been prepared by women's organisations as well as the government. Following opposition to the creation of a gender-specific human rights institution from a woman cabinet minister, prospects for the legislative passage of the most recent Bill appear to be bleak.¹¹³ However, many civil society organisations continue to advocate for an independent National Women's Commission with investigative, monitoring and research functions.¹¹⁴

V. Consultation and Cooperation with Civil Society Organisations

The first 'consultative forum' between the new members of the Human Rights Commission (HRC) and a diverse gathering of civil society organisations was on 11 July 2011. In the course of opening remarks, Commissioner (Mrs) Jezima Ismail spoke of their commitment to partner with civil society organisations. "Without civil society, HRC will find it very hard to function. Talking is not enough. We need a concrete mechanism and a concrete tool. HRC

¹¹² "Most complaints to ombudsman regarding education", *SriLankaMirror.org*, 6 April 2012, <http://english.srilankamirror.com/2012/04/most-complaints-to-ombudsman-regarding-education/>.

¹¹³ "Cabinet rejects Women's Commission", *Ceylon Today* (Colombo), 28 May 2012, <http://www.ceylontoday.lk/51-6956-news-detail-cabinet-rejects-womens-commission.html>.

¹¹⁴ Roel Raymond, "Women take last stand", *Ceylon Today* (Colombo), 14 June 2012, <http://www.ceylontoday.lk/59-7888-news-detail-women-take-last-stand.html>.

and CSOs could meet regularly, discuss and consult regularly, and together have an impact on whatever function has to be done.”¹¹⁵

In September 2011, it was reported that the HRCSL “is in the process of developing a mechanism for regular consultations with civil society”.¹¹⁶ There were no further national-level consultations initiated by the Commission in 2011. More than 10 regional forums are reported to have been conducted. These forums have been funded under the UN Joint Programme on Human Rights which is supporting this activity among others towards capacity-building of the HRCSL until the end of 2012.

It is uncertain whether the HRCSL will sustain these forums especially at regional-level in the absence of donor funding. The National Human Rights Action Plan envisages the establishment of regional advisory committees of civil society members to assist the regional offices of the Commission. Members and staff of the HRCSL have been invited to, and have participated in, civil society consultations, workshops, public discussions and educational forums.¹¹⁷

Two non-governmental organisations, the Law & Society Trust (LST) and Rights Now – Collective for Democracy organised a dialogue between some human rights organisations that have engaged with the HRCSL, and the members and senior staff of the Commission, on 5 December 2011. The objective was to improve communication and interaction between human rights defenders and the Commission. The exchange was cordial and there was sharing of updates from the HRCSL as to its recent activities and future plans as well as of the current concerns of human rights defenders, including enhancing police station and prison visits, fast-tracking of serious and ‘high profile’ complaints, financial support for complainants who have to travel to Colombo for inquiries with loss of income and expense of

¹¹⁵ Ishara Jayawardane, “HRC assures of commitment to rights”, *Daily News* (Colombo), 13 July 2011, <http://www.dailynews.lk/2011/07/13/news27.asp>.

¹¹⁶ Human Rights Commission of Sri Lanka, *Report to the 16th annual meeting of the Asia-Pacific-Forum of National Human Rights Institutions*, Bangkok, Thailand, 6-8 September 2011, <http://www.asiapacificforum.net/about/annual-meetings/16th-thailand-2011/downloads/apf-member-reports/sri-lanka>, p. 5.

¹¹⁷ For example, the Consultation on implementation of the 2010 Recommendations of the UN Committee on Economic, Social and Cultural Rights in November 2011, see “Minding the gap on economic, social and cultural rights”, *The Island* (Colombo), 4 January 2012, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=42442.

travel; and other issues in the functioning of the HRCSL. However, it is uncertain if any of these concerns have since been followed up by the Commission.

In general, there continues to be wariness and suspicion on both sides. Critical civil society activists consider the HRCSL as embedded in the State and condescending in its dealings with them; whereas, the HRCSL probably regards those civil society actors as inveterate adversaries of the State and malevolent detractors of their institution.

VI. Conclusion and Recommendations

When the Human Rights Commission was reconstituted in February 2011 with the appointment of its members, civil society reactions were mixed but tended towards pessimism.¹¹⁸ The ineffectiveness of previous Commissions in halting systemic human rights abuses; its subordination to the Executive sanctified in the 18th Amendment to the Constitution; and the background of the individuals picked for its membership, inspired limited enthusiasm and even less optimism. As the present Commission reaches the half-way point of its three year term in office, is there reason to qualify or revise those opinions?

Certainly some of the new members, despite the part-time remit of their office, committed themselves to revitalising the HRCSL and rehabilitating its domestic and international reputation. However, attention to internal organisational issues ranging from oversight of staff and functions, to mobilising resources and goodwill from partners and donors, pre-occupied them over the course of 2011.

Their eagerness to regain accreditation as an ‘A’ status institution was evident and referred to in public. It contributed to the HRCSL’s willingness to dialogue with civil society organisations. It encouraged them to cooperate with the capacity-assessment mission led by the APF in early 2012. It motivated them to publicise their activities and recommendations better including through their website. It drove them to engage more with regional networks including the meetings and projects of the APF. All of this is to be appreciated.

¹¹⁸ Wilson Gnanadass, “‘Independence’ of HRC under scrutiny”, *The Nation* (Colombo), 20 February 2011, <http://www.nation.lk/2011/02/20/newsfe1.htm>.

However, the members appeared to adopt a check-list approach to their campaign for upgrading; believing that if they tackled the stated reasons for downgrading in 2007¹¹⁹ (and re-confirmed in 2009),¹²⁰ that the HRCSL would effortlessly satisfy the minimum requirements for re-accreditation. There is a fundamental unwillingness on their part to recognise that there are pervasive issues that demand root and branch institutional reform, as well as the need for a changed relationship with the State and civil society organisations, rather than lapses of a minor nature that can be readily rectified through application of additional financial and human resources.

Certainly, there are well-meaning and conscientious officers and members of the HRCSL who strive to do their best for victims of human rights violations, within circumstances and constraints that are partly out of their control and partly of their own choosing. There is no doubt that for some complainants, particularly in matters of administrative injustice, that the HRCSL has been able to offer some relief through its interventions. However, it is also clear, that for other complainants particularly in matters of serious human rights abuses including threat or violation of the right to life and the right not to be tortured, that the Human Rights Commission of Sri Lanka has offered little, and has little to offer, by way of solace or support.

¹¹⁹ “The Sub-Committee at its current session notes the following: 1) The Paris Principles provide for the appointment of the governing body and other guarantees of independence. The 2006 appointment of the Governing Body was done without recommendation of the Constitutional Council prescribed in the Constitution. 2) The Commission did not take measures to ensure its independent character and political objectivity, as required by the Paris Principles. 3) The Commission has failed to issue annual reports on human rights as required by the Paris Principles”, *Report and Recommendations of the Sub-Committee on Accreditation*, International Coordinating Commission of National Institutions for the Promotion and Protection of Human Rights, 22-26 October 2007, pp. 10-11,

http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/2007_October%20SCA%20Report.pdf.

¹²⁰ “The Sub-Committee (“SCA”) notes the following: ... the SCA nevertheless stresses the need for a transparent and consultative selection process in practice. The SCA strongly encourages the SLHRC to engage with the government to ensure the adoption of such a process ... It expresses its concern that the SLHRC does not appear to have released regular and detailed reports or statements in relation to killings, abductions and disappearances stemming from the human rights crisis in Sri Lanka ... it re-emphasises the need for the SLHRC to carry out its core protection mandate to demonstrate its vigilance and independence during the ongoing state of emergency ... The SCA emphasises that engagement with civil society must be broad based, to ensure the pluralistic representation of social forces as required by the Paris Principles ... notes that [the 2006-07 Annual Report] provides insufficient information to assess the ongoing work of the SLHRC and appears to be only available in English ... It further notes that the Tamil and Sinhala sections of the SLHRC website are not functioning”, *Report and Recommendations of the Sub-Committee on Accreditation*, International Coordinating Commission of National Institutions for the Promotion and Protection of Human Rights, 26-30 March 2009, pp. 5-6,

http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/2009_March%20SCA%20REPORT.pdf.

Recommendations to the Government of Sri Lanka

1. Adopt a clear, transparent and participatory process for the appointment of members that promotes merit-based selection and pluralism and therefore strengthens the independence and public confidence in the Commission.
2. Resource the Human Rights Commission's protection of the rights of internally displaced persons (IDPs) including after their return, resettlement or relocation, and enact the draft Bill on IDPs prepared by the Commission's NPDS project in 2008.
3. Implement the National Action Plan on the Promotion and Protection of Human Rights without delay, including proposed legal, policy and institutional reforms concerning the Human Rights Commission.

Recommendations to the Human Rights Commission of Sri Lanka

1. Re-orient its internal culture and procedure to complaints and complainants, from imitating a judicial tribunal, to one more appropriate and relevant to a non-judicial national human rights institution.
2. Constitute regional or provincial-level commissions, delegate relevant powers of inquiry and monitoring conditions in police stations and prisons, and ensure local human rights defenders are among its members.
3. Pro-actively issue constructive and critical advice to the government, including on current human rights trends, gross abuses and imminent violations, as well as on security sector reform, instead of only acting on individual cases and complaints.

Taiwan: More Effort Needed Towards the Establishment of an National Human Rights Commission

Taiwan Association for Human Rights (TAHR)¹

I. Introduction

Taiwanese NGOs have been pushing for the establishment of a national human rights institution (NHRI) since 1991. During the 2000 presidential election campaign, both candidates from the main parties expressed their support for establishing an NHRI.

After the victory of opposition candidate Chen Shui-bian, the new administration consistently advocated for the adoption of the International the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) as domestic laws and setting up a human rights commission during President Chen's first term. Unfortunately, facing resistance from the former ruling party (the Kuomintang), the Chen Administration was only able to form the Presidential Office Human Rights Consultative Committee, a purely advisory body without concrete functions, financial sources, or adequate staff.

After the Kuomintang election victory in 2008, an alliance of Taiwanese NGOs headed by the Taiwan Association for Human Rights (TAHR) initiated a series of dialogues and collaboratively produced a draft National Human Rights Commission (NHRC) Bill. The NGO alliance resumed lobbying on the NHRC Bill and other related policies in the Legislative Yuan (the parliament), but the Kuomintang as well as the majority of legislators showed little interest in this issue. However, in March 2009, President Ma Ying-Jeou's administration surprisingly ratified the two oldest human rights covenants, the ICCPR and the ICESCR without any reservations, as well as an Implementation Law, which required all of Taiwan's laws and regulations to be brought in line with the two covenants by December 2011. Following these event, Taiwanese NGOs shifted their focus from the NHRC to the government's implementation of the two covenants. However,

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two years after the Implementation Law took effect, most Taiwanese, including judges, prosecutors, civil servants, and lawyers, are still unfamiliar with the ICCPR and the ICESCR due to the lack of related institutions, financial support, and adequate staff.

Without the establishment of an NHRC, developments in the human rights situation in Taiwan have remained low, and there is no systematic effort by the government to plan for further improvements. Although an NHRC is by no means a panacea, it is considered a basic foundation for a democratic state, as it could coordinate or mobilize various resources for human rights actions at the highest national level with involvement of governmental institutions (including all branches of government, executive, legislative and judicial), as well as promote cooperation with both civil society and the international community.

Before the joint legislative and presidential elections at the beginning of 2012, NGOs tried to collect candidates' positions on different social issues, including the establishment of an NHRC. While the Democratic Progressive Party showed at least some support towards the proposal of an NHRC, the Kuomintang was mostly ambiguous and unwilling to address the topic. The low level of understanding of NHRIs exhibited by those politicians illustrates the challenges for NGOs to lobby and to advise them about the issue.

This report will discuss the development of the human rights mechanism in Taiwan from 2011 to May 2012 under the current political structure, by presenting the deficiency in the work of human rights protection and providing suggestions offered by NGOs on the establishment of an NHRI.

II. Human Rights Mechanisms in Taiwan Today

Human Rights Institutions within the Governmental Structure

After ratifying the ICCPR and the ICESCR in 2009, Taiwan has the responsibility to submit a national report on its human rights situation to the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights for evaluation. Despite not being a state member of UN, Taiwan adopted the two international covenants as domestic laws. Beginning in May 2010, task forces or working groups on human rights promotion and protection were set up

by eleven agencies under the Executive Yuan (the Cabinet), including the Ministry of the Interior, the Ministry of Foreign Affairs, the Ministry of National Defense, the Ministry of Justice, the Ministry of Education, the Ministry of Finance, the Department of Health, the Environmental Protection Administration, the Council of Labor Affairs, the Aboriginal Peoples Council, and the Coast Guard Administration. These task forces began to serve as contact points within these agencies for the Executive Yuan Human Rights Working Group. This body, which had already been set up as early as 2001, was however an ad hoc group without regular meetings. Due to unclear responsibilities, limited mandate and a humble position, the group was generally unable to pass resolutions with real effect, since the implementation of its resolutions was required to go through the Executive Yuan.

The Presidential Office Human Rights Consultative Committee and Initial State Report

In December 2010, the Office of the President revived the Presidential Office Human Rights Consultative Committee, with the Vice President appointed as the chairperson. The committee is responsible for:

- (1) Promoting and consulting on human rights policies
- (2) Issuing national human rights reports
- (3) Researching and studying international human rights laws and practice
- (4) Interacting with the international community on related issues
- (5) Providing the president with other related information

The committee is currently composed of 17 members, including 4 governmental representatives (the Vice President and representatives of the Executive Yuan, the Judicial Yuan, and the Control Yuan) and 13 NGO representatives. In its first year (2011), the main task for the committee was to supervise the government's efforts to implement the two Covenants, in particular to ensure that the Initial State Report would be prepared in accordance with the format and guidelines of the UN treaty bodies and to urge the government to review and amend its laws, regulations, directions, and administrative measures to comply with the two Covenants. The

committee is a consultative one without the mandate to take individual appeals, to investigate or to examine human rights violations.

In order to produce the Initial State Report according to international practice, the Ministry of Justice coordinated the process, including arranging a total of 82 reviewing and editing sessions. In addition, the Ministry held four public hearings to solicit citizens' opinions in the northern, middle, southern and eastern parts of Taiwan. After more than a year of preparation and examination, the Taiwanese government officially published its Initial State Report on 20 April 2012.

Problems of the Initial State Report

Despite these efforts, the Initial State Report reflects that the government basically confined the task to describing its achievements and neglected the real human rights violations. Notably, the report lacks any timetable for further improvements, which is an important responsibility for any new state party to take on after signing the international covenants. In response to the flawed official report, TAHR, as part of an alliance of NGOs called the Covenants Watch, subsequently published its "Shadow Reports on ICCPR and ICESCR from NGOs" from the view of grass-roots organizations.

The Shadow Reports represented the hope of NGOs for opening dialogues between the government and the public on human rights issues. The purpose for the Shadow Reports was not to protest against the government, but to present the real situation of human rights violations and to demand the fulfillment of the government's promise on human rights protection. Thus, Covenants Watch called on all governmental officials and institutions, including Executive Yuan, Legislative Yuan, Judicial Yuan, Control Yuan, and Examination Yuan, to study the purpose and content of the "Shadow Reports on ICCPR and ICESCR from NGOs" and to use the report as a basis for the future improvement of human rights situation in Taiwan.

III. The Necessity of a Human Rights Reporting System and Related Institutions

According to ICCPR and ICESCR, states parties should regularly submit a national report to the Secretary-General of the United Nations and the Economic and Social Council for examination,

but Taiwan's state report was rejected by UN due to its special political status. Therefore, it is necessary to set up a national reporting system within Taiwan for the same function. Indeed, the exclusion from the UN human rights community creates an opportunity for Taiwan to develop a reporting system that could surpass the UN reporting system by relaxing political boundaries and limitations. Taiwan has persistently showed its determination of performing in accordance with the international human rights standards. Along with the good understanding of the purpose and the spirit of human rights reporting, it may be possible for Taiwan to form a domestic reporting system better than the one under UN.

In order to reach this goal, the national human rights reporting system should be independent and impartial, with a clear legal basis. It should involve international experts as well as be open to participation of civil society, and it should have the functions of monitoring, evaluation, and management. Therefore, NGOs have proposed that the government should set up an independent and permanent institution to take charge of the implementation of international covenants and related issues. We propose the following short term, medium term, and long term goals:

- In a short term, we suggest the government to use the small seven-member "Working Group for International Examination of the ICCPR and ICESCR Republic of China Initial State Report" which has already been set up to oversee the review of the Initial State Report as the incubator for the national reporting system and start to generate opinions and advice from domestic NGOs and international organizations.
- In a medium term, we suggest the government to set up a procedure of independent examination of reports free of governmental or political interference, as well as an independent foundation outside the current governmental structure.
- In a long term, on the hand Taiwan should prepare to adopt more international covenants to protect human rights. At the same time, Taiwan should also begin the process of legislating the establishment of a National Human Rights Commission (NHRC) according to the Paris Principles. With genuinely independent human rights institutions with sufficient support in terms of finance and resources, Taiwan can more comprehensively implement international human rights standards, creating a healthy environment for human rights at the domestic level.

We expect that the establishment of a reporting system will be one of the main tasks for the future NHRC, though not of course the only one. However, the future NHRC should not write the state reports, but rather independently examine the reports produced by the government. We hope the NHRC, through creating and managing a highly credible review process, will enable the government to improve the realization of human rights in our country by generating honest criticisms and constructive suggestions from domestic and international civil society and experts, presenting the real situation of human rights violations and challenges, and urging the government to fulfill promises and take actions.

Timor-Leste: The Ombudsman for Human Rights and Justice: Growing in capacity

Judicial Monitoring System Program (JMSP)¹

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

In October 2011 Timor-Leste participated in its first Universal Periodic Review (UPR) process in Geneva. The Ombudsman for Human Rights and Justice (PDHJ)², Timor-Leste's National Human Rights Institution, presented a joint submission with civil society organisations in March 2010.³ This report highlighted several concerns with Timor-Leste's human rights situation, including the protection and promotion of the rights of children, women and victims of past human rights violations. The UPR process highlighted that while Timor-Leste has a strong legislative and constitutional framework for the protection of human rights, these standards have not been fully implemented in State practices.

The protection of children's rights remains weak, particularly in the area of juvenile justice. Timor-Leste does not yet have a children's code or juvenile justice system which protects the best interest of the child and ensures that children in conflict with the law are deprived of their liberty only as a means of last resort. A small number of children have been held in detention with adults despite the age of criminal liability being 16 years. Children continue to be detained without proper legal framework for their arrest, charge and detention. In 2011 the PDHJ launched a pilot program to collect data regarding corporal punishment and non-physical violence against children in schools. This is an important development and is intended to support recommendations to the Ministry of Education by 2012.

Levels of gender-based violence against women and girls remain very high in Timor-Leste. A recent survey found that 34% of Timorese women have experienced violence by their

¹Prepared by Anna Mi-Young Yang, Legal Advisor, Women's Justice Unit

² Provedoria dos Direitos Humanos e Justiça: <<http://pdhj.org/wp/>>

³ Cases of domestic violence registered with the police after the promulgation of the Law Against Domestic Violence rose to 1,200 cases. However only 50% of those cases have been taken to the courts and only 2.5 of those cases have been processed by the courts: Joint submission from the Office of the Provedor for Human Rights and Justice and Civil Society organizations in Timor-Leste (21 March 2011).

husband or partner since the age of 15.⁴ While the promulgation of the Law Against Domestic Violence in 2010 was a positive step towards guaranteeing women's right to safety, only a fraction of reported cases have since been processed by the courts.⁵ There also continues to be persistent issues with lack of gender-sensitivity by the courts when dealing with cases of gender-based violence and inadequate application of measures to protect victims. Further, the law cannot be properly implemented without providing greater resources to police, social, medical and emergency services.

Impunity for past serious human rights violations persists in Timor-Leste. In July 2011, Valentim Lavo, a former militia member charged with committing crimes against humanity in the aftermath of the 1999 independence referendum was sentenced to nine years' imprisonment. Lavo was allowed to flee jurisdiction in 2011 due to errors made during the processing of this case and remains at large in Indonesia.

Recommendations from two truth commissions on the human rights violations committed during Indonesian occupation of Timor-Leste, the Comissão de Acolhimento, Verdade e Reconciliação (CAVR) and the Commission of Truth and Friendship (CTF), have not been fully implemented. Parliament has not passed draft laws establishing a national reparations programme for victims and an independent institute to oversee reparations, denying victims the right to justice for human rights violations committed between 1975 and 1999.⁶

Between 2007 and 2010, almost 800 cases of infractions were registered against members of the police force.⁷ In 2010, the PDHJ received in total 75 complaints about human rights violations and 79% of these related to action by the security forces (74% by the police and 5% by the military). Similarly in 2011, the PDHJ investigated 55 cases of alleged human rights violations by State actors and 74% of these related to allegations of violations by the police and 4% by the military.⁸ While the PDHJ noted that the security situation improved in 2011, it remained concerned about these allegations as well as the violence caused by martial arts groups.

⁴ National Statistics Directorate, Ministry of Finance Democratic Republic of Timor-Leste, Dili, Demographic and Health Survey for Timor-Leste 2009-2010.

⁵ Joint submission from the Office of the Provedor for Human Rights and Justice and Civil Society organizations in Timor-Leste (21 March 2011).

⁶ See Amnesty International and JSMP joint public statement, 'Timor-Leste: Parliament must stop ignoring victims' rights' (3 February 2012).

⁷ Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 for the Working Group on the Universal Periodic Review, A/HRC/WG.6/12/TLS/3 (22 July 2011).

⁸ PDHJ, 'Annual Report 2011' (Tetum) at 34, 35.

Apart from monitoring the provision of electricity and making a general recommendation for improving the regularity and efficiency of this service, the PDHJ did not specifically address the issue of economic, social and cultural rights in Timor-Leste. This is disappointing given that poverty, deprivation and insecure employment are some of the most pressing social issues in Timor-Leste. As noted by the Special Rapporteur Magdalena Sepúlveda Carmona on extreme poverty and human rights in May 2012, while Timor-Leste has experienced rapid economic growth due to its oil and gas reserves, benefits have not reached the 41% of the population who still live below the poverty line.⁹

While the Constitution of Timor-Leste promotes economic, social and cultural rights such as the rights to work (section 50), housing (section 58), education and culture (section 59) and a healthy, humane and ecologically balanced environment (section 61), laws and government policy and practice often do not protect these rights. The Special Rapporteur found that “those responsible for implementing laws and programmes are hampered by insufficient resources, inadequate capacity, a lack of accountability, and the concentration of decision-making processes in Dili”.¹⁰ For example, she noted that while the State budget has increased in recent years, the percentage allocated to social services, including health and education, has decreased.¹¹ Given that Timor-Leste remains one of the least developed countries, and the extreme vulnerability of its young population, the PDHJ should give greater priority to these issues in the future.

II. Independence

A. Legal foundation

The PDHJ is provided for under section 27 of the Constitution of the Republic of Timor-Leste (the ‘Constitution’). Section 27 of the Constitution provides for an independent ombudsman with the power to investigate individual complaints against public bodies and to forward recommendations on these complaints to competent bodies.

The PDHJ was established in 2004 by Law No. 7/2004 Approving the Statute of the Office of the Ombudsman for Human Rights and Justice (‘Statute of PDHJ’) following consultations

⁹ Report of the Special Rapporteur on extreme poverty and human rights on her mission to Timor-Leste (13–18 November 2011), A/HRC/20/25/Add.1 (24 May 2012) at 5.

¹⁰ *Ibid* at 7.

¹¹ *Ibid* at 8.

by a specifically established commission.¹² Article 5.1 of the enabling law provides that the PDHJ shall be an independent statutory body that is not subject to the direction, control or influence of any person or authority. Under the enabling law, the PDHJ is empowered to undertake the following functions:

- Investigate violations of fundamental human rights, freedoms and guarantees, abuse of power, maladministration, illegality, manifest injustice and lack of due process, nepotism, collusion, influence peddling and corruption;
- Oversee the functioning of public authorities, conduct inquiries into systematic or widespread violations of human rights, maladministration or corruption;
- Issue advisory opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights and good governance;
- Seek declarations of unconstitutionality of legislation from the Supreme Court;
- Monitor and review regulations, administrative instructions, policies and practices or any draft legislation for consistency with international law;
- Recommend the adoption of new legislation and propose amendments to legislation or administrative measures (including review of its own enabling legislation), and;
- Promote human rights and good governance.

There is no provision authorising the suspension of the PDHJ's activities during states of emergency or other exceptional circumstances. During the 2006 crisis and the 2008 State of Emergency, the PDHJ remained active and continued its monitoring and investigation activities, including by securing access to military operations areas.

The PDHJ is accredited as compliant with the Paris Principles (as of August 2011).

B. Relationship with State institutions

The Constitution and Statute of PDHJ guarantees that the PDHJ is independent from the executive. However, the fact that the PDHJ does not have the authority to manage its own budget poses a threat to its independence from the State. In both 2010 and 2011, the PDHJ

¹² Entered into force on 26 May 2004.

recommended to parliament and government that it be given the authority to manage its own budget while being subject to external audit.¹³

The PDHJ is empowered to exercise its functions in relation to public entities, including the government, the national police (PNTL), the defence force (F-FDTL), the prison service and private entities that fulfil public functions and services or manage public funds or assets.¹⁴ The PDHJ cannot investigate the legislative activities of the National Parliament and the performance of the Courts' judicial functions.¹⁵ The PDHJ also does not have power to set aside, revoke or modify decisions of agencies or entities, make compensation orders, challenge a court decision or investigate a matter that is already the subject of court action.¹⁶

The PDHJ also cannot investigate matters involving dealings between the government of Timor-Leste and other governments or international organisations. It cannot investigate the granting of pardons or commutation of sentences by the President of Timor-Leste.¹⁷ This means that the PDHJ was excluded from investigating the issuing of pardons by President José Ramos-Horta on 20 August 2010 to 26 individuals found guilty for their involvement in the 2006 political and security crisis as well as the attack and attempted murder of President Ramos-Horta and Prime Minister Xanana Gusmão on 11 February 2008. The issuing of pardons undoubtedly had a negative impact on perceptions of equality before the law and on public confidence in the legal system.

The PDHJ has broad powers of investigation. It can require a person to appear before it, disclose information, and produce any object including documents and records. It is also empowered to require complete access, inspection and examination of any premises, document, equipment or asset.¹⁸ The PDHJ can request the Prosecutor to obtain search and seizure warrants for this purpose.¹⁹ Any person so requested must cooperate with the PDHJ, including civil servants, administrative officials and both civil and military organs of government. Failure to cooperate constitutes an offence punishable by fine.²⁰ The PDHJ has in the past made use of the formal notification procedure to summon officials to appear and

¹³ Special Recommendation 1, see PDHJ, 'Annual Report 2010' (Tetum) at 103, PDHJ, 'Annual Report 2011' (Tetum) at 71.

¹⁴ Article 3.1 and 3.2 of Statute of PDHJ.

¹⁵ Article 4 of Statute of PDHJ.

¹⁶ Article 29 of Statute of PDHJ.

¹⁷ Article 42.3 of Statute of PDHJ.

¹⁸ Article 42.3 of Statute of PDHJ.

¹⁹ Article 42.4 of Statute of PDHJ.

²⁰ Articles 44 and 48.1 of Statute of PDHJ.

disclose information. For example, during the 2006 Crisis the PDHJ summoned various public officials before it to give information, including the F-FDTL Commander, PNTL Commander and Prime Minister.

Public authorities and individuals are required by law to cooperate with the PDHJ. In practice, cooperation by public authorities has been mixed. In 2011 PDHJ investigated 82 cases of allegation of maladministration by a public authority and was able to make recommendations in 20 of those cases.²¹ This indicates that in 2011 the PDHJ was able to obtain a reasonable level of cooperation from public authorities in the investigation stages.

However, the PDHJ noted in its *2011 Annual Report* that public entities still do not cooperate fully with the PDHJ in implementing its recommendations and often fail to provide information on action taken to comply with these recommendations.²² This contravenes article 47.3 of the Statute of PDHJ which states that entities must address within 60 days of the issuing of a recommendation the extent to which they have implemented the recommendation. The PDHJ does not in practice follow-up and report publicly on the uptake of its recommendations, therefore it is difficult to assess the impact of the PDHJ in specific cases.

The PDHJ has a duty to report annually to the National Parliament.²³ It can also submit special reports on serious cases or matters, as well as other reports regarding investigations or other activities.²⁴ The PDHJ can also report to parliament on the failure of entities to implement its recommendations.²⁵ However, parliament is not required to respond formally to the reports.

In practice, the PDHJ does not have regular consultation sessions with the National Parliament. While it is empowered to comment on draft laws for consistency with human rights, in 2011 it did not make any submissions to parliament on important draft laws including the Civil Code and Land Law package. It also does not have any special right to intervene in parliamentary debates nor has parliament specifically invited comment from the PDHJ in the past.

²¹ PDHJ, 'Annual Report 2011' (Tetum) at 34, 40-43.

²² PDHJ, 'Annual Report 2011' (Tetum) at 68.

²³ Article 34 of Statute of PDHJ.

²⁴ Articles 46.4 and 46.5 of Statute of PDHJ.

²⁵ Article 47.4 of Statute of PDHJ.

The PDHJ may seek the leave of the court to intervene through the expression of opinions in cases involving matters under the PDHJ's competence.²⁶ It can also request the Supreme Court (currently functioning as the Court of Appeal) to review the constitutionality of legislation.²⁷ However, the PDHJ has never exercised these functions and there is little interaction between the judiciary and the PDHJ.

The PDHJ has in the past shown its independence from the government by publicly challenging government policy, including the criminalisation of abortion. Nevertheless, the PDHJ works well with government institutions to carry out its mandate. It also has a good relationship with national NGOs. In 2011, it conducted community workshops on human rights, community leadership and conflict resolution and mediation with the Ministry of Social Solidarity and the Ministry of State. The PDHJ also coordinated the joint civil society submission to the UPR process in 2010.

C. Membership and selection

The Ombudsman for Human Rights and Justice (Provedória) is elected by an absolute majority of the National Parliament.²⁸ The Statute of PDHJ stipulates that the Ombudsman must have sufficient experience, proven integrity and sound knowledge of the principles of human rights, good governance and public administration. The Ombudsman must also be recognised in the community for her high level of independence and impartiality.²⁹ The selection process for role the requires a public call for nominations and provides that appointees must meet legislated eligibility requirements. In practice, however, the political parties decide who is to be nominated and appointed. There are no interviews, public hearings or shortlisting process. Political interests undoubtedly influence the nomination and appointment, and the process cannot be described as transparent or merit based.

The Ombudsman is to be appointed for a fixed term of four years with the possibility of one re-election.³⁰ There are also clear provisions for the appointment of the Deputy Ombudsman and her removal from office.

The Ombudsman is empowered to appoint staff in accordance with the Statute of the Civil Service.³¹ In July 2011 the government passed the Law of the Provedoria which outlines the

²⁶ Article 25.3 of Statute of PDHJ.

²⁷ Article 24(c) of Statute of PDHJ and section 162 of the Constitution.

²⁸ Article 12.1 of Statute of PDHJ.

²⁹ Article 13 of Statute of PDHJ.

³⁰ Article 19.1 of Statute of PDHJ.

functions and coordination of sections of the PDHJ.³² The law is intended to ensure the independence of the Ombudsman by giving her control over recruitment and staff discipline. Article 20.2 provides that there shall be a “gender balance and the representation of vulnerable groups” in the staff. Despite this provision, the current Ombudsman and two Deputy Ombudsman are both male.

Staff also received a 20% increase in salary in 2011.³³ The PDHJ also increased the number of staff by 34, bringing the total number of staff to 100. This staffing increase was significant as it meant 54 temporary positions were turned into full-time positions.³⁴

Article 18 of the Statute of PDHJ provides that the Ombudsman and Deputy Ombudsman cannot be held civilly or criminally liable for any act done or omitted, observations made or opinions issued, in good faith and in the exercise of their functions. This immunity protects the independence of the Ombudsman to carry out her functions without fear of prosecution. To date, there has been no reason to invoke this immunity.

The Ombudsman must declare her assets and any other income before taking office.³⁵ The Ombudsman also cannot take other positions that are declared by law to be incompatible with the office of Ombudsman, including political activities, any other paid position, the management or control of a profit-making body or leadership in any association, trade union, foundation or religious organisation.³⁶

The PDHJ made capacity development a priority in 2011 and received support from the United Nations Development Programme (UNDP) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) to develop the skills of staff on investigation, analysis and report writing. Staff also attended technical human rights training overseas in 2011, including on women’s human rights, human rights education, and the human rights of migrant workers.³⁷

D. Resourcing of PDHJ

³¹ Article 10.1 of Statute of PDHJ.

³² Law No. 25/2011 Organic Structure of the Office of the Provedor for Human Rights and Justice.

³³ PDHJ, ‘Report presented at 16th Annual Meeting and Biennial Conference of the Asia Pacific Forum’ (6-8 September 2011) at 6.

³⁴ PDHJ, ‘Annual Report 2011’ (Tetum) at 53.

³⁵ Article 14 of Statute of PDHJ.

³⁶ Article 17 of Statute of PDHJ.

³⁷ PDHJ, ‘Report presented at 16th Annual Meeting and Biennial Conference of the Asia Pacific Forum’ (6-8 September 2011) at 6, 7.

Article 11 of the Statute of PDHJ provides that its budget shall be sufficient to ensure its operation and to maintain its independence, impartiality and efficiency. In 2011 the PDHJ's total budget was US\$1,298,000.00, an increase of 33% from 2010. This covered the recruitment of 34 additional permanent staff, additional laptops for investigators and equipment for regional offices in Baucau, Same, Maliana and Oecusse. It received a further US\$550,000.00 from international donors for institutional and capacity development. Despite the substantial increase in budget, the PDHJ stated in its *2011 Annual Report* that the staffing level is still insufficient to form special units for children, women, the disabled and vulnerable persons.³⁸

The increase in state funding as well as continued support from international donors has meant that the PDHJ is better placed to carry out its mandate in all areas. The UN Integrated Mission in Timor-Leste (UNMIT) also provided one national and one international staff with expertise in national human rights institutions to provide advice to the PDHJ. It is essential that the State continues to increase its funding in the future to guarantee the sustainability and independence of the PDHJ once international donors reduce their development aid for Timor-Leste.

Article 11 of the Statute of PDHJ provides for transparency and the accountability of resources. The PDHJ is required to keep proper records and submit a statement of accounts to the National Parliament. It may also be audited.

III. Effectiveness

The Statute of PDHJ provides for a clear complaints-handling process. Any natural or legal person may lodge an oral or written complaint, free of any charges, to the Ombudsman about a human rights violation, abuse of power, maladministration, illegality, manifest injustice, lack of due process, nepotism, collusion, influence peddling or corruption.³⁹

The Ombudsman must determine within 45 days whether she will investigate the complaint or dismiss it for a reason outlined in article 37.3 of the Statute of PDHJ.

The annual reports do not provide statistics on the how long investigations take on average. It would be useful for the PDHJ to publish in the future detailed statistics on investigation times

³⁸ PDHJ, 'Annual Report 2011' (Tetum) at 67

³⁹ Article 36 of Statute of PDHJ.

so as to assess whether the procedure provides timely justice for victims and whether greater resources are required for complaints handling.

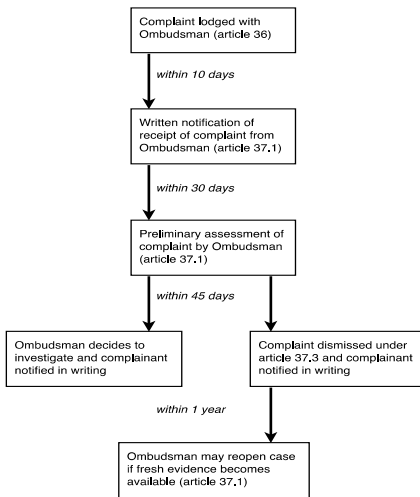


Diagram 1: PDHJ complaints handling procedure

Once the investigation is completed, the Ombudsman must provide the parties to the complaint with a draft report on the findings of the investigation. Both parties have 15 days to comment.⁴⁰ Entities who are subject to recommendations arising from the investigation must inform the Ombudsman within 60 days the extent to which those recommendations have been implemented.⁴¹ However, in reality, the Ombudsman has noted poor compliance with this requirement.

The complaints-handling procedure recognises that poor literacy rates persist in Timor-Leste and so allows for the oral lodgment of complaints. While new regional offices mean better access, like other justice institutions, physical access remains a barrier for much of the rural population. In 2011 the PDHJ began implementing a ‘Mobile Service’ programme whereby staff travelled to communities to deliver human rights education and receive complaints. Forty-four complaints were lodged through this initiative.⁴² It is hoped that the PDHJ can continue this initiative and explore other methods of receiving complaints, such as through SMS and the internet.

Table 1: Case statistics for 2011

Case type	Complaints lodged in 2011	Cases investigated in 2011	Cases closed in 2011	Cases pending investigation
Human rights	?	55	3	52
Maladministration	?	82	4	78
Ombudsman initiated	N/A	1	1	0

⁴⁰ Article 45 of Statute of PDHJ.

⁴¹ Article 47 of Statute of PDHJ.

⁴² PDHJ, ‘Annual Report 2011’ (Tetum) at 14.

Out of the total of 8 cases investigated and closed by the PDHJ in 2011, the Ombudsman made recommendations in 7 cases to competent authorities including the PNTL, Ministry of Education, Ministry of State Administration and local authorities.

The PDHJ may close an investigation for various reasons, including opening of criminal investigation, insufficient evidence and lack of correct contact information for complainants.⁴³

IV. Thematic Focus

There is no specific focal point within the PDHJ for human rights defenders and women human rights defenders. Civil society organisations in Timor-Leste are generally vocal and can freely conduct advocacy without fear of intimidation from State authorities.

In 2010 the PDHJ prepared a joint submission with civil society organisations for Timor-Leste's first UPR, which was conducted on October 2011. It has in the past presented shadow reports to the CEDAW Committee and works closely with the Human Rights Unit of UNMIT. It is also a full member of the Asia Pacific Forum.

Timor-Leste does not have the death penalty.⁴⁴ On the issue of child pornography, Timor-Leste acceded to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography on 16 April 2003. Producing, distributing, disseminating, importing, offering, selling, possessing or using child pornography is a crime under the Penal Code of Timor-Leste.⁴⁵

Section 30 of the Constitution provides that no one shall be subjected to torture and cruel, inhuman or degrading treatment. The PDHJ has in the past received complaints about the excessive use of force by the security forces. In 2011, out of the 55 cases of allegations of human rights violations, 43 cases involved allegations of inhumane treatment, 4 cases of physical assault, 4 cases of the use of threat and 2 cases of illegal detention. In 2011 the PDHJ continued to provide training to members of the PNTL, F-FDTL and prison guards on human rights to address this issue.

⁴³ PDHJ, 'Annual Report 2011' (Tetum) at 37.

⁴⁴ Section 29 of the Constitution of Timor-Leste.

⁴⁵ See article 155 (mistreatment of a minor) and article 176 (child pornography) of the Penal Code of Timor-Leste.

The PDHJ was a member of the Human Trafficking Working Group led by the Timor-Leste Ministry of Foreign Affairs. While legislation on human trafficking has been drafted, it is yet to be introduced into parliament. The PDHJ has also received training with civil society organisations on combating human trafficking in Timor-Leste.

V. Consultation and Cooperation with Civil Society

Article 33 of the Statute of PDHJ provides that it shall maintain close contact, consult and cooperate with other organisations concerned with the promotion and protection of human rights and justice. It is also mandated to liaise closely with other authorities in Timor-Leste to foster common policies and practices and to promote cooperation. In practice, the PDHJ works cooperatively with civil society organisations in Timor-Leste. It is involved in a number of forums dealing with a broad range of human rights.

VI. Conclusion and Recommendations

In 2011 the PDHJ continued to build its capacity to effectively promote and protect human rights in Timor-Leste. The substantial increase in permanent staffing was a critical step towards fulfilling its mandate. It is essential that the State provides sufficient resources in the coming years to enable the PDHJ to undertake its core functions, particularly investigating complaints and training security forces on human rights, and for international donors to continue to provide expertise and capacity development opportunities to PDHJ staff. In addition to sufficient resources, it is essential that the PDHJ has complete control of its budget so that it operates as an independent statutory authority. Finally, public entities must be held publicly accountable to implementing the PDHJ's recommendations.

Recommendations:

1. The government must allocate sufficient resources to the PDHJ to effectively carry out its mandate. Priority should be allocated to investigating complaints and protecting vulnerable groups, including children, women and the disabled.
2. The government must give PDHJ complete independence to manage its own budget while being subject to appropriate safeguards, including external auditing and reporting to the National Parliament.

3. All public entities must comply with article 47.3 of the Statute of PDHJ and provide full disclosure of the steps taken to implement the PDHJ's recommendations. The Ombudsman should make full use of article 49 (offences) to sanction non-compliance through disciplinary actions.
4. The PDHJ should prioritise the promotion and protection of economic, social and cultural rights in Timor-Leste including through analysis of the state budget, policies and legislation.
5. The PDHJ should ensure that there is gender balance among its staff, particularly in leadership positions.

ANNI is a network of human rights organizations and defenders engaged with national human rights institutions in Asia to ensure accountability of these bodies for the promotion and protection of human rights. The ANNI members are:

- ADVAR - Iran
- Ain o Salish Kendra (ASK) – Bangladesh
- All India Network of NGOs and Individuals Working with NHRIs (AiNNI)
- Asian Forum for Human Rights and Development (FORUM-ASIA)
- Cambodian League for the Promotion and Defence of Human Rights (LICADHO)
- Center for Human Rights and Development (CHRD) – Mongolia
- Cambodian Working Group for the Establishment of an NHRI (CWG)
- Commission for Disappearances and Victims of Violence (KontraS) - Indonesia
- Defenders of Human Rights Center - Iran
- Education and Research Association for Consumer Education (ERA Consumer) - Malaysia
- Hong Kong Human Rights Monitor (HKHRM)
- Human Rights Organization of Kurdistan (ALKARAMA)
- Human Rights Forum (HRF), Bangladesh
- Human Rights Working Group (HRWG)- Indonesia
- Indonesian Human Rights Monitor (IMPARSIAL)
- Informal Service Sector Center (INSEC) – Nepal
- Institute for Policy Research and Advocacy (ELSAM) - Indonesia
- International Campaign for Human Rights in Iran
- Japan Federation of Bar Associations (JFBA)
- Judicial System Monitoring Program (JSMP) – Timor Leste
- Justice for Peace Foundation (JPF) – Thailand
- Korea House for International Solidarity (KHIS) – South Korea
- Law and Society Trust (LST) – Sri Lanka
- Lawyers' League for Liberty (LIBERTAS) - Philippines
- Maldivian Democracy Network (MDN) – Maldives
- Odhikar -Bangladesh
- People's Watch (PW) – India
- Philippine Alliance of Human Rights Advocates (PAHRA)