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DYSFUNCTIONAL 'OVERSIGHT': CONTINUING DEBATES ON SRI LANKA'S HUMAN RIGHTS COMMISSION

LAW & SOCIETY TRUST

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Editor's Note

In line with a consistent focus in the *LST Review*, this Issue publishes the Concluding Statement of the Asia Pacific Forum (APF) of National Human Rights Institutions at its 14th Annual Meeting (2009) as a prelude to the continuation of a sustained critique of the National Human Rights Commission (NHRC) of Sri Lanka.

It is no surprise that the 2009 APF Concluding Statement contains two references to Sri Lanka, both of which are far from praiseworthy.

In the first reference, (see paragraph 9) the APF Forum points to the fact that in line with the decision of the International Coordinating Committee (ICC) of National Institutions for the Promotion and Protection of Human Rights to downgrade the status of Sri Lanka's NHRC from "A" to "B", (initially in 2007 which decision was reiterated in 2009), the NHRC has been commensurately downgraded at APF level to associate member status from its earlier full member status. This was in accordance with the decision of the APF to use ICC accreditation decisions in determining membership status for the APF.

It is recommended, in this context, that while APF would assist Sri Lanka in regaining full membership in both fora, the Sri Lanka government should appoint the Chairperson and the Commissioners of the NHRC in accordance with Sri Lanka's Constitution.

The significance of this decision is by no means small and reflects extremely adversely on this country. Traditionally both international and regional monitoring mechanisms in relation to national human rights institutions across the world have been slow to arrive at downgrading decisions based on questions of constitutional legality of the specific institution in issue. This is due to both the inevitable complexity of the same as well as an understandable reluctance to get involved in legal questions of dispute within a particular country. However, the Sri Lankan NHRC exemplifies an exception to the same. The blatant manner in which its Commissioners had been appointed from 2006 in defiance of the constitutional stipulation that their appointments should be approved by the Constitutional Council has been only one reason for this exception.

Other equally important reasons include the fact that the NHRC has routinely showed itself to be non independent from government and indeed, allowed itself to be used as a convenient cover up to hiding outrageous violations of human rights by state actors in recent years.

The serious nature of the violations that have occurred in Sri Lanka during the past few years is, in fact, the context of the second reference to the country in the APF Concluding Statement where (along with Myanmar, Iran, the Occupied Territories, Syria and Yemen) Sri Lanka is ranked as a country in which human rights defenders have faced utmost difficulties.

The many problems in the functioning of the NHRC during this period are well examined in the consequent paper by *B. Skanthakumar* as well as in the Law & Society Trust's submission (in collaboration with FORUM-ASIA) to the ICC in regard to the re-accreditation review of Sri Lanka's NHRC, both of which are published in this Issue.

Most remarkably however, a recent example illustrating the complete disregard of the NHRC to its statutory mandate to ensure that Sri Lanka's domestic laws are in conformity with international human rights standards is found in its order dated 31.01.2008 which concluded that suspects kept at the Boossa detention camp had no right of confidential communication with their lawyers. The relevant order stated *inter alia* that no violation of rights had been occasioned police officers insisting that they should be within earshot of two lawyers who had attempted to confer privately with their clients. Problematically it was observed that "still some international laws and standards have not been incorporated into our law... further it should be noted that the Sri Lankan government is not bound to follow all international laws and standards" (see the said order).

This Issue publishes this documentation in the interests of keeping attention focussed on Sri Lanka's NHRC which has become, in many respects, symbolic of the breakdown of public faith in the ability and capacity of the country's institutions to provide relief to persons whose rights are violated by state actors. The general public expectations within which these institutions should operate are referred to in the two consequential documents published in this Issue, namely the Statement of the Asian NGO's Network on National Human Rights Institutions (ANNI) at the APF's 14th Annual Meeting as well as the 2009 ANNI Annual Report.

The fate that has now befallen Sri Lanka's NHRC at the international and regional level constitutes a fair warning to other human rights institutions across the world that the ICC as well as the APF will not hesitate in engaging in similar action in the future if a particular body is found to consistently and egregiously violate the basic foundations of the Paris Principles which govern the legitimizing of such institutions.

Kishali Pinto-Jayawardena

ASIA PACIFIC FORUM OF NATIONAL HUMAN RIGHTS INSTITUTIONS – CONCLUDING STATEMENT, AUGUST 2009*

Introduction

1. The Asia Pacific Forum of National Human Rights Institutions (the APF), consisting of the national human rights institutions (NHRIs) of Jordan, Afghanistan, Australia, India, Indonesia, Malaysia, Maldives, Mongolia, Nepal, New Zealand, Palestine, Philippines, Qatar, Republic of Korea, Sri Lanka, Thailand and Timor-Leste, held this Fourteenth Annual Meeting in Amman, Jordan from 3-6 August 2009 under the patronage of His Majesty King Abdullah II ibn Al Hussein.
2. The Forum Councillors expressed their deep gratitude and appreciation to His Majesty King Abdullah II ibn Al Hussein for giving his patronage to the conference and to the Jordan National Centre for Human Rights for hosting the meeting, to the United Nations Office of the High Commissioner for Human Rights (OHCHR) for its co-sponsorship and to all the APF's donors for their financial support. They acknowledged the significant contribution of H.R.H. Prince Hassan bin Talal as the keynote speaker on Human Rights and Religious Belief.
3. H.E. Mr Nader Al-Dahabi, Prime Minister of Jordan, officiated at the opening ceremony of the meeting. Dr Adnan Badran, Chairperson of the Board of Trustees of the Jordan National Centre for Human Rights and Chairperson of the APF, and Tan Sri Abu Talib Othman, Chairperson of the Human Rights Commission of Malaysia and Deputy Chairperson of the APF delivered speeches at the opening ceremony. The speakers stressed the importance of human rights and the role of NHRIs and the APF in the promotion and protection of human rights throughout the Asia Pacific region.
4. Forum Councillors also warmly thanked H.E. Mr Abdulhadi Al Majaly, Speaker of the Lower House of Parliament, for hosting a conference function. They acknowledged the expert contributions of Dr Bassam Al-Omoush, Mr Robert Archer and Mr Demostenes Chryssikos, and warmly welcomed the participation and statements of the Chairperson of the International Coordinating Committee of National Institutions (ICC), Ms Jennifer Lynch QC, and the representatives of the OHCHR, Mr Homayoun Alizadeh and Ms Francesca Albanese.
5. The Forum Councillors encouraged and welcomed the participation and statements of approximately 43 international, regional and national non-governmental organisations (NGOs) and the representatives of the parliaments and/or governments of Australia, Indonesia, Jordan, Malaysia, Nauru, New Zealand, Philippines, Sri Lanka, Samoa, and Thailand and the intergovernmental organisation of the Commonwealth Secretariat.

* Concluding Statement of the Fourteenth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, 3-6 August 2009, Amman, Jordan.

6. Finally the Forum Councillors expressed their appreciation for the excellent efforts and hospitality of the Chairperson, Commissioner General Dr Muhyieddeen Touq, and staff of the Jordan National Centre for Human Rights and the APF secretariat in the organisation of the annual meeting and conference.

Conclusions

The Forum, during its open plenary sessions:

7. Expressed appreciation to the OHCHR for its support in connection with NHRIs and their protection mandates; for the establishment and strengthening of NHRIs; and to the ICC and its accreditation process. The APF reaffirmed the success of its partnership with the OHCHR and looked forward to enhancing their mutual cooperation and support including through the development of a comprehensive multi-year partnership and the implementation of recommendations emanating from the international human rights system.

8. Expressed appreciation to the Chairperson of the ICC, Ms Jennifer Lynch, for her active participation in the Forum Councillors meeting and APF Conference. Forum Councillors offered their continued support to ensure that the ICC and regional coordinating committees remain important entities in the international human rights system. They recorded their sincere appreciation to Ms Lynch for her excellent Chairpersonship of the ICC and her untiring support for the work of NHRIs domestically, regionally and internationally.

9. Informed the Conference of the outcomes of the meeting of Forum Councillors held on 3 and 4 August 2009. The following decisions were highlighted:

- The unanimous election of the Jordan National Centre for Human Rights to the position of Chairperson of the APF, the National Human Rights Commission of Thailand and the Human Rights Commission of Malaysia to the two positions of Deputy Chairpersons.
- The approval of a proposal to use ICC accreditation decisions in determining membership status for the APF. As a result of this decision and in line with ICC accreditation decisions the national human rights institutions from Palestine and Qatar became full member institutions of the APF and the Sri Lankan Commission became an associate member of the APF. The APF reiterated that it would provide assistance to the Sri Lankan Commission in seeking to regain its full membership of the ICC and APF and recommend that the Sri Lankan Government appoint the Chairperson and Commissioners in accordance with the Sri Lankan Constitution. The APF also noted the importance of the recommendations of the ICC Sub-Committee on Accreditation to the NHRIs of Qatar and Palestine and the APF offered its support to ensure compliance with the Paris Principles.

- The approval of a proposal to (i) separate the annual Forum Councillor and business meetings of the APF from the APF Conference; (ii) convene the APF 15 annual meeting in 2010 in a central regional location; and (iii) convene the combined APF 16 Annual Meeting and Conference in 2011.

- The nomination of India, Jordan, Malaysia and New Zealand to the ICC Bureau. The Republic of Korea was elected to the Sub-Committee on Accreditation.

- The nomination of the Chief Commissioner of the New Zealand Human Rights Commission as the region's candidate for the position of ICC Chairperson. If the New Zealand Chief Commissioner cannot, for whatever reason, serve the full three year term as ICC Chairperson then the APF would recommend to the ICC that the remainder of the term be filled by the Jordan National Centre for Human Rights.

- Welcomed the establishment of a Working Group on Migration and the election of a steering committee composed of Jordan, Nepal, Malaysia, Indonesia and the Republic of Korea.

- The decision to accept with appreciation the offer of the National Human Rights Commission of Thailand to host the Sixteenth Annual Meeting and Conference in 2011.

10. Welcomed the efforts of the Senior Executive Officers to contribute to the effective and efficient functioning of national institutions as well as to their close cooperation and coordination on issues of mutual interest and concern.

11. Welcomed the reports of APF members on their operations over the preceding year and commended them for their work; in particular, welcomed the emphasis on sub-regional cooperation between NHRIs on thematic issues and capacity building.

12. Welcomed the reports of the governments of Australia, Nauru, New Zealand and Samoa and the intergovernmental organisation of the Commonwealth Secretariat on the activities undertaken to protect and promote human rights including support for NHRIs. In particular they welcomed the commitments made by the governments of Nauru and Samoa to actively explore the establishment of NHRIs and offered these governments the support of the APF.

13. Welcomed the reports of NGOs/CSOs. Forum Councillors expressed their appreciation for the constructive and coordinated contribution of NGOs/CSOs, thanked NGOs/CSOs for their submissions, collective participation and advocacy at the meeting and stressed their commitment to meaningful dialogue and practical cooperation. Forum Councillors agreed to further consider:

- Providing a session for NGO/CSO input into the APF annual meeting in 2010;

- The NGO/CSO recommendations to strengthen institutional protection of human rights in the areas of the establishment and enhancement of NHRIS; the establishment and enhancement of regional mechanisms; the integration of human rights mechanisms with the work of NHRIs; NGO/CSO engagement with the APF Conference and Meeting and the protection of human rights defenders;
- The NGO/CSO recommendations on the role of NHRIs in combating corruption and the need for institutional transparency and in promoting freedom of religion and belief and the promotion of religious tolerance and co-existence; and
- The NGO/CSO recommendations on human rights defenders.

14. Was informed of serious human rights violations in a number of States throughout the region, especially Myanmar, Iran, Occupied Palestinian Territories, Sri Lanka, Syria, and Yemen, and the corresponding difficult situation faced by human rights defenders. NHRIs pledged to take all available steps to protect human rights defenders.

15. Considered the issue of Human Rights and Corruption and committed to undertake practical measures to combat corruption using a human rights based approach and to promote awareness of the close linkages between corruption and human rights and the harmful effects of corruption on the enjoyment of civil, political, economic, social and cultural rights.

16. Considered the issue of Human Rights, Religion and Belief and the need for inter and intra faith dialogue nationally, regionally and internationally to promote mutual understanding and the protection and promotion of human rights and the value of using a human rights approach to balance potentially competing rights.

17. Acknowledged the service and contribution made by Professor Ahn Khyung-Whan, former Chairperson of the National Human Rights Commission of Korea and Vice Chairperson of the ICC.

‘WINDOW-DRESSING’? THE NATIONAL HUMAN RIGHTS COMMISSION OF SRI LANKA*

*B. Skanthakumar**

I. General Overview

In recent years, violations of international humanitarian law, extra-judicial killings, abductions and ‘disappearances’, verbal and physical attacks on journalists and human rights defenders, spiralling intolerance for dissent and the dissemination of information embarrassing to State actors, and wanton disregard for constitutional provisions and democratic norms¹ have come to epitomise Sri Lanka’s human rights environment.

Although the Government of Sri Lanka’s (GoSL) abrogation of the Cease-Fire Agreement with the armed separatist Liberation Tigers of Tamil Eelam (LTTE) took effect from 16 January 2008; it only confirmed the irrevocable breakdown of the flawed 2002-2005 ‘Peace Process’ in the intervening period;² and shook off the last fetter on the full-blown prosecution of war³ that gained in ferocity until the LTTE was crushed in May 2009.

In this context, the expectations on the National Human Rights Commission of Sri Lanka (NHRC or Commission hereafter) are inevitably greater; and its alarming unwillingness to recognise the urgency and seriousness of the human rights crisis, are of greater disappointment and enormous concern. Tragically, the “cautious optimism”⁴ once expressed in the envisaged role and impact of this national human rights institution has long dissipated, and confidence in it has hit rock-bottom.

* This is a revised and expanded version of the country paper published in Emmerlyne Gil and Pia Alexandra Muzaffar Dawson (eds.), *2009 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, Asian Forum for Human Rights and Development (FORUM-ASIA), Bangkok, 2009, pp.195-219. I am grateful to National Human Rights Commission of Sri Lanka (NHRC) staff in four regional offices visited between May and August 2009 for discussing their work and challenges, and human rights defenders in those districts for their observations on the functioning of the NHRC. Dilhara Pathirana assisted with research. Sudarshana Gunawardana (*Rights Now – Collective for Democracy*) and Ruki Fernando (*Law & Society Trust*) were generous with guidance and insights. The responsibility for any errors of fact or interpretation is mine alone. In memoriam Shiraz Hamid.

* Economic, Social & Cultural Rights programme, Law & Society Trust (LST), Colombo, Sri Lanka.

¹ Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices: Sri Lanka 2008*, US State Department, Washington D.C., 2009, www.state.gov/g/drl/rls/hrrpt/2008/sca/119140.htm; B. Skanthakumar, “‘The Enemy Within’: Human Rights Defenders in Sri Lanka”, *LST Review*, Vol.19, Issue No.253 (November 2008), pp.1-15.

² Ruki Fernando, ‘Human Rights: Issues and Concerns’ in Keethaponcalan, S. I. and Ravi Jayawardana (eds.), *Sri Lanka: Perspectives on the Ceasefire Agreement of 2002*, South Asia Peace Institute, Colombo, 2009, pp.275-300.

³ Jayadeva Uyangoda, *The Way We Are: Politics of Sri Lanka 2007-2008*, Social Scientists’ Association, Colombo, 2008.

⁴ Mario Gomez, “Sri Lanka’s New Human Rights Commission”, *Human Rights Quarterly*, Vol.20, No.1 (1998), pp.281-302 at p.302.

In stark contrast to the challenges of ongoing human rights violations, the NHRC chose to avoid directly addressing conflict-related human rights violations and therefore confrontation with the GoSL. On the contrary, the most vocal members of the 2006-2009 Commission downplayed the scale and intensity of human rights abuses, alleging that adverse media reports were “highly exaggerated, unfounded and malicious”, and made with a view to “tarnish the image of the country”.⁵

The sources of the malaise affecting the NHRC are the selection, composition and calibre of its Commissioners; the bureaucratic approach of staff to human rights concerns and violations; the chronic shortage of human, financial and infrastructural resources especially in regional offices and particularly those in conflict-affected regions; and the poor relationship between its head office in Colombo and many human rights organisations.

In 2007, the NHRC’s non-compliance with the Paris Principles (Relating to the Status and Functioning of the National Institutions for the Protection and Promotion of Human Rights) led to its downgrading from Status ‘A’ to Status ‘B’ member by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), of which it is a member.⁶

The NHRC’s subsequent failure to institute the reforms recommended by the ICC’s Sub-Committee on Accreditation (SCA) led to confirmation of its ‘B’ status on its review in March 2009.⁷ Only ‘A’ status institutions are conferred full membership of the ICC with voting rights, and receive concomitant recognition by the United Nations Human Rights Council within its structures and processes.

The crisis affecting the Human Rights Commission of Sri Lanka has since deepened and taken a new turn through the non-appointment of Commissioners, following the end of the previous term of office of the sitting Commissioners in May 2009. There has been no statement by the GoSL as to its intentions in this regard. Therefore, the premier national human rights institution of the country has been deliberately rendered leaderless.

II. Independence

A. Legal Framework

The National Human Rights Commission of Sri Lanka (NHRC) is a statutory institution created by an Act of Parliament⁸ in August 1996, though it only began functioning almost a

⁵ S. Ananda Coomaraswamy, Dharmasiri Jayawickrama and Mahanama Tillekeratne interviewed in May 2007 for *Sri Lanka’s Human Rights Crisis*, International Crisis Group, Brussels, 2007 at p.20.

⁶ Kishali Pinto-Jayawardena, “Telling truths and political brinkmanship”, *The Sunday Times*, 16 December 2007.

⁷ Section 3.2, *International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Report and Recommendations of the Session of the Sub-Committee on Accreditation*, Geneva, 26-30 March 2009, www.nhri.net/2009/SCA_REPORT_March%202009%20Session_%28English%29.pdf at pp.5-6.

⁸ Human Rights Commission of Sri Lanka Act, No.21 of 1996.

year later, in July 1997.⁹ In 2001, the NHRC among a number of other statutory bodies arguably received constitutional recognition, when it was listed in the Schedule to the 17th Amendment to the Constitution.

During the drafting of the Act, and in its legislative passage there was active debate on it among human rights organisations and legal academics, as well as limited discussion among Parliamentarians. Weaknesses in language and administrative and procedural defects were identified, for example, in the criteria for selection of Commissioners; and the enforcement powers of the Commission.

An extremely serious defect is that the scope of the Commission's inquiries and investigations is confined to infringement or imminent infringement of fundamental rights alone and not human rights as a whole.

The Sri Lankan Constitution has a chapter on fundamental rights (that is, civil and political including linguistic rights) that are deemed to be justiciable in contrast with the chapter on directive principles of state policy (that is, economic, social and cultural rights).

However, the fundamental rights chapter does not include even the entirety of civil and political rights that Sri Lanka has accepted through international treaty law, notably the right to life. Further, by confining the Commission's mandate to fundamental rights, its vision of human rights is limited to those rights expressly protected in the Sri Lankan Constitution¹⁰ rather than the large corpus of human rights conventions that Sri Lanka has ratified or acceded. The NHRC's interpretation of human rights too has also been restricted by the domestic jurisprudence on human rights that has been timid and conservative, in comparison to that of neighbouring India.

Reference to 'human rights' is only to be found in the enabling statute in a promotional and not protective context that is in relation to "human rights education". Furthermore, it is reduced to those "rights declared and recognised by the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights";¹¹ to the exclusion of other core international human rights treaties such as the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child (all ratified or acceded by Sri Lanka), the Universal Declaration of Human Rights, International Labour Organisation Conventions and customary international law relating to human rights.

Of great concern is the power vested in an unspecified "Minister" (presumably the Minister of Justice earlier, and presently the Minister for Disaster Management and Human Rights) to

⁹ Mario Gomez, "Great Expectations: The Sri Lankan Human Rights Commission", *LST Review*, Vol.9, Issue No.131 (September 1998), pp.30-40 at p.30.

¹⁰ 'Fundamental right' is defined tautologically in the enabling law as "...a fundamental right declared and recognised by the Constitution", s.33, Human Rights Commission of Sri Lanka Act, No.21 of 1996.

¹¹ S.33, Human Rights Commission of Sri Lanka Act, No.21 of 1996.

make regulations “prescribing the procedure to be followed in the conduct of investigations”.¹² This is in addition to the Minister’s wide discretionary authority to make regulations “in respect of any matter which is required by the [Human Rights Commission of Sri Lanka] Act, to be prescribed”.¹³

These critiques though raised by civil society organisations in the discussions around the draft Act¹⁴ were ignored with predictably, perhaps intentionally, ruinous consequences for the independence and effectiveness of this national human rights institution.

There are limited and clearly defined grounds for removal of Commissioners by the President¹⁵ or Parliament.¹⁶ The Commissioners’ salaries are voted by parliament and not the Executive; are charged to the Consolidated Fund rather than any departmental or ministry budget; and cannot be reduced during their term of office.¹⁷

These safeguards offer some measure of independence from Executive pressure and interference but are premised on legislators themselves being independent of Government; imbued with a human rights consciousness; and supportive of national human rights institutions: none of which has been much in evidence for several years, if not decades.

Although, there is no express statutory provision to this effect, the Commission has always had regional offices and this is perhaps its greatest strength. This structure and many of the senior personnel in the provinces were inherited from the Human Rights Task Force that preceded the Commission.

Presently, there are 10 offices located in Ampara, Anuradhapura, Badulla, Batticaloa, Jaffna, Kalmunai, Kandy, Matara, Trincomalee and Vavuniya. Since 2002 there has also been a thematic unit on Internally Displaced Persons¹⁸ founded under the ‘National Protection and Durable Solutions for Internally Displaced Persons Project’. Following the December 2004 Tsunami, the Commission created a Disaster Relief and Monitoring Unit (DRMU) in January 2005 to investigate human rights violations of Tsunami-affected communities.¹⁹

The NHRC has a long way to go before the ethnic pluralism of Sri Lanka is reflected in its staff cadre. Outside of the Tamil-speaking majority Northern and Eastern Provinces, there are

¹² S.31(2), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

¹³ S.31(1), Human Rights Commission of Sri Lanka Act, No.21 of 1996. Interpolation is mine.

¹⁴ See, Deepika Udagama, “Human Rights Commission Bill (1995)”, *LST Review* Vol.6, Issue No.96 (October 1995), pp.13-17; and “Human Rights Commission Bill and the Proposed Amendments”, *LST Review*, Vol.6, Issue No.100 (February 1996), pp.1-34.

¹⁵ S.4(1)(a)(i-vi), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

¹⁶ S.4(1)(b), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

¹⁷ S.8, Human Rights Commission of Sri Lanka Act, No.21 of 1996.

¹⁸ The context and challenges are discussed in Mario Gomez, “National Human Rights Commissions and Internally Displaced Persons: The Sri Lankan Experience” in Ujjwal Kumar Singh (ed.), *Human Rights and Peace: Ideas, Laws, Institutions and Movements*, Sage, India, 2009, pp.302-316.

¹⁹ See, Amal de Chickera, “The Human Rights Implications of the Tsunami” in Elizabeth Nissan (ed.), *Sri Lanka: State of Human Rights 2006*, Law & Society Trust, Colombo, 2007, pp.47-89.

few Tamils and Muslims in its offices elsewhere. However, the majority of Tamil-speakers live outside of the North and East. None of the senior management in its head office in Colombo is from an ethnic or religious minority.

An island-wide state of emergency was re-imposed on 13 August 2005²⁰ following the LTTE's assassination of Foreign Minister Lakshman Kadirgamar PC, MP, and has been renewed without respite thereafter. Most of Sri Lanka's post-colonial rule has been under a state of emergency.²¹ The NHRC has continued to operate without any legal restrictions on its functioning, mandate and methods of work during this period.

Regrettably, it has not made any comment on the scope and application of emergency powers. Neither has it acknowledged the extra-legal constraints that affect human rights protection, and the work of human rights defenders in Sri Lanka, as a consequence of emergency laws. This should be contrasted with the expectation, "that, in the situation of a state of emergency, an NHRI will conduct itself with a heightened level of vigilance and independence in the exercise of their mandate".²²

B. Relationship with State Organs and Other National Human Rights Institutions

There is no statutory requirement for public authorities to cooperate with the Human Rights Commission of Sri Lanka. While routine inspections of police stations and prisons take place, the perception is that the Commission does not enjoy the full cooperation of the Government.

In November 2008, NHRC personnel from its IDP Unit were denied access to the Menik Farm camp in which Tamils recently displaced from the then LTTE-controlled areas were detained by armed forces personnel. The NHRC was informed that it should obtain prior written permission from the Vavuniya Government Agent, who subsequently claimed that she had been instructed by the security forces to turn down all such requests. As Senaka Dissanayake of the IDP Unit observed, "It is a legal obligation of HRC to visit these camps and we do not need prior permission from anybody to carry out our duties."²³

In 2008 and in the first quarter of 2009 NHRC regional staff was particularly on the receiving end of verbal intimidation including threats of death in the course of their inquiries and

²⁰ Emergency (Miscellaneous Provisions and Powers) Regulation No.1 of 2005, Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary No.1405/14, 13 August 2005, 1A-25A. See Saliya Edirisinghe, "Emergency Rule" in *Sri Lanka: State of Human Rights 2006*, Law & Society Trust, Colombo, 2007, esp. at pp.196-221; on the constitutional and legal framework of emergency law, see Asanga Welikala, *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka*, Centre for Policy Alternatives, Colombo, 2008, at pp.173-206.

²¹ Radhika Coomaraswamy and Charmaine de los Reyes, "Rule by emergency: Sri Lanka's postcolonial constitutional experience", *International Journal of Constitutional Law*, Vol.2, No.2 (2004), pp.272-295.

²² General Observation 5.1, *ICC Sub-Committee on Accreditation*, June 2009.

²³ "HRC denied access to IDPs", *Daily Mirror*, 27 November 2008.

investigation into complaints.²⁴ In the recent past, NHRC investigating officers have been verbally and physically threatened by uniformed law enforcement personnel (from the military and police), as well as individuals and groups believed to be operating under the protection and even direction of state security agencies, leading to temporary closure of offices,²⁵ transfers of affected staff, and resignations, and at least one (Tamil) officer fleeing the country after he had received death threats and a relative who was also the care-taker of his house was believed to be mistaken for him and killed.

Following a fact-finding mission to Boossa Detention Camp, near Galle in the Southern Province, which is a notorious facility for Tamils arrested under the Prevention of Terrorism Act and emergency regulations, the NHRC was forthright in concluding that conditions there and the treatment of detainees did not conform to international standards.²⁶

The Camp is administered by the Terrorist Investigation Division (TID) which reports to the omnipotent Defence Secretary (a retired army officer and brother of the President). Unfortunately, the NHRC determined in an order of 31 January 2008 that “no violation of rights had occurred as a result of police officers insisting that they should be within earshot of two lawyers who had attempted to confer privately with their clients”²⁷ at that detention centre.

The NHRC does not have access under its enabling law or emergency regulations to military and paramilitary (that is, armed Tamil groups aligned to the State) camps from where Tamil youth suspected of association with the LTTE have been removed for interrogation through torture and subsequently ‘disappeared’. Neither, has it publicly requested the extension of its right to make unannounced visits to such unofficial detention centres, and more to the point, demand that the practise of interrogation and ‘disappearing’ is ended.

In the context of the prevailing national security ideology where the State presents itself as besieged from within and without and reacts with ruthlessness against real and imagined critics—in common with many other public, private and non-governmental institutions for public accountability—the NHRC avoids imputing any connection between serious and gross violations of human rights and state security agencies and their sub-contractors in paramilitary²⁸ and other criminal organisations.

²⁴ Kurulu Kariyakarawana, “HRC Kalmunai Regional Coordinator threatened with death”, *Daily Mirror*, 30 April 2009.

²⁵ In December 2007, death threats were received by staff of the Mannar and Trincomalee NHRC regional offices; “Human Rights Commission officers threatened”, *Daily News*, 24 December 2007.

²⁶ ‘Special Visit to Boossa Detention Camp’, Inquiries and Investigations Division of the Human Rights Commission of Sri Lanka, 10 January 2008; “To ascertain conditions of the detainees: HRC visits Boossa camp”, *Daily News*, 25 February 2008.

²⁷ Cited in Kishali Pinto-Jayawardena, *The Rule of Law in Decline in Sri Lanka: Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka*, Rehabilitation and Research Centre for Torture Victims, Copenhagen, 2009, at p.125.

²⁸ On these connections see, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Follow-Up to Country Recommendations*, A/HRC/8/3/Add.3 (14 May

Although the NHRC has chosen to remain silent in the face of apparently state-sanctioned violations of human rights, there was one exception in October 2008 when in a terse statement it condemned the grenade attacks on the home of leading human rights lawyer and civil society activist, J. C. Weliamuna.²⁹ However, the statement stopped short of any admonition to state authorities or recommendations to the Government. An inquiry by the Commission was initiated but discontinued for lack of progress. Needless to add, no arrests have been made by the police, nor any progress with their investigations disclosed. There has been no further comment by the Commission on impunity for this and other abuses.

The Human Rights Commission is statutorily required to submit an annual report to Parliament listing all matters referred to it and detailing action taken as well as recommendations that it made.³⁰ However, the NHRC has a poor record in the prompt preparation of its annual report; and in any case its reports are primarily focused on its activities, to the exclusion of analyses of current human rights concerns and prescriptions for legal, institutional and policy reform.

For several years, between 2002 and 2006, no report was published. Recently, undoubtedly in response to critical observations of the ICC's Sub-Committee on Accreditation, the NHRC has sought to catch up by publishing its joint 2006 & 2007 and 2004-5 report in quick succession. However, as at the time of writing this paper in August 2009, the NHRC's 2008 annual report was still unavailable.

The NHRC's website—limited though it is in terms of information uploaded, incorrect addresses for some regional offices, and non-functional mirror sites in Sinhala and Tamil—is the only web portal through which the annual reports, which are otherwise poorly disseminated and unavailable elsewhere to members of the public, may be accessed. This website was not functional for several weeks between May and July 2009.

Under the terms of its enabling law, the NHRC is entitled to submit periodic or special reports to Parliament "in respect of any particular matter, or matters referred to it, and the action taken in respect thereof".³¹ However, no avail has been made of this provision.

There is no evidence in parliamentary records of discussion of the NHRC's 2006-7 report. There is little interest in raising human rights related issues among governing coalition parliamentarians who view mere mention of 'human rights' as a coded or direct attack on their Government's conduct of military operations against the Liberation Tigers of Tamil Eelam (LTTE) in the theatre of war, as well as its authoritarianism and repression of dissent elsewhere in the island. The allergy has reached such proportions that even reference to the state-sponsored Human Rights Commission appears to be non-existent in the legislature.

2008) at pp.14-15; extracts on Sri Lanka reprinted in *LST Review*, Vol.19, Issue 251 & 252 (September & October 2008), pp.49-62 at pp.58-59.

²⁹ "...HRC condemns attack", *The Island*, 1 October 2008.

³⁰ S.30, Human Rights Commission of Sri Lanka Act, No.21 of 1996.

³¹ *Ibid.*

Opposition parliamentarians have themselves sought the intervention of the Human Rights Commission in 2008; but view human rights in instrumental fashion and presently a handy stick with which to beat the Government in the court of domestic and international opinion. The unhappy record of the parties they support, in perpetrating egregious violations of human rights and fostering impunity while in office, does not inspire confidence in their commitment to undertake the institutional and systemic reforms necessary for the Commission to become a robust human rights actor.

In August 2008 the NHRC's unit on Internally Displaced Persons (that practically functions in a semi-autonomous fashion in relation to the Commission) prepared and presented a Bill³² for the creation of an Internally Displaced Persons (IDP) Authority. There appears to be no urgency on the part of the Government to consider this Bill as it has made no public comment on it nor listed it on the Order Paper of Parliament for debate. Nevertheless, the initiative taken by the NHRC's IDP unit must be recognised and congratulated, particularly in the absence of any similar initiative by the parent Commission, or even more modest submissions on draft legislation in the recent past.

There is no structured relationship between the NHRC and specialised institutions such as the Office of the Parliamentary Commission on Administration (Ombudsman), the National Child Protection Authority, the National Police Commission, and the Official Languages Commission among others. There is cross-referral of complaints and complainants but no transparent procedure nor necessary coordination and consultation on shared matters of interest and concern. There are only ad-hoc joint activities, centred on human rights promotion, and no common interventions as regards human rights protection; for example, joint fact-finding missions, joint submissions to the GoSL, joint reports and statements, etc. When they should be swimming together, these human rights institutions are choosing to sink separately.

C. Membership and Selection

The importance accorded by the Paris Principles to the selection and pluralism of Commissioners of national human rights institutions is justified by the sorry experience of the Sri Lankan Human Rights Commission.

In April 2006, new Commissioners were appointed directly and solely by the Executive President in blatant violation of the 17th Amendment to the Constitution that prescribes the lawful method of their appointment;³³ and even the procedure defined by the NHRC's

³² The full title of the Bill which also conveys its scope is, "An Act to provide for the Establishment of an Internally Displaced Persons Authority, to set out the Powers and Functions of such Authority and to provide Protection from Arbitrary Eviction and Displacement, and to provide for the Protection of Persons under Risk of Displacement and Internally Displaced Persons, and for matters connected therewith or incidental thereto", www.idpsrilanka.lk/htunl/SpecialProgrammes/IDP%20Bill/2008%20Aug%2008%20-%20Draft%20IDP%20Bill.pdf.

³³ See, Kishali Pinto Jayawardena, "One Step Forwards and Two Steps Backwards: The Problematic Functioning of Sri Lanka's National Human Rights Commission (NHRC)", *LST Review*, Vol.16, Issue No.225 (July 2006), pp.23-27, esp. at pp. 23-25.

enabling law whereby in the absence of the Constitutional Council (established through the aforementioned Constitutional amendment), members of the Commission are “appointed by the President on the recommendation of the Prime Minister in consultation with the Speaker and the Leader of the Opposition”.³⁴

There are five Commissioners³⁵, none of whom are full-time as there is no such requirement in the enabling law. Each Commissioner holds office for a fixed term of three years and may only be removed according to appropriately limited and qualified criteria such as insolvency; conflict of interest through paid employment; infirmity of mind or body; prolonged absence without leave; and so on.³⁶

The criterion for their selection is that they be “chosen from among persons having knowledge of, or practical experience in, matters relating to human rights”³⁷. This is weaker than the language proposed by civil society activists who had recommended instead, “proven expertise and competence in the field of protecting and promoting human rights”, following recommendations developed by Amnesty International.

None of the most recent Commissioners are recognised human rights defenders, and on their watch the reputation of the Commission has plummeted owing to its near invisibility at national-level, poor performance, and ineffectiveness.

The only prescription as to pluralism in the selection of Commissioners is as to the “necessity” for the representation of “the minorities”;³⁸ who are undefined but commonly understood to be ethnic minorities. However, nowhere are “the minorities” enumerated, which is to the disadvantage of numerically smaller ethnic minorities, and minorities within minorities who generally go unrepresented.

Thus, the most recent cohort of Commissioners included two ethnic minority members, that is a Northern Tamil and a Muslim, of whom the former also was appointed by the President³⁹ as Chairman of the Commission as is his discretionary authority under the enabling law. Previous Commissions have always had Tamil and Muslim representation.

³⁴ S.3(2), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

³⁵ S.3(1), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

³⁶ S.4(1)(a), (b) & 4(2), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

³⁷ S.3(1), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

³⁸ S.3(3), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

³⁹ S.3(4), Human Rights Commission of Sri Lanka Act, No.21 of 1996. His predecessor, also appointed by the present President, too was a Northern Tamil and also a former Justice of the Supreme Court: the transparent aim in both instances being to award the plum position to a Tamil and publicise this fact as evidence of the Government’s inclusiveness of ethnic minorities. When the Chairman of the Commission took a leave of absence in January 2009 to go abroad for an extended period, his Muslim colleague was selected by the President, as empowered under s.6(3) of the Human Rights Commission of Sri Lanka Act, No.21 of 1996, to act as Chairman, (“Bafiq appointed Acting Chairman of Human Rights Commission”, *The Morning Leader*, 4 February 2009) and remained so until the expiry of the Commissioner’s term of office in May 2009.

There is no requirement as to the representation of women. Thus, the first Commission did not have even a single woman commissioner and the most recent, only one. There is no bar to the reappointment of Commissioners⁴⁰ on the expiry of their term of office, and no limit on the number of terms they may serve.

Fortunately, for purposes of certainty and authority, any defect in the appointment of Commissioners, or any vacancy among their number, does not invalidate any act or proceeding of the Commission.⁴¹

Generally, the composition of the Commissioners has been unsatisfactory as their members are drawn from a narrow strata of society based in Colombo, such as lawyers, legal academics, prominent civil society activists, retired judges, and former senior civil servants.

The composition of the 2006-9 Commission was probably the nadir in this respect as all five of its members were legal professionals: a former Supreme Court Justice; a former Justice of the Court of Appeal; a former High Court Judge; and two legal practitioners: none of whom had public reputations associated with human rights protection and promotion.

Inevitably, the professional background of the Commissioners moulds the culture of the Commission, which functions in the manner of a quasi-judicial tribunal rather than an investigative and prosecutorial agency.

D. Resourcing

The Human Rights Commission of Sri Lanka is empowered to hire its own staff. The senior-most executive officer is designated the Secretary to the Commission. Some staff, particularly at senior level in its regional offices was inherited from the Human Rights Task Force. Otherwise recruitment is through open advertisement and competition. Public servants may be seconded from government service for either temporary or permanent appointment.⁴²

Its staff cadre is below strength and the problem is worst in regional offices in the conflict-affected areas, where it is difficult to recruit and retain staff. One reason for this problem, aside from the obvious reluctance to place oneself in a vulnerable situation, is that the hiring of staff takes place in Colombo, and those living there rarely wish to transfer elsewhere because of superior schooling for children, and better employment opportunities and other facilities for family members. However, even elsewhere, regional coordinators complain that they require more investigating and legal officers and stenographers.

⁴⁰ S.5, Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁴¹ S.7, Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁴² S.25(1), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

The low budget for rent has led to regional offices being situated or relocated to areas away from the city centre that are less accessible to the public because they are not on the main road and in areas poorly served by public transport. Field visits by NHRC staff including those to police stations and prisons are hampered by the limited availability of official transport; e.g., car or motorcycle. In some instances, the NHRC coordinator's personal vehicle doubles up for office use. This has a serious effect on the response time to urgent complaints, and the frequency of inspections.

The regional offices visited were equipped with a couple of personal computers, printers and a photocopy machine. However, in spite of access to the internet, the offices have not been networked with each other and the head office in Colombo, for more efficient sharing and storage of information and quicker communication.

In 2007, the Commission's budget from the GoSL totalled Rs94 million, as compared to Rs74 million in 2006. It also received Rs54.2 million from donors in 2007, as compared to Rs55.7 million in 2006. The Commission had requested Rs170 million from the GoSL.

Its members complained that extracting even the modest amount allocated by the Treasury is a continuous battle: "We do not get at once all the money which has been approved. We are given two instalments every month but even this is not easy to get. Someone has to go to the Treasury regularly and beg for the money".⁴³

The disproportion between donor funding and state support is of extreme concern. The funds that are received from the public exchequer are evidently insufficient for the Commission to meet its core functions of human rights protection and promotion, as they are allocated to salaries and fixed costs, whereas donor funding supports project and programme costs but presumably reflect donor priorities rather than those of the Commission.

Donors have included The Asia Foundation (TAF), Oxfam-GB, United Nations Children Fund (UNICEF), United Nations Development Programme (UNDP), and the United Nations High Commissioner for Refugees (UNHCR).

Since 2007, the Commission has also confronted difficulties in attracting and extending donor funding from bilateral and international non-governmental sources, because of disquiet over the selection and appointment of its members and consequently the perceived lack of independence from the GoSL, as well as its hostile relationship with human rights non-governmental organisations.

⁴³ Sarasi Wijeratne, "Human Rights Commission lacks vital resources", *The Morning Leader*, 16 May 2007.

III. Effectiveness

A. Mandate and Powers

In assessing the effectiveness and performance of the Human Rights Commission of Sri Lanka, it will be useful to review its mandate and powers so as to identify the scope and limits of its authority.

The mandate of the Commission is as follows:⁴⁴

- Conduct inquiries and investigations into (administrative) procedures to ensure compliance with fundamental rights and respect for, and observance of, fundamental rights;
- Inquire into and investigate complaints of infringements or imminent infringements of fundamental rights and their resolution through conciliation and mediation;
- Advise and assist Government in the preparation of legislation and administrative directives and procedures for the promotion and protection of human rights;
- Recommend to Government, measures to ensure that national laws and administrative procedures are consistent with international human rights norms and standards;
- Recommend to Government, treaties and other international human rights instruments to which Sri Lanka should subscribe or accede;
- Promote awareness of, and provide education on, human rights.

In comparison to the responsibilities identified for national human rights institutions in the Paris Principles⁴⁵, the mandate is unsatisfactory. For instance, the Commission ought to be encouraged to publicise its recommendations and opinions. The NHRC does not. The Commission should act as an early warning signal drawing the Government's attention to systematic human rights violations and make recommendations for their end. The NHRC does not.

The Commission should cooperate with the United Nations and its specialised agencies; regional institutions and other national institutions. The NHRC's engagement with the UN system has been low and has declined even further since 2006: confined most recently to the collection and provision of information on child soldiers pursuant to Security Council Resolution 1612. It should be noted that this is a concern favoured by the GoSL because of the LTTE's practise of under-age recruitment, and was therefore of political utility to the former in marshalling international support for its domestic 'war against terrorism'.

⁴⁴ S.10(a-f) respectively, Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁴⁵ Para. 3(a-g), Paris Principles relating to the Status of National Institutions.

The NHRC did not submit a report to the Human Rights Council's Universal Periodic Review (UPR) of Sri Lanka in 2008. The NHRC has not submitted reports to UN Special Procedures Mandate Holders in the recent past.

The NHRC also did not engage with the Durban Review Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance in April 2009, despite the express injunction in the Paris Principles on the role of national human rights institutions in combating racial discrimination, and the national context of a 26-year war that was both cause and consequence of human rights violations experienced by the ethnic minority, Northern and Eastern Tamil community.

Meanwhile, the powers of the Commission are as follows:⁴⁶

- Investigate any infringement or imminent infringement of fundamental rights;
- Appoint Provincial-level sub-committees, as necessary, to exercise powers of the Commission as delegated by it;
- Intervene, with the permission of court, in any judicial proceedings relating to the infringement or imminent infringement of fundamental rights;
- Monitor the welfare of persons detained by judicial order or otherwise, by regular inspection of their places of detention, and to make recommendations as necessary for the improvement of their conditions;
- Take such steps as may be directed by the Supreme Court, in respect of any matter referred to it by the Supreme Court;
- Undertake research into, and promote awareness of, human rights by conducting programmes, seminars, and workshops, and disseminating the results of such research;
- Award such sums of money as it may decide to a complainant or person acting on behalf of the complainant to defray the expenses incurred in making a complaint alleging the infringement or imminent infringement of a fundamental right of the person concerned;
- Do "all such other things as are necessary or conducive to the discharge of its functions".

The NHRC since inception has failed to exercise all of its powers and to the maximum degree possible. For instance, it has not sought opportunities to intervene in an *amicus curiae* capacity in the course of fundamental rights applications. Instead, it has been content for the Supreme Court to refer certain issues in cases before that Court to the Commission, and only then submit its opinion. Neither has it delegated its powers at Provincial-level that would

⁴⁶ S.11(a-h) respectively, Human Rights Commission of Sri Lanka Act, No.21 of 1996.

have helped bring the Commission closer to victims, and strengthen the authority of its regional offices there.

The NHRC must be informed, within 48 hours, of the arrest or detention of any person pursuant to the Prevention of Terrorism Act and emergency regulations under the Public Security Ordinance, as well as the place of detention.⁴⁷ The Commission must also be informed of release or transfer of the detainee. The NHRC maintains a database of those detained under these provisions so that their relatives can trace them, and registered 1,317 in 2008⁴⁸ and 2,681 Detention Orders in 2007.⁴⁹ Although it is an offence not to inform the Commission of such arrest or detention or to obstruct the Commission, punishable by imprisonment for a period not exceeding one year or a fine of Rs5,000 or both,⁵⁰ it is known that many such arrests are not notified to them. In these instances those in remand are at greatest risk of extra-judicial killing.

The investigative powers of the Commission are elaborated further in its enabling law as follows:

- Inquire and report into any matter that may be referred to it by the Supreme Court in its hearing of a fundamental rights application;⁵¹
- Investigate an allegation of infringement or imminent infringement of a fundamental right of a person or group of persons either on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or on its own motion. This complaint may arise through executive or administrative action or an act committed by any person that constitutes an offence under the Prevention of Terrorism Act.⁵²

There are a number of points of interest here.

Firstly, the Commission is authorised to initiate *suo moto* ('own motion' applications), even in the absence of a complaint being received. The NHRC has not used this authority as boldly as it could. Instead, it takes a reactive approach of waiting for a complaint to be lodged even in the case of an incident in the public domain. Frequently, its officers when questioned as to their inaction pronounce themselves helpless to act without a formal complaint having been filed. Yet, these officers know very well that the victims of violations fear confronting their abuser, knowing that the Commission is unable to protect them from intimidation and further harm. It is therefore all the more pernicious that in many instances the identity of complainants has been at best unwittingly, and at worst knowingly, divulged

⁴⁷ S.28(1), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁴⁸ Human Rights Commission of Sri Lanka, *Report to 14th Annual Meeting of the Asia-Pacific Forum of National Human Rights Institutions*, 31 July 2009, at p.4, www.asiapacificforum.net/about/annual-meetings/14th-jordan-2009/downloads/apf-member-reports/Sri_Lanka_Report_to_APF.doc.

⁴⁹ Human Rights Commission of Sri Lanka, *Annual Report 2006 & 2007*, Colombo 2008, at p.25.

⁵⁰ S.28(3), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁵¹ S.12(1), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁵² S.14, Human Rights Commission of Sri Lanka Act, No.21 of 1996.

by NHRC officers to the police, including when the perpetrator is a police officer or is protected by the police, leading to further retribution.

Secondly, the Commission may commence investigations even where the infringement has not taken place, nor is ongoing, but rather is anticipated or imminent. There were opportunities for the Commission to invoke this power on its own motion in 2008, for example, in the case of large numbers of persons displaced through conflict, however these were ignored.

Thirdly, complaints may be lodged not only by the complainant but also by a “person acting on behalf of an aggrieved person” who is generally legal counsel. However, this broadening of *locus standi* is still too restrictive, and ought to be expanded to allow any person or group acting in the public interest to file a complaint regarding an infringement or imminent infringement.⁵³

Finally, the NHRC is empowered to entertain complaints against non-state actors where the offences committed constitute an offence under the Prevention of Terrorism Act. This clause was clearly inserted to “balance” violations by state and non-state actors, specifically the armed separatist Liberation Tigers of Tamil Eelam (LTTE). However, in practice, this power has not been invoked by the NHRC because it is unable to compel a non-state actor that is not within the jurisdiction of the State to be present for inquiries, or to undertake investigations where those violations were committed in areas under LTTE control.

Meanwhile, the NHRC is unable under its enabling Act to entertain complaints regarding infringements or imminent infringement of non-state actors in general, for example, business organisations or private health and education providers. Opinion has been, and will continue to be, divided within the domestic human rights community as to whether this is a merit or a failing. For instance, it has been argued that expanding the NHRC’s mandate “distorts the work of the Commission and limits its effectiveness and efficiency”⁵⁴ by overloading an already stretched institution and diluting its focus on State violations; and tantamount to equating non-state actors to the State thereby obscuring their differentiated responsibilities under national and international human rights law.

B. Complaints Handling

The complaints handling process as provided in the enabling law is that the Commission should conduct an investigation upon receipt of a complaint and inform the complainant

⁵³ Kishali Pinto-Jayawardena, *The Rule of Law in Decline in Sri Lanka: Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka*, Rehabilitation and Research Centre for Torture Victims, Copenhagen, 2009, at p.195.

⁵⁴ Neelan Tiruchelvam, PC, MP, “Human Rights Commission Bill” in Lisa M. Kois (ed.), *Transcending the Bitter Legacy: Selected Parliamentary Speeches*, International Centre for Ethnic Studies, Colombo, 2000, at p.25.

within 30 days if it decides the complaint does not fall within its mandate.⁵⁵ However, there is no duty on the Commission to give reasons for its decision.

There is no time bar imposed by the NHRC's enabling law within which a complaint must be filed. Therefore, the human rights community was stunned when the NHRC's Commissioners determined in 2007 that complaints would be entertained only within three months of the alleged wrong or harm (Circular No.7 of 20 June 2007).

The justification advanced by one Commissioner was that this rule is intended to reduce the number of "false complaints"⁵⁶ received. In response to the outrage that erupted, the NHRC claimed to be flexible and to accept complaints within one year of the incident.

However, as recently as 1 April 2009, the Commission refused to entertain a complaint (regarding police inaction following a brutal assault on the complainant by associates of a known police informant), on the basis that it had been communicated more than three months after the incident.⁵⁷ Interviews with NHRC regional coordinators in mid-2009 also confirmed that the time-bar is in operation and is used to disqualify complaints made more than three months after the alleged violation, excepting cases of torture and pension irregularities.

The self-imposed time limit is arbitrary and capricious, and unjust to the powerless having nowhere to turn for relief and redress.

Where the Commission decides to proceed with the complaint, it has several options: it may (i) refer the matter for conciliation or mediation;⁵⁸ (ii) recommend prosecution of the offending party to the relevant authorities;⁵⁹ (iii) refer the matter to any court with appropriate jurisdiction;⁶⁰ (iv) make recommendations to the relevant authority with a view to preventing or remedying the infringement or its continuance.⁶¹

The belief of Commission staff is that recourse to conciliation or mediation is always preferable and always to be encouraged. This has extended to even complaints arising from serious violations of human rights. One of the difficulties is that the Commission identifies too closely with the State and the public bureaucracy and is loath to take punitive action against other public servants. It is often conciliatory when it should be uncompromising; and often meek when it should be aggressive.

⁵⁵ S.15(1), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁵⁶ Isuri Kaviratne, "Human Rights Commission under fire", *The Sunday Times*, 29 June 2008.

⁵⁷ Asian Human Rights Commission, *SRI LANKA: A local criminal disables a man and police fail to act*, AHRC-UAC-057-2009, 10 June 2009.

⁵⁸ S.15(2), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁵⁹ S.15(3)(a), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁶⁰ S.15(3)(b), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁶¹ S.15(3)(c), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

It is also true that the Commission has been hampered in exercising its power of referral to a judicial tribunal by the absence of Supreme Court Rules on procedure more than 10 years since its creation. However, it has not pushed for such rules either.

Where conciliation or mediation is not possible or practical, and inquiries having been conducted, the head office in Colombo will issue its recommendation. The Commission may direct any state authority or person or persons to report, within a specified period, of the action taken to give effect to its recommendation.⁶²

The NHRC lacks the power to enforce its own recommendations. Instead, the only sanction at its disposal, when its recommendation is ignored or partially followed, is to make a report to the President on the matter, and the President in turn is obliged to place such report before Parliament. In 2008, some 88 reports were communicated to the President.⁶³ There is no procedure for the action to be taken by the legislature, nor time-frame within which Parliament must do so. In fact, the legislature has not intervened in the face of executive or administrative inaction on NHRC recommendations.

In December 2007, the Minister for Disaster Management and Human Rights claimed that reforms to the Commission's enabling law would be introduced to enforce its recommendations.⁶⁴ The reference made to judicial powers is disconcerting as national human rights institutions are explicitly not intended to be judicial forums. However, no such amendments have been presented to-date, and they are unlikely to have the political support of an overweening Executive that resists any encroachment on its power and patronage.

As at the end of 2008, the Commission's Head Office in Colombo received 6,574 complaints, of which 3,588 were deemed to fall within its mandate.⁶⁵ These statistics can be compared with the 7,611 complaints received in 2007, of which 4,615 were determined to be suitable for inquiry.⁶⁶ The fall in the number of complaints lodged with the NHRC in 2008, is discordant with the prevailing human rights environment that had shown no improvement in comparison to the preceding year.

Of the cases registered at the Commission's Colombo office in 2008, the largest categories (in descending order) are as follows.⁶⁷

⁶² S.15(7), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁶³ Human Rights Commission of Sri Lanka, *Report to 14th Annual Meeting of the Asia-Pacific Forum of National Human Rights Institutions*, 31 July 2009, at p.8, www.asiapacificforum.net/about/annual-meetings/14th-jordan-2009/downloads/apf-member-reports/Sri_Lanka_Report_to_APF.doc.

⁶⁴ Thushari Kalubowila, "Judicial powers to enforce Human Rights Commission recommendations", *Divaina*, 9 December 2007 (in Sinhala).

⁶⁵ See note #63 above (at p.1).

⁶⁶ Human Rights Commission of Sri Lanka, *Annual Report 2006 & 2007*, Colombo, 2008, at p.20.

⁶⁷ This is a modified version of data disclosed in Human Rights Commission of Sri Lanka, *Report to 14th Annual Meeting of the Asia-Pacific Forum of National Human Rights Institutions*, 31 July 2009, at pp.1-2, www.asiapacificforum.net/about/annual-meetings/14th-jordan-2009/downloads/apf-member-reports/Sri_Lanka_Report_to_APF.doc.

Public Sector Employment (i.e., recruitment, promotion, service extension, transfer, termination, interdiction)	598
Arrest/Detention	550
Torture	439
Inaction	345
School Admission	287
Land and Property	172
Missing Persons	147

As illustrated above, the case-load of the Commission's Head Office is dominated by complaints relating to public sector employment (for example, transfers, promotions, confirmation of permanent employment, etc.), school admissions (filed by aggrieved parents), and the acts or omissions of local government institutions and officials. Most complaints received by the NHRC apparently relate to alleged *mala fide* administrative acts of public officials, and where the complainant is often another public servant.

Of the cases registered at the ten regional offices of the National Human Rights Commission in 2008, the leading categories are:⁶⁸

Missing/Abduction/Disappearance	883
Arrest/Detention	767
Public Employment (i.e., promotion, transfers, recruitment, interdiction, service extension, retirement /termination)	529
Inaction	518
Property	371
Torture	337
School Admission	183

In the list above, the largest heads of complaint relate to 'disappearances' and abductions, and illegal arrests and detention, and are clearly conflict-related, as they were largely recorded in Vavuniya, Batticaloa, Trincomalee and Jaffna (in that order). However, most cases of torture were reported from outside conflict-affected regions and recorded in Matara, Kandy and Anuradhapura (in that order).

There was no let-up in the trend of serious violations of human rights into the first half of 2009: data obtained from police stations in the now 'pacified' Eastern Province by the

⁶⁸ *Ibid*, at pp.2-3.

Presidential Commission on Abductions and Disappearances revealed that in the first five months of 2009, some 331 cases of abductions, disappearances, unidentified bodies and unsolved killings were recorded.⁶⁹

IV. Consultation and Cooperation with Civil Society Organisations

There has been a highly strained relationship between the members of the Human Rights Commission of Sri Lanka and human rights organisations since 2006 as a direct result of their unconstitutional appointment.

The attitude of the Commission has ranged from non-cooperation to outright enmity and even a thinly veiled threat to impose an offence of contempt against organisations that contest the legality of the appointment of the Commission's members.⁷⁰

"[W]e refuse to have any dealings with those [NGOs] who consider us not lawfully appointed", said the Commission with candour in response to one of the reasons for its downgrading by the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights (ICC) in 2007.⁷¹

In a separate communiqué to the ICC, the NHRC alleged that NGOs critical of it had lobbied for its re-accreditation in order to "prevent donor aid" to the Commission, and with a view to "obtaining more funds for their activities".⁷² The missive was infused with prejudice, hostility and misinformation regarding those human rights NGOs and accused most of them of being unlawful organisations through non-registration with the GoSL's NGO Secretariat.

It should be noted that at no time has any human rights organisation in Sri Lanka challenged the legality of the Human Rights Commission itself, the objection has always been to the legitimacy of the Commissioners directly appointed after 2006.

Since the beginning of 2009, there has been a positive but still partial change of attitude within the Commission on this score, with three consultations with civil society organisations in January, March and June 2009, leading most concretely to a 'focal point' on human rights defenders within the Commission.⁷³ In regional offices, there is no such designated 'focal

⁶⁹ Shamindra Fernando, "Batticaloa still a cause for concern", *The Island*, 17 June 2009. The one-person Commission is headed by a former member of the Human Rights Commission (2006-09) and retired High Court Judge, Mahanama Tillekeratne.

⁷⁰ Amal de Chickera with Kishali Pinto Jayawardena, "The Human Rights Commission of Sri Lanka: Sombre Reflections and a Critical Evaluation" in Asian NGOs Network on National Institutions (ed.), *ANNI 2008 Report on the Performance and Establishment of National Human Rights Institutions in Asia*, FORUM-ASIA, Bangkok, 2008, pp.161-178, at pp.170-171.

⁷¹ "HRC responds to 'downgrading'", *Daily News*, 10 March 2008.

⁷² "Biased conclusions irk HR Commission", *Daily News*, 04 February 2008.

⁷³ The Asia-Pacific Forum of National Human Rights Institutions (APF), of which the National Human Rights Commission of Sri Lanka was a full member until APF's 14th annual meeting in 2009, affirmed in the concluding statement (para.26) at its 11th annual meeting in Suva, Fiji in 2006, that "the complementary roles of national institutions and non-governmental organisations as defenders of human rights and as human rights defenders themselves. It recognised the particular

point', and field interviews established that regional coordinators appeared to be unimpressed by the need for such a mechanism, and sometimes unfamiliar with the concept of 'human rights defenders'.

However, the NHRC continues to confine its formal interactions to handpicked organisations, and to avoid advocacy organisations that have been most vocal in their criticism of the selection process of the members of the Commission and the overall functioning of the Commission.

In evaluating the NHRC's relationship with civil society organisations, it is also necessary to differentiate between the attitudes of the Commissioners, head office staff, and the regional office staff.

It is the Commissioners (especially those from the judiciary) who have been most antagonistic towards local civil society organisations and most scornful of engagement with them. Of course, for reasons of financial support, international non-governmental organisations and UN agencies have been treated differently. Even the NHRC's officers recognise that this is unhelpful and understand the need for cooperation and even collaboration. However, they are answerable to the Commissioners and cannot without their support re-orient the Commission.

The regional offices have little option but to maintain cordial relations with civil society organisations in their districts because they are isolated, defenceless and starved of resources. It is NGOs who facilitate much of the public education and awareness-raising that NHRC staff do on human rights in the provinces. It is NGOs who are often most sympathetic to the infrastructure needs of the regional offices, and share or donate their resources. However, even at regional level and taking their cue from the head office, there is little structured consultation between the NHRC and civil society groups. Instead, relationships are personalised when they should be institutionalised.

On the whole, the overall approach of the Commission has fallen short of the ICC SCA's General Observation on the importance of maintaining "consistent relationships with civil society"⁷⁴ and the imperative for national institutions to "develop relations with the non-governmental organisations devoted to protecting and promoting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialised areas"⁷⁵.

responsibilities of national institutions towards human rights defenders and vice versa. It requested the [APF] secretariat to explore how the members of the Forum can protect and promote the rights of human rights defenders more effectively at regional and national levels", *LST Review*, Vol.16, Issue 225 (July 2006) at p.4.

⁷⁴ General Observation 2.1, *ICC Sub-Committee on Accreditation*, June 2009.

⁷⁵ Para.6(g), *Paris Principles relating to the Status of National Institutions*.

V. Conclusion

The non-appointment of Commissioners to the Human Rights Commission of Sri Lanka since May 2009 is a recent and ominous development. It is of a piece with the Government of Sri Lanka's decision in June 2009 not to renew the mandate of the Udalgama Commission into Serious Violations of Human Rights, though that Commission had not been able to complete its investigations into most of the cases before it.⁷⁶

Flush from its comprehensive military defeat of the Liberation Tigers of Tamil Eelam, the GoSL appears to have decided that it no longer needs even the 'window-dressing' of commissions of inquiry⁷⁷ to demonstrate its domestic capacity and willingness to respond to the human rights crisis, and therefore deflect pressure for international human rights monitoring in Sri Lanka.

In this transformed context, both the National Human Rights Commission and civil society organisations need to re-think their mode of interaction, affirming their joint right and responsibility as human rights defenders to promote and strive for the protection and realisation of human rights and fundamental freedoms at national and international levels,⁷⁸ while acknowledging their tensions and different identities. The alternative to mutual engagement may be mutual irrelevance.

VI. Recommendations on the National Human Rights Commission of Sri Lanka (NHRC)⁷⁹

1. The NHRC be empowered to investigate all violations of human rights and not only fundamental rights violations.
2. Any person or group acting in the public interest is allowed to bring an infringement or imminent infringement of human rights to the attention of the NHRC.
3. Amend the NHRC's enabling law to allow for its monitoring, advocacy, promotional activities and complaints handling functions to be extended to defined Non-State Actors.

⁷⁶ Chandani Kirinde, "The Commission acted as a deterrent: Justice Udalgama", *Sunday Times*, 21 June 2009.

⁷⁷ Amnesty International, *Twenty Years of Make-Believe: Sri Lanka's Commissions of Inquiry*, AI International Secretariat, London, 2009, ASA 37/005/2009.

⁷⁸ Art.1, *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*, GAR 53/144 of 9 December 1998. The UN 'Declaration on Human Rights Defenders' (as it is better known) has been translated by the Law & Society Trust and Rights Now into Sinhala, and by the Law & Society Trust into Tamil, and co-published with FORUM-ASIA in 2008.

⁷⁹ These recommendations are a modified and enlarged version of those put forward in Kishali Pinto-Jayawardena, *The Rule of Law in Decline in Sri Lanka: Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka*, Rehabilitation and Research Centre for Torture Victims, Copenhagen, 2009, at pp.214-215.

4. Decisions or recommendations of the NHRC are vested with legal force.
5. The NHRC be required to act speedily on any complaint of human rights violation; provide reasons in complaints it does not pursue; and be barred from abandoning admissible cases without the consent of the victim or the complainant.
6. The NHRC be required to conduct investigations in an environment that is non-threatening to the victim (for example, in cases of alleged torture not at its site of perpetration, such as a police station).
7. Severe penalties are imposed on NHRC staff that collude with alleged perpetrators of human rights violations or wilfully disclose the particulars of the victim to the alleged perpetrator.
8. A uniform procedure across NHRC offices is established when recording complaints, making preliminary inquiries, and gathering and evaluating relevant documents.
9. Non-interference in the NHRC's power of 'surprise visits' to any place of detention (not only police stations and prisons) and prompt publication and dissemination of its reports on those inspections.
10. Severe penalties are imposed on relevant public officers who breach their statutory duty to inform the NHRC of arrests under the Prevention of Terrorism Act and emergency regulations.
11. The power of the Minister to make regulations *inter alia* on conduct of investigations is removed to safeguard the NHRC's independence from the Executive.
12. Supreme Court rules of procedure enabling the NHRC to refer cases to the appropriate court are prescribed forthwith.
13. No time limits are imposed on the filing of complaints concerning serious violations of human rights.
14. Additional regional offices should be speedily established prioritising Mannar, Nuwara Eliya, Ratnapura, Galle and Hambantota.
15. The NHRC in the discharge of its mandate and powers adheres at all times to the Paris Principles relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights.

A REGIONAL OVERVIEW: HOW DO ASIAN NHRIs CHOOSE THEIR MEMBERS AND HOW DO THEY RECEIVE OUR COMPLAINTS?*

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

The 2009 ANNI Report reveals that in most countries in Asia, human rights defenders are often not consulted in the selection and appointment process of members of NHRIs. In some cases, the power to select and appoint is given solely to the executive branch of the government. In other cases, it is the legislative body that is given the discretion to select and appoint the members. In most cases, there is no prior consultation or an open announcement seeking nominations for the posts. Appointments are viewed as rewards to political allies of the appointing powers and more often than not, expertise and commitment to human rights are not given primary consideration.

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

I. Silencing Civil Society in the Selection and Appointment Processes of NHRIs

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

Under the Paris Principles, “[the composition of the national institutions and the appointment of its members, whether by means of an election or otherwise shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist

* This is the Introduction to *2009 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, edited by Emmerlyne Gil and Pia Alexandra Muzaffar Dawson, published by the Asian Forum for Human Rights and Development (FORUM-ASIA), Bangkok, 2009.

representation of the social forces (of civil society) involved in the promotion and protection of human rights.]”

Currently, in Asia, there are several methods by which members of NHRIs are selected and appointed. One method, which is the least recommended, is where the selection and appointment are done exclusively by the executive branch of the government. In the Philippines, the President has absolute discretion over the selection and appointment of members of the Commission on Human Rights of the Philippines (CHRP). There are no known rules of procedure for nomination, application, selection, and appointment of new Commissioners. There is also no space for civil society participation in the selection process. This is an undesirable model as it runs directly against the Paris Principles. Appointments that are done without any transparency or consultation with civil society may result in a set of members lacking the expertise, commitment and independence necessary to effectively promote and protect human rights. There is also a bigger chance for appointments to be treated by the appointing authority as ‘political rewards’ or concessions to close allies.

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

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

Another method by which members of NHRIs are selected and appointed in Asia is through appointments by the legislative branch of the government. In Mongolia, the parliament, the State Great Khural (SGK), appoints the members of the National Human Rights Commission of Mongolia (NHRCM) from nominees forwarded by the SGK’s Speaker. These nominees come from proposals from the President, the Parliamentary Standing Committee on Legal

Affairs and the Supreme Court. Civil society participation is nowhere to be found in this process of selecting and appointing members of the NHRCM. During the selection of the current set of members, non-governmental organizations raised the concern that they were unable to participate in the discussions at the SGK, nor were there any broad consultations with civil society groups prior to the selection of nominees. The current members of the NHRCM are from government institutions and often, because of this type of background, as noted in the report, "conflicts of interest emerge". For instance, after the violent riots that erupted in July 2008, the government of Mongolia detained at least 200 individuals alleged to be involved in these riots. The Chairperson of the NHRCM visited detention centres to check on the situation of these detainees. However, despite evidence of torture and malnutrition being suffered by the detainees, the Chairperson of the NHRCM announced that there were no human rights violations occurring within the detention centres. Many human rights groups viewed this statement as a manifestation of how the NHRCM can be co-opted by the government's efforts to project an image of peace and democracy to the international community. Many human rights groups believe that having strong government backgrounds makes members of the NHRCM tend to view the issues from the government's perspective, instead of looking at the situation critically and more objectively.

In other countries in Asia, members of the NHRI are selected and appointed by an autonomous body, which is more often than not, the same type of mechanism used to select members of the judiciary. This method has recently been implemented for the selection and appointment of members of the National Human Rights Commission of Thailand (NHRCT). The process in the past, as laid out under the 1997 Constitution, provided for a Selection Committee composed of 27 persons, which included at least 10 representatives from human rights NGOs. The 2007 Constitution has amended this process and now, the Selection Committee shall be composed of only 7 persons. These are the very same persons who select and appoint members of the judiciary in Thailand. The Selection Committee is now composed of:

- (1) The President of the Supreme Court of Justice,
- (2) President of the Constitutional Court,
- (3) President of the Supreme Administrative Court,
- (4) President of the House of Representatives,
- (5) Leader of the Opposition in the House of Representatives,
- (6) A person elected by the general assembly of the Supreme Court of Justice, and
- (7) A person elected by the general assembly of judges of the Supreme Administrative Court.

The new process effectively eliminated participation of civil society in the selection and appointment of members of the NHRCT.

The ramifications of this elimination of civil society participation immediately became clear after the names of the new Commissioners of the NHRCT were released. It should be noted that most of the new members are from government, one of them being a former officer of the

police force. The only representative from a “non-governmental organisation” is one man who is from a group campaigning against drunk-driving.

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

It is therefore clear that many countries in Asia where NHRIs exist, do not include or consider civil society voices in the selection and appointment process of members of NHRIs. There is a very limited space for human rights defenders to bring forward their nominees, nor is there any opportunity for them to examine or scrutinize the expertise, commitment, and independence of those who have been nominated as members. Many of the appointments are treated as ‘political favours’ or concessions to close allies of the appointing power. This therefore severely erodes the trust civil society has for members of the NHRI. This then leads to less engagement by civil society groups with the NHRIs.

II. A Feeble Response to Complaints

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

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

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

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

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

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

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

The lack of political will is also pointed to as a main factor as to why human rights groups view the National Human Rights Commission of Nepal (NHRCN) as slow and inefficient in receiving and handling complaints. Of the total registered 1,949 complaints during the fiscal year 2007/2008, only 376 cases were decided on and 7 still pending. Recommendations were made only to 73 cases. There are 728 cases that are still under investigation. Because of this

slow response to complaints, many victims of human rights violations file their complaints to other groups, such as the Bar Association, human rights NGOs, the police, with community leaders, or with Chief District officers. There is also a huge number of human rights complaints filed directly with the courts. According to the study conducted by the Advocacy Forum and the International Centre for Transitional Justice, only 10 percent of victims of human rights violations file complaints with the NHRCN. There is not much confidence placed in the willingness of the NHRCN to safeguard the rights of victims of human rights violations.

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

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

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

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

III. The Importance of Solidarity and Partnership

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

unfortunate that in Asia today, the voices of NGOs are silenced or not heard in the process of selecting and appointing members of NHRIs. It is mainly because of this that in Asia, the trust and confidence NGOs have in NHRIs have been severely eroded this past year. It is also believed that the type of leadership an NHRI has would shape the institution and determine whether it would be proactive and committed to responding to complaints of human rights violations.

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

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

STATEMENT OF THE ASIAN NGOs NETWORK ON NATIONAL HUMAN RIGHTS INSTITUTIONS (ANNI)*

This statement is prepared by the Asian Forum for Human Rights and Development (FORUM-ASIA), as convener of the Asian NGOs Network on National Human Rights Institutions (ANNI), and supported by a number of international, regional, and national non-governmental organizations from the Asian, Arab and Pacific regions.

In this year's report of the ANNI, two issues which are highly relevant to the region have been highlighted by human rights defenders from across the region. First, the independence of NHRIs, particularly examining the selection process of NHRIs, and second, the complaints-handling mechanisms of NHRIs or the process by which they take on cases of human rights violations reported to them.

From the reports, it was seen that the independence of NHRIs in Asia is at a decline. One primary reason for this is the highly-politicized selection and appointment process of commissioners, as well as the silencing of voices of human rights defenders in this selection and appointment process. We are especially concerned with the new selection and appointment process for the members of the National Human Rights Commission of Thailand (NHRCT). In the past, the process in Thailand embodied a best practice which included the participation of NGOs and human rights defenders. The new process, however, is now composed of the very same persons who select and appoint members of the judiciary in Thailand. The new process effectively eliminated the participation of civil society in the selection and appointment process of members of the NHRCT.

The ANNI also expresses its concern over the recent events in Korea threatening the National Human Rights Commission of Korea (NHRCK). The ANNI believes that the appointment of the new Chairperson was done in a non-transparent and non-consultative manner and directly contradicts the Paris Principles. We also express deep concern over the inexistence of pluralism in the National Human Rights Commission of India, noting that for the past 3 years, no woman has been appointed as member of this Commission, and cannot for almost another two years. It is clearly stipulated in the Paris Principles that appointment of members of an NHRI must be done "in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights".

The issue of selection and appointment of members of NHRIs cannot be emphasized enough because the ANNI believes that the independence and effectiveness of a national human rights institution relies to a great extent on the integrity, commitment and capacity of its leaders. Thus, the selection and appointment process is an essential cog in the wheel that would make an institution independent, accountable, transparent and effective.

* Presented at the 14th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions on 5 August 2009 in Amman, Jordan.

For the last two years, the ANNI has also been calling for a focal point within NHRIs on human rights defenders; and we still reiterate this call to member institutions of the APF. We note that so far, from the information we have gathered, it is only the Commission on Human Rights of the Philippines (CHRP) that has identified a working 'focal point' for human rights defenders within their institution. Some NHRIs claim that there is no need to set up a 'focal point' for the reason that they already have a complaints-handling mechanism that can be accessed by human rights defenders when they are threatened or at risk.

The 2009 ANNI Report reveals, however, that in many NHRIs across Asia, there are feeble responses to the complaints filed before them on violations of human rights. There are a variety of reasons behind this. One reason is that some NHRIs do not have full powers to receive complaints and pursue investigations on alleged violations of human rights. Another is that there is a lack of political will on the part of some NHRIs to urgently respond to complaints or to conduct investigations on human rights issues in their countries. Finally, the 2009 ANNI Report notes that some complaints-handling mechanisms are not accessible to victims of human rights violations. Many NHRIs only have offices in the capitals or the cities and it is difficult for victims from isolated areas to travel to these offices in order to lodge their complaints.

It is in this light that the ANNI would like to put forward the following recommendations to the Asia Pacific Forum and its member NHRIs:

First, we urge the APF to promote a transparent and consultative selection and appointment process among its member NHRIs, which would include civil society in all stages in the nomination and the selection of the candidates, and the examination of the qualifications of the candidates.

Second, we urge the APF to promote among its member institutions the concept of "pluralism" in the composition of NHRIs. Members of NHRIs should include representatives from various groups, including trade unions, ethnic groups or professions. When selecting and appointing members of NHRIs, gender, expertise and experience on various human rights issues should also be considered. To ensure pluralist composition of NHRIs, we urge that the APF develop specific guidelines that will diversify the powers of nomination and selection process of members of these institutions. The guidelines should also ensure that a check and balance mechanism is installed to avoid absolute powers vested in one authority. This would prevent the independence of NHRIs from being compromised easily and arbitrarily.

Third, we urge the APF to develop clear criteria to be considered by NHRIs to ensure that the candidates appointed as members of NHRIs are human rights experts that are independent, credible, and of high competence in the human rights field.

Fourth, we urge member institutions of the APF to undertake consultation with human rights defenders in formulating mechanisms for receiving and responding to cases of human rights violations. We reiterate what is stated in the report that if voices of human rights defenders are heard, there would be a sense of solidarity and partnership with NHRIs. Human rights

defenders would then readily engage with NHRIs and share with NHRIs their expertise and the networks they employ in defending victims on the ground. There is no doubt that a partnership like this would result in stronger NHRIs in Asia, and a more effective movement working for the promotion and protection of human rights in the region.

**RE-ACCREDITATION REVIEW OF THE HUMAN RIGHTS COMMISSION
OF SRI LANKA BY THE SUB-COMMITTEE ON ACCREDITATION (SCA)
OF THE INTERNATIONAL COORDINATING COMMITTEE (ICC)
OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND
PROTECTION OF HUMAN RIGHTS ***

Introduction

In March 2009, the International Coordinating Committee's Sub-Committee on Accreditation will review the Human Rights Commission of Sri Lanka's compliance with the Paris Principles relating to the status and functioning of national institutions for protection and promotion of human rights towards its re-accreditation.

In October 2007, the Sub-Committee on Accreditation (hereafter 'Sub-Committee') in its assessment of the Human Rights Commission of Sri Lanka (hereafter 'Commission'), recommended its re-accreditation from Status 'A' to Status 'B', recognising that the national institution was not fully in compliance with the Paris Principles.

This joint submission by the Law & Society Trust (LST)—a civil society human rights organisation in Sri Lanka—and the Asian Forum for Human Rights and Development (FORUM ASIA)—a regional human rights organisation based in Bangkok, Thailand—both members of the Asian NGOs Network on National Human Rights Institutions (ANNI), notes with regret the lack of progress by the Commission in fully implementing the October 2007 Recommendations of the Sub-Committee, and concludes that the Commission has not achieved compliance in law and in practice with the Paris Principles.

1. Appointment and Selection

Your Sub-Committee observed in 2007: *"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"*.

There has been no reconstitution of the membership of the Human Rights Commission since 2007 in accordance with constitutional standards of independence and integrity. The Chairman and Commissioners were directly appointed by the President in May 2006 contrary to the Constitutional provision¹ that appointment be made only on the recommendation of the Constitutional Council.

The members of the Commission have not acknowledged the unconstitutionality of their appointment nor made representations in public for its remedy. There is no recommendation

* In March 2009 – Submission by the Law & Society Trust (Sri Lanka) in collaboration with FORUM ASIA (Thailand) to the ICC-SCA in March 2009.

¹ A.41B, Constitution of the Democratic Socialist Republic of Sri Lanka, as amended by s.2, Seventeenth Amendment to the Constitution, 3 October 2001.

or opinion expressed on this matter in the Commission's recent report of activities published in 2008.

The current term of office of the members of the Commission will lapse in April 2009.² Presently, a public interest petition before the Supreme Court has compelled judicial intervention towards the re-activation of the Constitutional Council.³ However, it is still unclear if and when it will be allowed by the Executive to become operational.

Your Sub-Committee's firm reiteration of the principle of independence from Government in the appointment of Commissioners, in compliance with the statute establishing the Human Rights Commission and the Constitution of Sri Lanka; the criterion for selection of Commissioners from "among persons having knowledge of, or practical experience in, matters relating to human rights"⁴; and ensuring the plural representation of human rights defenders through a transparent and consultative process in accordance with the ICC's General Observation on selection and appointment of the governing body (adopted in its October 2006 session), can be of decisive influence in the method of appointment and composition of the Commission after April 2009.

2. Independence and Objectivity

Your Sub-Committee observed in 2007: *"The Commission did not take measures to ensure its independent character and political objectivity, as required by the Paris Principles"*.

Since the resumption of armed hostilities between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam in 2006, there has been a sharp increase in serious violations of human rights, impunity for human rights abuses, and generalised repression and intimidation of critical or dissenting opinion.

However, in stark contrast to the volume and frequency of reports on Sri Lanka emanating from UN Special Procedures Mandate Holders, and international and national non-governmental organisations, not a single report into killings, abductions and disappearances or even press release has originated from the Human Rights Commission on the human rights crisis in Sri Lanka.

When asked about public perceptions that the Commission is ineffective, two of the Commissioners (including its Chairman) responded that such allegations are completely unjustified: "They think we should criticise and embarrass the government but they never report the good things we do".⁵

² S.3(5), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

³ "Constitutional Council: Concerned parties should meet soon", *Daily Mirror*, 5 December 2008, www.dailymirror.lk/DM_BLOG/Sections/frmNewsDetailView.aspx?ARTID=34253.

⁴ S.3(1), Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁵ "Human Rights Commission lacks vital resources", *The Morning Leader*, 16 May 2007, www.themorningleader.lk/20070516/interviews.html.

The only inference that can be drawn is that the Commission believes public condemnation of gross human rights abuses in the context of conflict to be confrontational of political and military authorities and unsound in the discharge of its mandate. However, the impression that is conveyed is that it lacks independence from Government and shows no evidence of political objectivity.

3. Conduct in a State of Emergency

Your Sub-Committee observed in 2007: “[T]he Sub-Committee expects that, in the situation of a coup d’état or a state of emergency, an NHRI will conduct itself with a heightened sense of vigilance and independence in the exercise of its mandate”.

Sri Lanka has been in a continuous state of emergency since 13 August 2005, while draconian counter-terrorist regulations were introduced on 6 December 2006.

However, civil society organisations in Sri Lanka have since not observed any discernible change in the nature of activities, discharge of mandate, exercise of powers, nor public pronouncements of the Human Rights Commission.

The UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment of Punishment in his recent report on Sri Lanka expressed his dissatisfaction with the capacity of the Commission to prevent torture through making “regular and unannounced visits to all places of detention throughout the country at any time, to conduct private interviews with detainees, and to subject them to thorough independent medical examinations”.⁶

In 2007 the Commission states that it conducted two fact finding inquiries, into the massacre of 17 aid workers in Mutur and into conditions of persons detained under emergency regulations at the Boossa camp. However, the findings and recommendations have not been made public.

4. Civil Society Relationships

Your Sub-Committee observed in 2007: “[T]he importance for NHRIs to maintain consistent relationships with civil society”.

Since 2006, the Human Rights Commission has adopted a policy of selective engagement with civil society organisations that have not criticised its method of appointment and selection and that are not engaged in consistent human rights monitoring, reporting and advocacy.

⁶ Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, on Mission to Sri Lanka, A/HRC/17/3/Add.6, 26 February 2008, Para.76.

Thus in 2007, it collaborated with one civil society organisation (engaged in election monitoring) by sharing its records on disappearances and abductions reported to the Commission.⁷ However, it has refused to do the same with other organisations.

On 22 January 2009, the Commission invited a few civil society organisations to a meeting but had no explanation as to the basis of selection and why other organisations (such as the Law & Society Trust) had not been invited. There has been no follow up since from the Commission to the suggestion of a plural and more representative meeting of human rights organisations, and a structured framework for constructive collaboration between human rights defenders and the Commission.

5. Annual Reports

Your Sub-Committee observed in 2007: *“The Commission has failed to issue annual reports on human rights as required by the Paris Principles”*.

In 2008, the Human Rights Commission published a report on its activities spanning the years 2006 and 2007 and made it available on its website⁸.

While welcoming the publication of the recent report, we are concerned about its unwillingness to even acknowledge the scale and seriousness of the human rights crisis in Sri Lanka.

Your Sub-Committee’s attention is also drawn to the distinction between an activity report of an NHRI, which important as it is, cannot substitute for regular reports on the human rights situation with data, analysis and recommendations.

For example the most recent report states that 7,611 complaints were received in 2007 by the Commission’s main office in Colombo, and that 1,840 of these were disposed of in the same year.⁹ However, these complaints are not disaggregated, and therefore it is uncertain how many relates to serious human rights violations relating to right to life, right not to be tortured, and so on in contrast to complaints on school admissions, transfers and promotions of public officers etc. Some breakdown is provided in complaints received at some regional offices of the Commission but not in a uniform manner.

⁷ The report published, drawing on information provided by the Human Rights Commission and the Police Department, identified the Liberation Tigers of Tamil Eelam, the Tamil paramilitary group associated with former LTTE commander Vinayagamoorthi Muralitharan (aka ‘Karuna’) and “underworld gangs” of responsibility for killings, disappearances and abductions, and therefore exonerating State actors.

⁸ www.hrcsl.lk/english/Annual%20Reports.html.

⁹ Human Rights Commission of Sri Lanka, *Annual Report 2006 & 2007*, Colombo, 2008, p.20.

Conclusion

While mindful of the financial and human resource constraints faced by the Human Rights Commission of Sri Lanka, and weaknesses in its enabling legislation that limit its powers and functions, we believe that the Commission has not fully implemented your Sub-Committee's recommendations from 2007.

Your Committee's review of the Commission's status is an opportunity to encourage the Commission to redouble its efforts and to recover its credibility and legitimacy as a national human rights institution in conformity with the Paris Principles.

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Law and Social Sciences Research Network (LASSnet)

The Law and Social Sciences Research Network (LASSnet), which is hosted at lassnet.blogspot.com, was constituted to map the field of Law and Social Sciences in South Asia. The network started with 14 people in conversation at the Centre for the Study of Law and Governance, Jawaharlal Nehru University (JNU) in December 2007. The network has grown to over 210 members in a year and a half. This was the first time this virtual community met. In many ways, the energy that each person brought to the conference signalled the consolidation of the academic and political interest in situating inter-disciplinarity at the heart of the study of law, society and politics.

The inaugural Law and Social Sciences Research Network (LASSnet) Conference held at the Jawaharlal Nehru University, New Delhi, from 8-11 January 2009 marked the coming of age of the law and social science research community in India. The conference was organised by the Centre for the Study of Law and Governance, JNU, with support from the Ford Foundation, New Delhi and the Max Planck Institute for Social Anthropology, Halle. The conference was held over four days where over a hundred papers were presented in 35 panels spread over seven sessions (see www.lassnet.org & lassnet.blogspot.com).

The next LASSnet conference will be hosted by the Alternative Law Forum and Centre for Study of Culture and Society in Bangalore. The network continues to be anchored at the Centre for the Study of Law and Governance. If you wish to be part of the LASSnet community, please write to: lassnet@gmail.com.

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