April 2002 ▪ Vol. 1 , No. 2

article 2

2(3). Each State Party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c) To ensure that the competent authorities shall enforce such remedies when granted.

of the International Covenant on Civil and Political Rights

A sister publication of Human Rights SOLIDARITY

International Covenant on Civil and Political Rights (ICCPR)

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

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Statement on the International Launch of *article 2*

Asian Legal Resource Centre

The international launch of *article 2* was successfully held on the 3 April 2002 at the United Nations Office in Geneva, Switzerland, on the occasion of the 58th Session of the Commission on Human Rights. The event was attended by a number of members of the NGO community, state delegations and the press. The event proceeded with the format of speeches by a panel of speakers and a discussion. The speakers at the launching were: Dr. Bertrand Ramcharan, the Deputy High Commissioner for Human Rights, Mr. Param Cumaraswamy, Special Rapporteur on the Independence of Judges and Lawyers, Mr. Eric Sottas, Director of the World Organization Against Torture (OMCT) and Mr. Basil Fernando, Executive Director of the Asian Legal Resource Centre (ALRC) and the Asian Human Rights Commission (AHRC). The event was chaired by Mr. Sanjeewa Liyanage, Executive Officer of the ALRC and AHRC. All the speakers congratulated the ALRC for taking the initiative to launch this publication which is on the important theme of implementation of rights.

Dr. Ramcharan pointed out that in the drafting of the International Covenant on Civil and Political Rights (ICCPR), the implementation of rights played a very important part and that the availability of remedies before courts are important to make rights meaningful. He further said that judicial intervention is central in the promotion of human rights and judges bear responsibility to assist the wholesome growth of the society and to contribute to its stability and respect for rights.

Mr. Param Cumaraswamy said that during the last 50 years the international community has concentrated on formulations of human rights norms and standards and the next 50 years must be focussed on the implementation of these norms and standards in each country. He went on to say that, it is not only the judiciary that bear responsibility for the implementation of rights but the legislature and the executive as well and sometimes the judiciary is prevented from exercising their function by the executive or the legislature. He also said that addressing of these problems is very necessary if human rights are to be advanced.

Mr. Eric Sottas pointed out that it is a feature of global development today to weaken the state. When the state is weakened its law enforcement capacity is also weakened. As a result the rule of law is endangered. This global phenomenon needs to be seriously addressed. This is particularly so regarding the less developed countries. This degeneration of the rule of law affects the fabric of protection of human rights. Thus the strenthening of the protection mechanisms requires the addressing of the fundamental problems affecting the implementation of human rights and the rule of law.

Mr. Basil Fernando said that *article 2* has been launched to highlight one of the central problems facing human rights protection, which is the failure to implement rights. The issue is about the entire administration of justice, including police, prosecution and the judiciary. The police and the prosecution can act in a way to prevent investigations of human rights violations and thus creating the excuse of absence of evidence to justify failure to prosecute. This is becoming a common feature in many countries in Asia. Thus the ratifications of international human rights conventions and even constitutional recognition of rights may not lead to improvement of rights when the justice system is flawed or sabotaged.

There was a lively discussion during the event following these speeches.

For effective national protection systems*

Dr. Bertrand Ramcharan,
Deputy High Commissioner for Human Rights

I wanted to be here and to congratulate you on this initiative that you launch in issuing this publication *article 2*.

Allow me to say that there is book edited by Professor Louis Henkin and there is a chapter in this book by Professor Oscar Schachter, in which he looks at the duty to respect and to ensure human rights, including the issue of remedies. There is a good part on the drafting history of the International Covenant on Civil and Political Rights (ICCPR), and article 2 on remedies. Allow me to remind you of some of the things he has to say.

> While the text of the Covenant does not specify the nature of such domestic remedies, we may assume that undoing, repairing, and compensating for violation constitute appropriate remedies (as well as ways of giving effect to the rights in accordance with paragraph 2). If a violation is found, it must be ended and undone (if possible), and its fruits not used or repaired.

I just want to cite some of the ideas that were in the minds of the drafters, mainly, first of all the importance of the remedies. Secondly he says that

> The drafting of subparagraph (b) raised two issues: (1) whether judicial remedies should be mandatory and (2) whether the guarantee of effective remedies could be adequately met by recourse to administrative and legislative authorities. Within the drafting committees strong sentiment was expressed in favour of judicial remedies.

I will come back to this topic in a little while. Then he points out that

> There are other implications of the obligation in Article 2(3) to ensure an effective remedy and to provide for the determination of individual rights by judicial or other competent authority. If the courts are necessarily bound by legislative enactments and may never set them aside whatever their incompatibility with the Covenant, can it be said that a truly effective remedy exists for the violation of the rights of an individual?

* Edited text of a speech at the International Launch of *article 2*

He goes on to reveal the notion of remedies, going back to the time of the English Revolution of 1688. He concludes by saying "that the significance (of article 2) lies precisely in the unequivocal obligation to provide an effective remedy to 'any person' whose rights are recognized". I thought that I would revisit this because the notion of the Covenant is that states should take the norms in the Covenant home, to establish national protection systems that should embrace constitutional compliance, legislative compliance, the possibility of going before the courts to protect one's rights, educating about human rights, monitoring communities that are in need of protection and finally, paying particular attention to institutions that can help to protect the individuals or the group such as ombudsperson. So this notion of the norms that are elaborated internationally and then taken home nationally goes with the notion of a national protection system. And the significance of article 2 and the right to a remedy is precisely this. If you can't go before the courts and get vindication of your rights then what are you left with? Then the notion of a national protection system will be an artificial notion.

"If you can't go before the courts and get vindication of your rights then what are you left with? Then the notion of a national protection system will be an artificial notion"

I will not talk about any country but my own, Guyana. I just wrote a book on the highest court of my country, which came out in the last two months or so. My country became independent in 1966 and it abolished appeals to the Privy Council in 1969. I did this research for reasons that I will not go into here, but I was particularly interested in the following issues. Could one say that the courts were performing a role to stitch together a multi-ethnic society? Could one say that the international norms had penetrated the courts? And if there are situations in which individuals felt that they were in need of protection, and then they went to the courts, did they get that protection? I have to tell you that the answers to all three of these questions, in our instance, were in the negative. And so basing myself in my own country I came to the view that if the courts are not performing their role then the protection of human rights in a country is seriously deficient.

Let me take you back a little bit in time, to the mid-70s when the United Nations was investigating violations of human rights in Chile. I worked on the early investigations and as the situation was sliding the question arose, were the courts helped to provide the remedy of *habeas corpus*? Were the courts helped to stem the slide towards gross violation of human rights? And quite frankly the courts were not. If we go back to the early report of the working group of the United Nations on human rights in Chile you will see in those chapters under the judiciary—and the first chapter I wrote myself—there is this notion that the courts' failure to protect human rights would result in a slide towards the abyss that they were eventually to experience in that country.

When I was doing the research for this book [on courts in Guyana], I came across a book written on the famous chief justice of Tanzania. The book is written as a biography and I think the chief justice's name is Dr. Francis Nyalali. There you see a country

struggling with nation building. Then you see the heroic efforts of Chief Justice Nyalali trying to uphold the role of the judiciary in that country. I actually think, ladies and gentlemen, in the United Nations we must pay particularly more attention in the future to the role of the courts in the protection of human rights.

"Judges should be aware of international human rights law; judges should provide relief where needed; judges should understand, particularly in developing countries, that they have a role in helping to hold the country together"

Inter-Rights and the Commonwealth Secretariat organised a series of six or eight judicial colloquiums. They brought together judges from different parts of the world to look precisely at the issue of how it is that one can impart information and exchange experiences among judges on their role in the protection of human rights. And the last of these series was organised in the capital of my country, Georgetown, and I happened to be there. They came up with the Georgetown conclusions on the role of the judiciary in the protection of human rights. And there you see the following proposition: judges should be aware of international human rights law; judges should provide relief where needed; judges should understand, particularly in developing countries, that they have a role in helping to hold the country together. Colloquiums were held in Bangalore, Cambridge, Georgetown and other parts of the world, and judges themselves were expressing and attaching importance to the judicial protection of human rights.

Since you gentlemen who are organising this are coming from Asian backgrounds I would invite your attention to the meeting of Asian chief justices and the report of this workshop published as a background document of the Vienna Conference. There you see the importance that they attach to the role of judges in the protection of human rights.

I want to conclude by thanking you a) for launching this publication; b) for echoing the importance of remedies, particularly judicial remedies and c) for sharing the sense of breakdown in judicial protection in different parts of the world that is a leading cause for the failure to protect human rights. Finally, I hope that in the future together we will be able to stimulate more activities. I never say for one moment 'train judges', because I never think that we will have to train judges, but I would say to you that we must attach much more importance to giving them basic information about norms of jurisprudence.

Comments arising out of questions from the floor

I often tell myself that the story of human rights is a story of concentric circles. There is a commitment to human rights in the United Nations Charter and in the Universal Declaration. And the centre of these concentric circles I would call the principle of commitment. I think it is fair to say that countries far and wide share this commitment to human rights. And outside this centre of commitment there is this first circle which I would say is the circle of achievements. We have made some progress when it comes to the norms, when it comes to the acceptance of basic norms and when it comes to developing a culture of rights globally. Outside of it we have this second circle which I would call circle of immediate opportunities. These are the things that we might

be able to achieve in the coming period. And beyond that there is a much larger circle, the circle of the ground still to be achieved. The UN and the international community are there to bring the states of the world and the international human rights movement together, but they will never replace protection within countries. That's why I place before you this notion of a protection system within each country. At the end of the day I would like to say by placing this imagery of expanding circles before you is to say that there is a little circle of some achievements and there are much larger circles outside that we still have to cover to have effective protection. So it is the challenge of each generation to push the first circle outwards.

"The UN and the international community are there to bring the states of the world and the international human rights movement together, but they will never replace protection within countries"

Not by judiciary alone*

Param Cumaraswamy, Special Rapporteur
on the Independence of Judges and Lawyers

I am indeed honored to be invited to participate in launching this new publication *article 2* by the Asian Legal Resource Centre (ALRC). The ALRC must be congratulated for this innovative undertaking. I have been associated with the Centre for many years. It is today one of the leading regional NGOs in Asia analysing human rights issues and exposing human rights violations through its monthly publication *Human Rights SOLIDARITY*. Thus through such publications human rights consciousness is kept alive in the region. On a personal note, I would like to congratulate Basil Fernando, who is a live wire behind the Centre. His relentless and untiring efforts for the cause of human rights in the Asian region are most remarkable and admirable.

It is true that over the years the international human rights community has been involved in the articulation of the rights throughout the International Bill of Rights. I understand that 148 countries having ratified the ICCPR and 145 the International Covenant on Economic, Social and Cultural Rights (ICESCR). However not much has been done for states to implement these rights. Implementation processes have been extremely slow. As the Deputy High Commissioner just mentioned, article 2 provides duties for governments to apply and guarantee all the rights set out in the Covenants. Of course under international law the implementation of human rights is primarily a domestic matter. Hence, the duty of government is to do so. However, events have shown and continue to show that in our daily lives these rights are violated often most blatantly and with impunity—not only by governments but also by non-state actors.

While a lot has been said about the role of the judiciary, by itself the judiciary cannot be the sole guardian of human rights. The legislature and executive have equally important roles in this exercise and the effectiveness of the judiciary depends on the support and respect it gets from these other two arms of the government. In the last year we saw how an independent Supreme Court in Zimbabwe was assaulted by the high-handed power of

* Edited text of a speech at the International Launch of *article 2*

the executive arm. When the judiciary itself requires protection how can it independently and impartially remedy violations of human rights? Having held this mandate for the last seven years, and having intervened in about 100 countries, I've seen how agents of justice systems have been subjected to all forms of threats and harassment, including assassination. Hence, we need outside support as well for the protection and remedying of human rights violations. This is where national human rights institutions can play an important role. However, many of those set up recently are not as effective as they ought to be. They hardly meet the minimum standards of the Paris Principles. Hence, constant vigilance of the civil society through the NGO community becomes vital, as does the raising of awareness and exertion of pressure on states to comply with their treaty obligations. In the final analysis, public opinion is the most effective pressure on governments who violate human rights. We saw this in the way of people power was exerted in two countries in Asia, the Philippines and Indonesia. In Thailand massive public demonstration also brought down a particular government.

> "There are today enough standards and enough norms. What I would really like to see in the next 50 years is committed implementation of these standards"

In the last 50 years, the international community has been engaged in standard setting and the formulation of norms for the promotion and protection of human rights. There are today, in my opinion, enough standards and enough norms. What I would really like to see in the next 50 years is committed implementation of these standards. It is in this context that I see the relevance of this publication, *article 2*. It is a welcome initiative and I wish it every success.

Before I close, I want to touch on something the Deputy High Commissioner mentioned about, the Bangalore Principles, which are very fine principles that have been reiterated at several subsequent colloquiums. What I would really like is one step further that the Office of the High Commissioner could undertake if resources are available. It will be very useful to have a database where judgments of the apex courts on human rights issues are analysed and immediately disseminated to all judiciaries and all the heads of judiciaries in the world. There have been very interesting judgments from apex courts on human rights issues, but they are not disseminated to many parts of the world in a timely manner.

In this regard I will give you two experiences that I encountered recently. The Supreme Court of Canada has a very good collection of jurisprudence now on judicial independence, and how/if an independent court could really come in aid of human rights violations. Bangladesh has had related issues before its Supreme Court. The Chief Justice of Bangladesh—who has since retired—met me in Durban and one evening mentioned to me about the issues before his court. He asked me whether I know of any precedents and I mentioned to him about the decisions of the Supreme Court of Canada. But the Dhaka Supreme Courts did not have the Canadian dominion law reports. What we did was to send a quick email to the Chief Justice of Canada to supply a

whole set of judgments on a particular issue to the Bangladesh Supreme Court. Three weeks later the case was heard and two months later the judgment was delivered in the Bangladesh Supreme Court, consistent with the principles set out in the judgments of the Supreme Court of Canada. Both countries shared the common law tradition. Hence you find how effective this kind of networking can be. This is why it will be extremely useful if we can have a database of these judgments collected, collated, edited and immediately disseminated to all the supreme courts.

"If we talk about training programmes on domestic implementation of international human rights norms, we really need to get judges from all countries involved and sensitised with regard to what other judges are doing"

I was in East Timor recently and saw the way the judges are trying to implement international human rights law, but they don't have adequate resources. They don't have a library, they don't have assistants, they don't have enough lawyers—these are the difficulties judiciaries in emerging countries are experiencing, and we can be more effective by giving them this kind of assistance. I had a similar experience in South Africa, where there was a case going before a South African court on the problem of provocation. The lawyers handling the matter asked me whether there was a precedent. I said yes, the Caribbean courts had one recently. Immediately they were very interested in this particular judgment. Immediately the citations were sent to South Africa and I think they are waiting for the judgement of that particular case. This is a kind of networking we can do. And with that note, I once again wish this publication all success.

Comments arising out of questions from the floor

On the domestic application of international human rights norms, that is the essence of the Bangalore Principles that the Deputy High Commissioner mentioned earlier. But unfortunately, those principles have been formulated based on the common law tradition. May I also add that judges today in many parts of the world are also going through what we call continuous legal education, because once they are appointed as judges it does not mean that they stop learning. They continue to learn and they attend courses as well. If we talk about training programmes on domestic implementation of international human rights norms, we really need to get judges from all countries involved and sensitised with regard to what other judges are doing. The Bangalore Principles goes to the extent that even if a country has not ratified the particular convention there are way for the courts to creatively implement international law on human rights.

Human rights implementation through stronger institutions*

Eric Sottas, Director,
World Organisation Against Torture

First of all I would like to thank the organizers for this invitation and to congratulate them for this dramatic step, because I think the problem of implementation is today one of the most difficult we have to address. I remember some years ago I was in Colombia speaking with some people who were some survivors of massacres in that country. They told me that they were very tired of training programmes, information etc., and what they needed was real protection and implementation of rights when violations were taking place.

The big advantage to speak after Bertrand Ramcharan and Param Cumaraswamy is that I don't need to spend time to enter into the question of the independence of judiciary. It has been dealt with very comprehensively. I will address another question that is complementary, which is the necessity to have stronger states and stronger international institutions. By stronger states I don't mean authoritarian states, but states able to really implement the rule of law. One of the problems we are facing at this moment is not only at the level of civil and political rights but at the level of all rights. As an organization fighting against torture [World Organisation Against Torture—OMCT] we have from the beginning tried to have a comprehensive approach that torture is not a problem *per se* but a result of different types of violations. Torture as it is mentioned in this excellent introduction—occurring more in the developing countries—is not a question of a culture of violence like we sometimes have here. It is also not a question of difference of attitudes. It is linked more to socio-economic problems. Under such circumstances I don't think that programmes for peace culture such as we have here will help a lot. People are not peaceful or violent because of the culture but the conditions in which they live.

From the beginning in the 1980s OMCT decided to study least-developed countries, to see what kind of linkages exist between their economic difficulties and the torture, disappearances and

* Edited text of a speech at the International Launch of *article 2*

“Unfair wealth distribution and the non-satisfaction of basic needs are the two elements that expand violence in society”

massacres taking place more often in these countries. One of the findings of our research was that in fact torture has developed in states where social tensions are exacerbated due to unfair distribution of national revenue. In other words, it is not poverty in itself that generates violence, but the wealth gap that exists in the same societies. If these disparities are felt more, and when the basic needs for food and health are not satisfied, resulting frustration often leads to indiscriminate violence. The elite often appears to be incapable of adopting sufficient measures, as they do not dare to endanger the privileges that legitimize their power, resulting in more severe repression.

I think what is important here is to know that unfair wealth distribution and the non-satisfaction of basic needs are probably the two elements that expand violence in society. Unfair distribution, I would say, is the same all over the world. If you compare how revenue is distributed in a developed country like Switzerland, you will see that the gap is tremendous. But the basic needs of the population are secured. In some other countries it is the opposite. If you take the case of Tanzania, some basic needs are not covered but the distribution is more equal, and the tension is reduced. But the combination of both things—unfair revenue distribution and non-satisfaction of basic needs—is one explanation for the tension, repression and torture. This situation is basically the violation of economic rights. Unfortunately, even if these rights are recognised, even these rights are included in instruments, they are never implemented because they are considered problematic rights. I think it is a wide debate and the question to consider rights that have to be implemented by the judiciary should not only focus on civil and political rights.

The second point I would like to underline is the interaction between rights. Like I said before, torture takes place more where the economic and social situation is deteriorating. So I think it is one of the things we have to keep in mind. But if we want that type of situation to be reversed or if we want to build up against this vicious circle—so that respect of economic rights will not only lead to the respect of civil rights but also to a society where the socio-economic performance would increase—we have to consider necessary regulations that can be implemented. All of us know that this is exactly the opposite of what has been happening in the last two decades. The tendency has been to reduce the power of the state: while calling for less powerful states at the same time people have been speaking about the rule of law. But how do you enforce the rule of law between unequal partners if the state is not strong enough? And this is the same at the international level. We have the tendency to reduce power and the financial resources for inter-governmental organizations at the moment, when we need them more.

This Commission (UNCHR) is currently facing a crucial problem: the confrontation between Israel and Palestine is coming closer to war, which will affect the whole region. We can see that the Commission, the Security Council, the High Commissioner [for Human Rights] and Secretary General are calling for respect of

the decisions taken and respect of the conventions. Israel is ignoring these conventions and resolutions and they are trying to impose their own law, which is the law of the strongest. Unfortunately, they are backed by a big power, and in fact the one big power. So at this moment it is not only the problem of Israel and Palestine at stake, it is the survival of an international system that is able to regulate. I think the problem we are facing is that we have norms that are very sophisticated and never implemented—or hardly implemented—in most of the countries, or between countries. If we don't have an international system able to impose solutions that have been adopted and given force to different decisions, how can we expect governments to implement this international law? How can we just rely on the judiciary if they don't think that they are backed by these institutions? So I really think that this is one of the questions this Commission should address. My concern is that there have been similar situations like this before, but this is a more dangerous moment.

I repeat that it is a very important point that you have put on the table. Implementation of rights, particularly in a globalised system, is not only a question of the judiciary in a country but also the international regulating system that we have to take into consideration.

> "We have to develop a system where we are putting economic agreement and respect of human rights at the same level. If we are not making an effort at this level the judiciary in a country can be under pressure from the executive and also from the abroad"

Comments arising out of questions from the floor

A very brief comment about the machinery we have to develop to protect human rights. For me, good governance is not a human rights concept; it is a political concept. Human rights concepts are clearly established by the international system, through rules binding for all the states—if they have ratified or not is another question. In the process of developing some machinery or mechanisms like the Baltic Agreements, etc., all these systems are not making reference to good governance but making clear reference to the treaties and binding elements of international law as fundamental norms for a treaty between two states. In other words, when a treaty is ratified in this system states have an obligation to respect human rights and in case they are not respected, it is considered a breach. I think here we have a lot of work to do. We have to develop a system where we are putting economic agreement and respect of human rights at the same level. I think if we are not making an effort at this level the judiciary in a country can be under pressure from the executive and also from the abroad. We need to have a comprehensive human rights policy in which we are active partners to create mechanisms that are implemented. The importance of this is that there is a tendency towards the opposite. The idea is that we go from soft law to hard law. But we are witnessing hard law becoming soft law. It is the flexibility needed to adapt to the new situation. And I think for the population it has a double effect: first the laws are no longer protecting people, and secondly confidence in the system is completely undermined.

Towards 50 years of human rights implementation*

Basil Fernando, Executive Director,
Asian Legal Resource Centre

I had the privilege of being a Senior Officer in the United National Transitional Authority for Cambodia (UNTAC) from its inception, and also with the Human Rights Centre that we started immediately thereafter. In this I see the problem we are trying to discuss here. Whether there was any capacity to interfere in the administration of justice under the UNTAC mandate became a debatable issue because there was no clear indication. It was more or less decided that UNTAC did not have a mandate. Today, seven years later, I have a very close connection with Cambodia; I go there almost every 3 months. Yet after such a massive intervention Cambodia has a Penal Code with only about 40 offenses, with a set of judges who do not have education up to Grade 10, where there is no police system. Now how is democracy going to function? We were there to establish a foundation—of course miracles cannot be done—of a liberal democracy. But up to date, this is the situation. So how can we demand a fair trial when there is no system of courts that is in any sense credible? That is the sort of fundamental issue we are facing in many countries.

Now let me take as an example a country which was considered at one time a liberal democracy, my own country, Sri Lanka. We had, due to whatever the reasons, over 30,000 disappearances within a period of over four years. Actually, this figure of 30,000 is the number of cases fact-finding commissions inquired into; 16,000 more were never inquired into. But the issue really is this: even where there was a certain willingness to act on this, no prosecution or anything took place. Why? There have been no investigations. The UN Working Group on enforced and involuntary disappearances gave 11 recommendations that people in Sri Lanka have now carved into a stone for a roadside monument to the missing. That is just to remind passers-by that there were such recommendations. But none of those were met. It was not

* Edited text of a speech at the International Launch of *article 2*

purely because of lack of political will, but also systematic fault. Without investigations how can there ever be criminal prosecutions? So there is, linked with the whole matter of judiciary, subtle displacement of the judiciary by shutting the doors in the police and in the prosecution system. You shut the door there, and the case would never get into the courts. Now this is a fundamental problem in many part of Asia and it is being subtly done. While ratification is going on, and while externally there is a lot of compliance with these instruments, internally there is no mechanism to investigate violations.

"Without investigations how can there ever be criminal prosecutions?"

For me article 2 is a great idea. If a state signs up to these rights, you provide an adequate remedy. An adequate remedy, a judicial remedy, is to take place through the police, through the prosecutions and then through the judiciary. The judiciary sometimes consists of qualified people and people of higher moral authority who often would fight back if their integrity is challenged. But it is easy to manipulate the police and it is easy to create a vacuum by not having a proper prosecution system. These do not get examined by any international body, not only to criticise, but to provide assistance in various ways to get these institutions in place. Even where a law is made for the protection of some rights, this is no guarantee. Take the case of the Dalits in India: laws have been made and there have been attempts to guarantee constitutional rights but you have officers in the police force from upper castes who attempt to change this so prosecutions don't take place. As a result 240 million people still do not get humane treatment.

These are not exceptional cases. There is an ideological belief that the efficiency of the executive is what matters and this gets supported. Singapore is not a poor country. Judges in Singapore are higher paid than others. So it is a myth that only the payment of judges would make them implement the law. In Singapore, the lower ranks of the judiciary come from the civil service, and they go back to the civil service. There is no permanent cadre of judges building up. So for the higher courts you select people, sometimes very honourable people, but there is no tradition of the independence of the judiciary. As a result the very discourse has changed, the discourse on the basis of separation of powers, and on that basis the whole foundation of the International Covenant on Civil and Political Rights (ICCPR) is itself under challenge. That is why this is not just about a publication. This publication only highlights a problem in order to get a more serious discussion so that when we come to the Commission on Human Rights here, and other bodies, we will have more examination of remedies.

We owe to ourselves as a human rights community to examine where we ourselves have failed. What are our limitations? Why can't we make progress? In Cambodia 2 billion dollars were spent for UNTAC. I was in charge of human rights investigations, and I could take a helicopter anytime and go to a place where something had happened. We arrested four people during that time under our mandate, but all four people were eventually released. We did

not have any machinery to deal with anything. Actually we were accused of violating basic human rights principles as we were keeping people under arrest without being able to provide a trial.

> "The development of human rights norms and standards that were achieved in the last 50 years—a phenomenal and great achievement—can be transferred to a practical level"

So we learned these lessons, and they were highlighted recently in the present discussion on the Khmer Rouge tribunal. In my view, the UN made a correct decision in not going ahead with that, because in a country where you cannot guarantee an ordinary citizen an inquiry into murder how are you going to have genocide inquired into? Within one year of our work during UNTAC, "sathi manu"—human rights—became a household term in a country where there was genocide. But today when we try to take classes people ask "Where are those rights? If something happens to me—and it happens to many—where do I go? Where does it end?" I think the human rights community owe an obligation of conscience, as was mentioned yesterday by the High Commissioner, to take the need for adequate remedies very seriously, and if we do we can make progress. Not all governments are deliberately depriving people of rights. There is willingness to cooperate when the cooperation is comprehensive, when the cooperation is intelligent and when the cooperation involves many aspects needing discussion.

If such an approach proceeds, I think the development of human rights norms and standards that were achieved in the last 50 years—a phenomenal and great achievement—can be transferred to a practical level. In the next 50 years we must devote ourselves to this.

Comments arising out of questions from the floor

Just a brief comment on the questions of urgency and remedies. Unless remedies are worked out into details, urgency will always remain and it will not be answered. As for the question of torture and also disappearances, people have lived through such things and waited for years without any solution because, as the Deputy High Commissioner said, if the fundamental principle is commitment, it also comes from the society. It is the enormous debate that went on for about 200 years in Europe that created some of the basic principles of human rights. In the 18th century there was already a debate on torture. Before that Europe accepted torture as a principle. Unless society intelligently discusses these issues—going from macro human rights to micro human rights—this urgency will not be answered. And we will suffer quite a lot while we know about very urgent situations but are unable to do anything, like millions of people around the world.

Contemporary problems in administration of justice in India: Answers to a questionnaire formulated by the Committee on Reforms of the Criminal Justice System

Basil Fernando

With a view to revamping its criminal justice system, which is on the verge of collapse, the Indian Ministry of Home Affairs has constituted the Committee on Reforms of the Criminal Justice System. The committee has prepared a questionnaire to elicit suggestions and recommendations from knowledgeable persons. On behalf of the Asian Human Rights Commission (AHRC) I submitted answers to the Committee, of which the following are a selection.

PART A: LAW AND JUSTICE

SECTION I: ADVERSARIAL SYSTEM & RIGHT OF SILENCE

1.1 Do you think that the adversarial system as followed in our Country has contributed to satisfactory dispensation of criminal justice? If not what changes do you suggest?

The unsatisfactory state of criminal justice in India has nothing to with the adversarial system. The reason for that unsatisfactory situation lies elsewhere. India's social structure and attitudes are very much conditioned by entrenched habits of discrimination. There are various forms of discrimination, among which one may mention caste discrimination, discrimination of indigenous (tribal) people, and minorities. Discrimination weighs heavily on the justice system. This has created severe obstacles for development of India's justice system in general and the criminal justice system in particular. The investigative machinery regarding crimes is terribly underdeveloped, both in terms of attitudes as well as facilities. Further, the justice that one may get is also associated with poverty. The level of poverty in India is so appalling that the result is that the poor cannot afford justice. Beside this, the

management of the criminal justice system is backward, inefficient and obsolete. Poor human resources and technical resources affect every area of the system.

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Under these circumstances it can be said that the adversarial system has never stood a real chance in India. To the extent it has been effective it has mitigated the operation of traditional prejudices, however India continues to subsist under the Law of Manu, instead of modern rules of justice. It is against the background of the real history of India that the legal norms established by the British must be judged. In that light we see two things: first, new rules helped bring down the rigour of repression in the old system; second, old habits and practices prevented wholesome developments under the new principles.

The effect of abandoning the adversarial system will be negative for the people who have been less powerful in society throughout Indian history. Under the pretext of abandoning the adversarial system what seems to be underway is an effort to in fact abandon the more progressive aspects of the law, for the purpose of getting more easy convictions.

Hong Kong has an adversarial system. There is no move to change it. Instead much has been done improve it, by creating better police and a system of control of corruption by means of an independent investigative body, leading to improvements in the quality of rule of law and justice.

1.2 Do you favour investigation of cases being done under the supervision of the Judge, as in the inquisitorial system as in France?

First it should be noted that many aspects of the inquisitorial system have come under heavy criticism in the European Court of Human Rights, and also from many French jurists. Now the tendency is to modify the inquisitorial system by incorporating many aspects of the adversarial system.

It is naïve to think that the civil law system merely involves having an inquiring judge. That system has had its own historical development and one of its major advantages is its mechanism to guide police investigators to act legally. That system requires a very highly developed police force. If India could develop such police, then there would be no need for any change because the adversarial system itself would function well with such an advanced policing system.

It must also be noted that a civil law system would be more expensive. In the place of one judge required for a court, there would have to be two—one inquiring judge and a trial judge—doubling the problem of finding good magistrates in India. It is already difficult to find one judge for every court: how much more difficult will it be to find two?

Above all it would take a long time to create the mental habits needed to operate this new system. Under all the best circumstances it might even take over half a century to get used to this new system. Given the slow Indian (South Asian) capacity to adjust to change, it may take even more time.

Instead it would be better to seriously address the defects of operation in the adversarial system in a comprehensive manner, and improve its real operation. This would mean improving the policing system, prosecution system and judicial system—particularly in the lower courts and those excising criminal jurisdiction.

1.3 In the system presently followed, the accused enjoys the "right of silence", which often comes in the way of search for truth in criminal cases. Should this be changed requiring the accused to disclose his defense, once the prosecution case/charge levelled is made known to him?

The importance of the right of silence is that it ensures an efficient investigation into a crime before filing charges. That a person should be charged only if the prosecution has sufficient evidence to ensure a conviction is a very important principle. Otherwise there will be frivolous charges in the hope that perhaps the accused will incriminate himself or herself. As it stands now, when there is serious evidence against an accused the burden shifts to him to explain the matters in his disfavour. Thus, the principle is rich enough if the criminal investigations are done well, if the prosecutors are competent, and if the judges are well educated to deal with these principles. In contrast, if merely because a charge is filed the accused has to reveal his defense, the police and prosecutors will take more chances with their cases, instead of respecting the principle of the presumption of innocence.

It must also be noted that in the social circumstances of India, the opportunities for many accused to get good legal advice—or any legal advice at all—before making a defense are much less than in a developed country. Poverty and ignorance obstruct such opportunities. Through fear and other reasons an accused may put forward what he thinks is a better defense than the truth. Then the prosecutors can demolish the defense and expose the person as a liar. In my view, given the complex nature of human responses when faced with fear of punishment, it is very dangerous to demand that a person give a precise defence without he himself choosing to do so.

Demanding a defense beforehand will also reduce criminal trials to civil standards and blur the difference between the two. Given the fact that a person's life and liberty is at risk, reducing criminal trials to the same level as civil ones is immoral. To me this suggestion implies a great departure from the principles and practices of criminal law, which have been developed with great effort.

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SECTION II: BURDEN OF PROOF

2.1 Do you favour proof on the basis of preponderance of probabilities as in civil cases, instead of proof beyond reasonable doubt?

"If a person is to be sentenced to death on the preponderance of probabilities that is a mockery of justice. The same applies to imprisonment. Such a change to the standard of proof would trivialise criminal justice"

I am absolutely opposed to it. To effect such a change goes against the very fundamentals of criminal trial, which deal with the life and liberty of individuals. Civil disputes deal mainly with property matters and criminal trials deal with the life and liberty of people. If a person is to be sentenced to death on the preponderance of probabilities that is a mockery of justice. The same applies to imprisonment. Such a change to the standard of proof would trivialise criminal justice. A direct outcome would be the further degeneration of the police investigators and prosecutors. It would open the road for miscarriages of justice, which even now take place under a more strict burden of proof.

2.2 If no presumption of innocence or guilt of the accused is drawn, do you think that such neutrality would impact unfairly or lead to failure of justice?

Of course it would destroy the very fabric of the criminal justice system. As the presumption of innocence of the accused was developed after a long struggle against very barbaric practices, not long after the removal of this presumption the system would surely fall back into such black practices.

2.3 In some laws, the burden of proof is placed on the defence by raising certain rebuttable presumptions against the accused. Do you think that similar presumptions should be raised in respect of other offences? If yes, please indicate such offences.

The practice of placing rebuttable presumptions should be limited as much as possible, and in India (South Asia) in particular, where the police have yet to establish a reputation for acting in a fair manner.

SECTION III: PLEA-BARGAINING/ SETTLEMENT WITHOUT TRAIL/ COMPOUNDING OF OFFENCES

3.1 Do you favour introduction of the concept of 'plea-bargaining' as is practised in USA?

While the concept of plea bargaining itself need not be rejected, some preconditions should be set out, such as representation by competent counsel. Given the social context of India, where many poorer persons become accused, they can be pressurized into bargaining even when they have had nothing to with the offence. In such circumstances the threat is that, "You may lose the case and if you fight you'll be punished severely—so why not bargain for lesser punishment?" Thus a legally weak position of an accused without competent counsel can be exploited, even when the prosecution is aware that its case is a weak one.

3.2 Do you favour the scheme of "Concessional treatment for offenders who on their own initiative choose to plead guilty without any bargaining" as recommended by the Law Commission of India in Chapter IX of its One Hundred and Forty Second report?

This statement merely restates a practice that has existed for a long time. It is also supported by such considerations as self-remorse and regret for wrongdoing. However, even in these instances it is the duty of the judge to ensure that the accused is in fact acting freely and is well advised legally. Again, in the Indian social context this must be a primary consideration.

3.3 Do you favour enlarging the number of offences compoundable with or without the permission of the court? If yes, indicate such offences.

This should not be allowed for serious crimes. Particularly, the compounding of offenses should not allowed for crimes where offenders are state officers: for example, acts of torture by police.

3.4 Do you favour incorporating a general provision in the Criminal Procedure Code (Cr. P. C.), to the effect that unless otherwise expressly provided, all offences under special enactments shall be compoundable?

No. The general principle should be that compounding of offences is not allowed unless specifically stated otherwise. Once again what is at stake is the very nature of criminal trial. Criminal trial will be trivialized if all criminal actions can be compounded. It will also encourage further corruption where police in particular will try to make greater profit. This will also adversely affect offenses against persons belonging to specially protected groups, such as women and "low castes". Further, it will affect the judicial mentality, which for the purpose of easy disposal of cases will develop bargaining habits instead of judicial habits. The same will happen also to the quality of lawyers.

Easy compunding of cases will encourage crimes. Like the proverbial Roman who felt that he could hit people and then pay them a small sum, criminals too can easily benefit from such a situation.

3.5 Do you favour enlarging the scope of Sec. 206 of Cr. P. C., by making it applicable to all offences where penalty prescribed is fine with or without imprisonment?

This should become a general principle. Threat of imprisonment is necessary for prevention of crime. More serious crimes, if proved, must result in imprisonment. Payment of fines is not enough. Payment of fines as the only punishment will also benefit the rich and act to disadvantage the poor. Even now many people go to prison for non-payment of fines. Finally, the special offences for protection of weaker social groups will become meaningless without the threat of possible imprisonment.

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SECTION IV: SENTENCES AND SENTENCING

4.1 The predominant global view, including international conventions, appears to favour the abolition of death penalty. The Supreme Court of India has ruled that death penalty is not unconstitutional, and may be imposed in rarest of rare cases. Do you favour the abolition of death penalty? If so please indicate the reasons.

Yes. Life imprisonment exists as an alternative and that is quite enough punishment. Further, more and more cases are coming to light that indicate miscarriage of justice in a significant number of cases ending in death sentences. Discovery of a miscarriage of justice after execution is futile for the person concerned and his or her family. And further, the people who end up with death sentences are mostly the poor.

4.2 In the absence of a statutory definition of "imprisonment for life" the said expression has "imprisonment for life" to mean imprisonment till death, as is in vogue in several countries?

The legal definition should leave much discretion to the judges in determining imprisonment till death, subject to an absolute fixed minimum term. However, it is also necessary that in cases of serious crimes the term of imprisonment not be subject to easy reductions. In the future, when offences such as crimes against humanity are likely to enter into criminal codes, it will be necessary that a difference in punishment be maintained depending on the nature and the gravity of crimes. A set of guidelines can be developed to this end.

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4.3 The punishments provided under Sec. 53 of Indian Penal Code (IPC) are death, imprisonment for life, imprisonment—rigourous or simple, forfeiture of property and fine. In many countries, there are other types of punishments, including rendering community service. What new forms of punishment do you suggest for various offences?

For less serious crimes, offenders who are not hardened criminals with demonstrably bad records, and young offenders, community service is a better form of punishment. Working for voluntary organizations dealing with humanitarian issues is even better, and orders to follow compulsory courses on humanism conducted by approved groups can also be useful and may contribute to rehabilitation. The state can develop more creative rehabilitation programs, which can combine basic moral and ethical education plus skill training.

Where offences are against specially protected groups such as women and "low castes", convicts can be ordered to go through special orientation courses, and where possible do community service related to the victims of this social group. This can help to reduce the prejudice levels and improve tolerance.

PART B: INSTITUTIONS

KINDLY NOTE that my comments on this section are subject to overall consideration that the improvement of the institutions of justice—courts, police and prosecutors—depend on weeding out corruption and ensuring that a system really works. Improvement of this or that part of a system in order to avoid existing problems will only lead to the reappearance of the problem under the new arrangement.

The matters you have in your questions under this part all speak to one overall concern: CONFIDENCE IN THE SYSTEM. All parties—judges, police, prosecutors and the public—need to have real confidence. For this it is necessary to break the demoralization that presently pervades all these segments of society, particularly among the public.

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To illustrate how confidence can be built, I offer the example of Hong Kong, where the system has really being improved. In Hong Kong improvement was based on the development of an outside agency—outside the police in particular—which deals with corruption in a very comprehensive manner. If corruption is not decisively addressed, no other efforts will lead to any substantial change. Judicial institutions in particular need a decisive agency for dealing corruption

Below I include a brief history of Hong Kong's Independent Commission Against Corruption (ICAC), taken from its website, at [http://www.icac.org.hk].

> The Independent Commission Against Corruption was set up in 1974. Since its inception, the Commission adopts a three-pronged approach of investigation, prevention and education to fight corruption. With the support of the Government and the community, Hong Kong has now become one of the least corrupt places in the world.
>
> But how serious was the problem of corruption in Hong Kong before the ICAC was established? What was the reason for setting up an independent body to fight graft? Let us now take a look at the history of the setting up of the ICAC.
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> Hong Kong was in a state of rapid change in the sixties and seventies. The massive growth in population and the fast expansion of the manufacturing industry accelerated the pace of social and economic development. The Government, while maintaining social order and delivering the bare essentials in housing and other services, was unable to satisfy the insatiable needs of the exploding population. This provided a fertile environment for the unscrupulous. In order to earn a living and secure the services which they needed the public was forced to adopt the "backdoor route". "Tea money", "black money", "hell money" - whatever the phrase - became not only well-known to many Hong Kong people, but accepted with resignation as a necessary evil.
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> At that time, the problem of corruption was very serious in the public sector. Vivid examples included ambulance attendants demanding tea money before picking up a sick person and firemen soliciting water money before they would turn on the hoses to put out a fire. Even hospital amahs asked for "tips" before they gave patients a bedpan or a glass of water. Offering bribes to the right officials was also necessary for the application of public housing, schooling and other public services. Corruption was

particularly serious in the Police Force. Corrupt police officers covered up vice, gambling and drug activities. Social law and order was under threat. Many in the community had fallen victims to corruption. And yet, they swallowed their anger.

Corruption had no doubt become a major social problem in Hong Kong. But the Government seemed powerless to deal with it. The community patience was running thin and more and more people began to express their anger at the Government's lukewarm attitude towards tackling the problem. In the early seventies, a new and potent force of public opinion emerged. People pressed incessantly for the Government to take decisive action to fight graft. Public resentment escalated to new heights when a corrupt expatriate police officer under investigation succeeded in fleeing Hong Kong. The case provided the straw that broke the camel's back...

The Independent Commission Against Corruption (ICAC) was established in February 1974. Since its inception, the Commission has been committed to fighting corruption with the three-pronged approach of investigation, prevention and education.

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SECTION VI: TRIAL / COURTS / JUDGES

6.2 Do you think that the present level of equipment and experience of the Judges of the Criminal Courts is adequate and satisfactory? If not, suggest appropriate improvements.

Above all the change needed is one of mentality. Judges must be able to use modern communication and administration methods. However, for that they must feel that the system they are leading is really working. Above all they need higher morale. It is a common principle that every profession needs improvement. How you bring it about is another matter.

6.3 In the present system, Judicial Magistrates First Class are recruited from amongst Lawyers having about four years of practice at the Bar. Do you think that this experience is inadequate?

If proper managerial training can be provided, four years experience should be enough. However, how do you measure experience? There must be objective measurement by way of tests. Some serious tests can be developed to go into all areas of ability before recruitment.

6.16 Witnesses are often subject to serious threats to life / property by the accused or their supporters. What measures do you suggest to protect the witnesses?

The causes of such threats can be removed only by strong anti-corruption measures, as suggested above. Systematic threats and intimidation take place due to the weaknesses of the system. The people who intimidate feel that law enforcement is weak and they can do what they like. Without improving the overall system it is not possible to change such a mentality.

6.20 Do you subscribe to the view that Judges should be accountable? If so, suggest measures?

Immunity of judges for their professional work is a fundamental principle. Their neglect or corruption must be dealt with under an efficient system of control as suggested above. To address such issues in *ad hoc* way will lead to more problems.

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SECTION VII: INVESTIGATION

7.2 What measures do you suggest to improve the quality of investigation by the Police?

The quality of investigations will depend on accountability. Improving police is a very hard nut to crack. A strong anti-corruption strategy, completely outside police control, is essential. Besides that there should be education and training.

7.3 Should there be a cadre of Investigating Officers devoted exclusively to investigation of cases? If so, what should be their qualification, and rank?

There should be such a group. But this group must be under supervision of officers of higher rank. In the long run, without a strong anti–corruption agency such a group can turn out to be very dangerous. When crime is organized by the police themselves, it is this type of special group that becomes its hard core. The control of police must be through an outside source, such as the ICAC in Hong Kong.

7.5 It is becoming more and more difficult to obtain reliable oral evidence. The use of modern scientific evidence has therefore become indispensable for proof. But unfortunately, the forensic science techniques available in our country are neither adequate nor up-to-date. What measures do you think should be taken to improve the situation?

Introduction of forensic facilities of the highest quality is essential. Funds must be provided for this; in fact, they are a priority. Attempts to improve the system will fail if more adequate forensic facilities are not provided.

7.17 Do you favour the confessional statements made by the accused during investigation being video recorded I the presence of an officers not below the rank of Dy. S. P. [Deputy Superintendent]?

Till the whole system goes through thorough reform it would be dangerous to do this. Police act as a group. High-ranking officers will only be used to give credibility. The problem as it stands now is that many high-ranking people are not reliable. If they were reliable, the system would not be bad. Their subordinates would not do wrong things. If the subordinates are not reliable then the superiors too are not reliable. Higher rank often means higher craftiness and not higher morality.

SECTION VIII: PROSECUTION

8.1 Do you think that the level of prosecution is far from satisfactory? If so, what improvements do you suggest?

"The problem as it stands now is that many high-ranking people are not reliable. If they were reliable, the system would not be bad"

In AHRC's understanding of criminal justice in Asian countries, the weakest link in the system is the prosecution. We have particularly studied Sri Lanka, where this weakness is very obvious. There we have been making recommendations for changes during the last few years. The major defect lies in not incorporating the changes that have taken place in common law countries during the 20th century and instead keeping the same practices that British introduced in the 19th Century, which the British have since changed in their own country. I believe this is also the case in India. In our view it is more appropriate to adopt these changes rather than trying to adopt aspects of the inquisitorial system. The adversarial system has improved its prosecution systems during the last century. The prosecutors' branch in the UK, US and Australia has developed more sophisticated prosecution strategies. One area of improvement is that investigators must keep prosecutors informed of cases from the very start, and be guided by their legal advice. To achieve that, the prosecutors' branch has spread competent prosecutors throughout all parts of the judicial system in these countries. The central body provides guidelines and supervises the work. This way the excesses of investigators can be prevented and negligence addressed. Thus, bringing criminals before courts becomes a joint responsibility of prosecutors as well as investigators. Hence the improvements of these common law jurisdictions must be studied and adopted.

8.2 Do you agree that Prosecutors are often appointed on political and other irrelevant considerations and not on merits? If yes, what measures do you suggest to ensure appointment on merit of competent Lawyers as Prosecutors?

The presence of political influence is a common perception. A real alternative to that is the ICAC-type of strategy suggested above. Without such an alternative there will be no change, as better people will find that they are not allowed to work professionally by others motivated by different factors. The recruitment of better persons must be accompanied by serious reforms to deal with corruption.

8.11 What in your opinion are good and proper grounds for withdrawal from prosecution?

A prosecution case should be filed only when there is a likelihood of a successful prosecution. Thus, in principle, there can be no grounds for withdrawal. However, a settlement arrived at in court or in a manner acceptable in law may be a ground for withdrawal. Withdrawal at will only shows that the prosecution should not have been undertaken at all. As putting an individual to trial is a very serious matter for that person the filing of prosecution must be considered thoroughly and carefully before it is done. The prosecutors owe serious explanations if they are to withdraw a prosecution.

8.13 Are you in favour of notifying the victim before granting permission to withdraw from the prosecution, and to give him an opportunity, to continue the prosecution, if he so desires?

Absolutely. At all stages the prosecution must keep the victims aware of all that is happening to their cases. Victims rights must not be taken away by the prosecutors. The last word on these issues must be left to the victim.

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PART D: GENERAL

10.9 Protection of Human Rights of the Citizens is one of the important responsibilities of the Criminal Justice System. Do you think that the performance of the Criminal Justice System in protecting Human Rights is satisfactory? If not, suggest improvements.

It is not satisfactory at all. Systemic problems must be corrected by addressing them in a decisive way and introducing an ICAC-type institution. Meanwhile:

- Legal redress must be provided to victims of human rights violations.
- India must ratify the Convention Against Torture.
- Torture must be made an offence with serious punishment provided to offenders.
- Human rights claims must receive priority in courts.
- More compensation must be granted to victims.
- Violators should be debarred from the civil service.

10.10 Do you think that the existing laws dealing with crimes against women, children, Dalits and the disadvantaged persons do not adequately safeguard their interests? If yes, suggest appropriate amendments.

There need to more improvements. Details can be provided later. The most important aspect is the implementation of existing laws. For example, there are many laws relating to Dalits but they are hardly implemented. The reasons for non-implementation should be studied. One obvious reason is the attitudes of the law enforcement agencies. Radical change is needed in this area.

10.24 What measures do you suggest to employ information technology for improving the functional efficiency of administration of the Criminal Justice System?

ALL aspects of the criminal justice system must be revolutionized by the introduction of computers, data processing, web-sites and other communication systems. Advice of experts must be sought. A whole new section in the justice system must be established to this end.

10.25 If there are any aspects not covered by the above questions, feel free to offer your suggestions.

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My feeling is that the questions must be reworked to provide greater emphasis on overall fundamental changes than small changes here and there. What is needed is an overarching strategy for improvement of the criminal justice system. In that I consider the following most important:

- Address corruption.
- Change the prosecution system.
- Radically change the communication system.

Some recommendations from the Law Commission of India on arrest and detention

Dr. P. J. Alexander,
former Director General of Police, Kerala, India

The Higher Judiciary and the Law Commission of India have been suggesting welcome changes to the arrest laws in India, thanks mostly to increasing sensitivity about human rights violations and campaigning by activists and NGOs for greater respect of human rights by the state and its agencies.

Among the most significant developments in recent years have been the directions issued by the Supreme Court of India (in the now well-known Basu case) on post-arrest procedure by the police. The significance of these measurers can be appreciated only when we know that the yearly figures of recorded arrests as given by the National Crime Records Bureau are close to two hundred thousand, while many more are routinely detained by the police without formal arrest. The extensive human rights violations due to police arrests are just ignored and treated as a part of the essential preliminary police response to maintain law and order and prevent crime.

The 177th Report of the Law Commission on the law relating to arrests submitted to the government is not yet available. However press reports indicate that it recommends very substantial changes that would qualitatively affect police functioning. According to these, the Report states that "complaints of abuse of power of arrest continue unabated in the country and very often it is the poor and persons without official or political clout who become the victims of police excesses". It observes that the percentage of under trial prisoners is unusually large and many granted bail are unable to avail of the facility owing to their inability to furnish sureties or to comply with the conditions of release. Therefore it proposes that the best way to reduce the number of under trial prisoners is to regulate arrests. In its Report the Commission also notes that it has attempted to strike a balance between the liberty of citizens (the most precious of all fundamental rights) and the social interest in the maintenance of peace and law and order.

"No arrest should be made merely for questioning a person, as it amounts to an unlawful interference with the personal liberty guaranteed by Article 21 of the Constitution of India"

The sweeping changes the Commission has suggested are with a view to delineating and regulating the power of arrest without warrant vested in the police under Section 41 of the Criminal Procedure Code. The Commission says that no arrest should be made merely for questioning a person, as it amounts to an unlawful interference with the personal liberty guaranteed by Article 21 of the Constitution of India. Additionally, to arrest a person on suspicion is an awesome power vested with the police and it must be regulated to prevent abuse. The Commission found that arrests under preventive provisions have been more in number than arrests for substantive offences, and further that a large number of arrests have been in respect of bailable offences, which tend to be non-cognisable offences (i.e. where the police cannot arrest without a warrant or order from a Magistrate). The Commission has suggested three major changes to be brought about in the Criminal Procedure Court viz.,

1. No person shall be arrested for offences that are at present categorised as bailable and non-cognisable. For such offences as are under the category of non-cognisable offences no arrest shall be made by the police and no court shall issue an arrest warrant either.
2. In respect of offences treated as bailable and cognisable also no arrests shall be made but an "appearance notice" shall be served on the accused directing him to appear at the police station or before the Magistrate as and when required.
3. Offences punishable with seven years of imprisonment and treated at present as non-bailable and cognisable would be treated as bailable-cognisable offences. The Commission has left offences for which the punishment provided is above seven years untouched

These recommendations have come during a time when India has become acutely aware of the limitations of its law enforcement agencies due to the Gujarat tragedy, which was mostly caused by the neglect of the police force to keep the peace. The recommendations need speedy implementation together with other measures to recreate a popular confidence in the law enforcement system capable of creating harmony in society.

Cambodians deserve something more than a farcical tribunal*

Basil Fernando

A precondition of justice for the victims of Cambodia's genocide is justice for living Cambodians. Both present and past problems can be solved only through fundamental reform of the system for administration of justice. By artificially separating discussion on justice for living Cambodians from justice for the genocide victims, as is the case at present, every gesture towards either is farcical.

"The UN's real mistake has been its failure to take firm action to help the recovery of the Cambodian system for administration of justice"

The United Nations (UN) has erred in Cambodia, but not in its ending of negotiations for a tribunal to try those responsible for the genocide. In this the UN took the only option left to it. Its decision to not join with the Cambodian government in its present arrangement for the genocide tribunal is sometimes critiqued as the loss of an opportunity to influence development of the Cambodian justice system. However by participating it would merely have given credibility to an absurd undertaking.

The UN's real mistake—which began during the period of the UN Transitional Authority on Cambodia (UNTAC) and continues up to now—has been much more fundamental. This has been its failure to take firm action to help the recovery of the Cambodian system for administration of justice. This shortcoming has arisen for a number of reasons. First, UNTAC did not have a clear mandate on reform of the justice system in Cambodia, although the ambitious aim of its mission was to create liberal democracy there. Second, the UNTAC leadership lacked the will to give a more liberal interpretation to the mission's role necessary to achieve what was required of it. Third, subsequent UN interventions have exposed the existing legal system's flaws but have not offered a comprehensive scheme for technical advice and assistance. In short, the utter collapse of the Cambodian justice system does not appear to have caused much anxiety to the UN.

* This article was written in response to "Cambodia - the UN casts a blind eye to justice?" by Balakrishnan Rajagopal, appearing in the *International Herald Tribune* of 30-31 March 2002.

"Only recently did administration of justice begin to appear among priorities for donors to Cambodia. In spite of this, to date very little work has gone on to meet the problem"

Outsiders cannot readily conceive the extent of the problems facing Cambodia's justice system. There are virtually no laws: the Penal Code recognizes only 35 offences. The rudimentary and unfair system of criminal procedure that existed before UNTAC has not been amended. On all politically important cases, judges and prosecutors act on the instructions received from political superiors. The quality of education for judges and prosecutors is very low. There is virtually no policing organization: the rudimentary structure that exists consists of persons with hardly any training and very few facilities, often even without paper upon which to write down complaints. There are almost no forensic facilities, nor qualified persons to hold post-mortem inquiries; thus proof of cause of death is not required in a murder trial. Just 0.3 percent of the National Budget is allocated to the Ministry of Justice. The entire system is corrupted.

Only recently did administration of justice begin to appear among priorities for donors to Cambodia. In spite of this, to date very little work has gone on to meet the problem. Many basic laws may not be in place for a long time. Without laws, training programs for police, prosecutors and judges are of very little use. The inability to see the sheer stupidity of such exercises is itself an indication of the poor quality of the studies preceding such programs.

That the UN has taken an open position regarding its unwillingness to participate in the current arrangements for a genocide tribunal should act as an eye-opener for all concerned. It now owes a duty to the Cambodian people—as well as the international community—to make known its full position on the Cambodian system for administration of justice, and how it plans to facilitate reforms. The real tragedy in Cambodia will be if the UN continues to fail in this important task.

Massacre on the Mae Lamao

Urgent Appeals Desk,
Asian Human Rights Commission

During the last week of January 2002 at least 21 persons of Burmese origin were massacred in a single incident on the Mae Lamao stream, Mae Ramat district, within the vicinity of Mae Sot, Tak province, Thailand. As none of the victims were Thai the local authorities initially ignored the case, however were pressured to act after word of the terrible event spread. The National Human Rights Commission of Thailand has since became involved.

To date the case has been characterised by a lack of transparency, inconsistent accounts, and the absence of genuine effort directed towards capturing and bringing the murderers and masterminds to justice. Since early February it has virtually disappeared from public view. The Asian Human Rights Commission has issued an Urgent Appeal to keep attention focused on the event in an effort to bring pressure to bear on the authorities concerned to seek and hold responsible all those complicit.

BACKGROUND

Among the hundreds of thousands of migrant workers who have entered Thailand illegally from neighbouring countries, the vast majority are from Burma. Most of these people enter at various points on the border, and many again are employed in a multitude of industries and activities in border areas. These people are extremely vulnerable to all types of human rights violation, ranging from denial of wages and police extortion to assault, rape and murder.

Mae Sot region is one of the largest entry points and areas of employment for Burmese coming to Thailand. It is also an area where Burmese are murdered routinely: in the five districts around and including Mae Sot, four to five people of Burmese origin are killed weekly. As the police and immigration authorities are involved in the trade of Burmese across the border, as well being active participants in various human rights violations, they do not pursue the perpetrators of crimes against Burmese victims. The widespread mentality that crime need not be investigated

unless the victims are Thai people is reinforced by a chauvenist mentality ingrained through distorted history teaching that Burmese are the historical enemies of Thai people.

CASE DETAILS

In the last days of January 2002, villagers from Wangpha, Mae Ramat district, came across 14 bodies in the Mae Lamao stream, close to their village. The bodies were in two groups of seven, and included males and females aged from around 14 to 45. They were stripped naked, hands tied behind their backs, with stab wounds to the bodies and necks. After encountering the first group the village head is understood to have reported the matter to the local police. As the police were unaware of the unusually large number of bodies involved they treated it as a "normal" killing of Burmese people, and suggested the villagers float the bodies away from the village, so that they would travel downstream into the Moei River. In this area the Moei forms the border between Thailand and Burma.

The villagers floated the bodies away as suggested, however due to the large number of victims and nature of their deaths news of the killings spread, causing the provincial police chief to order the local police to recover the bodies. Seven corpses were located in the Moei River on February 2, however contrary to reports that the bodies were subject to autopsy, it is understood that the police cremated seven bodies there. On February 4 and 6 another three bodies were encountered, and these were in fact sent to the Mae Sot hospital for autopsy, which is reported to have revealed nothing except that the people were certainly of Burmese origin and were killed some days before they were discovered. The three additional bodies brings the total positively identified to 17. However reliable sources indicate that another four corpses from the same massacre were found in another nearby stream, bringing the total to at least 21.

On February 8 a network of local NGOs urged the National Human Rights Commission of Thailand to take action on the case. A team from the Commission finally visited the area of the atrocity during the first week of March. To date it has not issued any public report on the case, however on March 17 the Commissioner who led the mission, Jaran Ditha-apichai, publicly urged the Ministry of Interior to investigate the deaths in order to lead to the arrests of those responsible.

Reports of the event have lacked clarity and consistency, and since early February have virtually ceased altogether. The number of victims—and circumstances under which they were found—have fluctuated. The stories given by local officials have lacked consistency and credibility. The police have focused on emphasising that Thai people were not involved. Media and official discourse has oriented towards the possible motive for the murders and speculation that the victims were involved in some kind of

illegal activity and were killed lest they become witnesses. The business of actually catching those responsible for the killings has taken a back seat to all these subsiduary issues.

To date no move has been made on the part of the Thai authorities to seriously identify and apprehend the culprits of this atrocity. Although the National Human Rights Commission of Thailand has investigated the case, it has not yet made any formal intervention. The Asian Human Rights Commission is extremely concerned that with every passing day the likelihood that the perpetrators of this horror will ever be brought to justice grows increasingly remote. It therefore calls upon the government of Thailand to pursue a satisfactory outcome of this case at the nearest possible date. It also urges a concerted review of Thai government policies for protection of migrant workers—irrespective of their legal status.

[For further information on this case see:

Urgent Appeal UA-12-2002: Massacre on the Mae Lamao
(http://www.ahrchk.net/ua/mainfile.php/2002/221)

Massacres in Asia website (Click on link to Mae Lamao)
http://massacres.ahrchk.net]

The Asian Human Rights Charter on enforcement of rights and the machinery for enforcement (www.ahrchk.net/charter)

15.1 Many Asian states have guarantees of human rights in their constitutions, and many of them have ratified international instruments on human rights. However, there continues to be a wide gap between rights enshrined in these documents and the abject reality that denies people their rights. Asian states must take urgent action to implement the human rights of their citizens and residents.

15.4a The judiciary is a major means for the protection of rights. It has the power to receive complaints of the violation of rights, to hear evidence, and to provide redress for violations, including punishment for violators. The judiciary can only perform this function if the legal system is strong and well-organized. The members of the judiciary should be competent, experienced and have a commitment to human rights, dignity and justice. They should be independent of the legislature and the executive by vesting the power of their appointment in a judicial service commission and by constitutional safeguards of their tenure. Judicial institutions should fairly reflect the character of the different sections of the people by religion, region, gender and social class. This means that there must be a restructuring of the judiciary and the investigative machinery. More women, more under-privileged categories and more of the Pariahs of society must by deliberate State action be lifted out of the mire and instilled in judicial positions with necessary training. Only such a measure will command the confidence of the weaker sector whose human rights are ordinarily ignored in the traditional societies of Asia.

15.4.b The legal profession should be independent. Legal aid should be provided for those who are unable to afford the services of lawyers or have access to courts, for the protection of their rights. Rules which unduly restrict access to courts should be reformed to provide a broad access. Social and welfare organizations should be authorised to bring legal action on behalf of individuals and groups who are unable to utilize the courts.

15.4c All states should establish Human Rights Commissions and specialized institutions for the protection of rights, particularly of vulnerable members of society. They can provide easy, friendly and inexpensive access to justice for victims of human rights violations. These bodies can supplement the role of the judiciary. They enjoy special advantages: they can help establish standards for the implementation of human rights norms; they can disseminate information about human rights; they can investigate allegations of violation of rights; they can promote conciliation and mediation; and they can seek to enforce human rights through administrative or judicial means. They can act on their own initiative as well on complaints from members of the public.

15.4d Civil society institutions can help to enforce rights through the organization of People's Tribunals, which can touch the conscience of the government and the public. The establishment of People's Tribunals emphasizes that the responsibility for the protection of rights is wide, and not a preserve of the state. They are not confined to legal rules in their adjudication and can consequently help to uncover the moral and spiritual foundations of human rights.

In this issue of *article 2*

article 2 is a published by the Asian Legal Resource Centre (ALRC) in conjuction with *Human Rights SOLIDARITY*, a publication of the Asian Human Rights Commission (AHRC).

ALRC is an independent regional non-governmental organisation holding general consultative status with the Economic and Social Council of the United Nations. ALRC seeks to strengthen and encourage positive action on legal and human rights issues at local and national levels throughout Asia.

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