article 2

of the International Covenant on Civil and Political Rights

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focus

a coup, killings & corruption in Southeast Asia

any person whose rights or freedoms are violated shall have an effective remedy, determined by competent judicial, administrative or legislative authorities

The meaning of article 2: IMPLEMENTATION of human rights

Since the adoption of the Universal Declaration of Human Rights in 1948, the human rights movement has worked hard to spread its gospel. The development of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) was a major milestone. Numerous other conventions and declarations have further improved and enhanced the body of human rights principles, and articulated them to the global community. United Nations mechanisms have provided a base for monitoring the observance of rights.

All over the world extensive programmes are now taking place to educate people on human rights. States engage in this work to varying degrees, United Nations agencies facilitate them, and academic institutions participate. The most important education work is done by human rights organisations. As a result today there exists a vast number of persons and organisations firmly committed to human rights; more than at any other time in the history of humankind. Yet human rights continue to be monstrously violated all over the world.

It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation. One factor hindering honest examination is the belief that improvement of knowledge about human rights will by itself end human rights violations. This is a myth based on the corresponding belief that education is itself capable of improving things. In reality human rights can only be implemented through a system of justice. If this system is fundamentally flawed, no amount of knowledge—no amount of repetition of human rights concepts—will by itself correct its defects. Rather, these need to be studied and corrected by practical actions. Hence research and intimate knowledge of local issues must become an integral part of human rights education and related work.

Human rights monitoring mechanisms aim to redress individual violations. This approach is inadequate when dealing with systemic breaches. For example, a country may be condemned for acts of torture, mass murder, crimes against humanity and other violations, and a monitoring body may make some recommendations to correct these. However, monitoring bodies have neither the mandate nor capacity to engage in studies on the actual functioning of components within the justice system—the police, prosecutors and judiciary—through which such recommendations have to be achieved. Thus, even if one person or another is punished, the actual system allowing violations remains, and may even get worse.

Legislation on human rights also does not by itself result in improvements in rights. Legislation can work only through the administration of justice. If justice institutions are fundamentally flawed then legislation remains in the books and is used only to confuse monitoring bodies into believing that conditions are improving. For example, a constitution may provide for fair trial, however the criminal investigation, prosecution and judicial systems may not have reached a credible standard. Such legislation then only mocks the victims and cynically manipulates monitoring bodies and the international community.

Article 2 aims to draw global attention to article 2 of the ICCPR, and make it a key concern of all partners in the global human rights community. This integral article deals with provision of adequate remedies for human rights violations by legislative, administrative and judicial means. It reads as follows. [*Continued on back inner cover*]

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Thailand: The return of the military & the defiance of common sense

Asian Human Rights Commission, Hong Kong

The 19 September 2006 military coup in Thailand led by General Sonthi Boonyaratglin abruptly ended the aggressive and autocratic caretaker government of Pol. Lt. Col. Thaksin Shinawatra. But the coup is a far greater tragedy for Thailand than the Thaksin administration ever was.

The September 19 military coup has been described by some persons as benign. Their reasoning goes that the former government was bad and intransigent. Whatever way it could be removed was good. Even normally well-informed news media have evoked images of a quiet and non-violent coup that is expected to just "slip in and slip out", in the words of one BBC correspondent.

These arguments are naive and confused.

The Thaksin government was a civilian autocracy. It did not respect human rights, the rule of law or democratic principles. It manipulated the media, intimidated its opponents, and played with legislation and public institutions for its own advantage. It exacerbated violence, from wanton extrajudicial killings of supposed drug dealers across Thailand to the conflict in the south. It enormously expanded the power and influence of the police. It fixed an election and allegedly extorted vast sums of money.

But a military autocracy is worse than a civilian autocracy. Within hours of taking power, the army abrogated the constitution, banned political assemblies, and authorised censorship. The Thaksin government sought to undermine the constitution, harass gatherings of political opponents, and control the media through advertising revenue and criminal defamation. But by its very nature, it did not have the audacity to abandon the country's supreme law and ban civil rights. By contrast, and by its very nature, the army immediately did so.

This article is adapted from a dossier released by the Asian Human Rights Commission to coincide with the one-month anniversary of the September 19 military coup in Thailand. The full dossier is available online at: http://thailand.ahrchk.net/docs/AHRC_Thailand_Coup_2006.pdf

The argument in favour of a military coup is akin to the argument used by proponents of torture. Torture, they say, is sometimes a regrettable necessity. Where the lives of many are at stake, the physical integrity of one may be violated. Likewise, a coup is sometimes described as a regrettable necessity. Where a country is at stake, a government's integrity can be violated.

"The argument in favour of a military coup is akin to the argument used by proponents of torture"

Both arguments boil down to the same wrong-headed notion: that a coup, like torture, can be started and stopped with convenience. It cannot. Torture, once it is introduced into a system of investigation, mutates and spreads. It affects not only the victim but the persons who use it, their institutions and the perceptions of society about what is permitted and what is not. Likewise, a military that obtains power through a coup infiltrates and distorts all areas of governance, as well as public attitudes and expectations. Once admitted, it is not easily removed. Its presence is felt long after it is physically gone.

There is a saying that runs, "Afraid of the tiger, one invokes a tutelary, but the tutelary turns out to be worse than the tiger." Today, Thailand has replaced a tiger with a tutelary. Happy that the tiger is gone, the terrible implications of how and by whom it was removed are not yet understood. But there is one certainty: no military coup just "slips in and out". By nature, military rulers leave things behind to ensure that their interests endure. And by nature, those interests are contrary to the rule of law, human rights and genuine democracy. Proof of this can be found today in Pakistan and Burma, and in the leftovers of military dictatorships in virtually every country of South and Southeast Asia.

The question is not whether the coup is benign or malign. The question is, how much damage has it already caused, and how can it be mitigated?

Genuine constitutionalism vs. interim constitutionalism

Writing in 1993, Professor Ted McDorman of the University of Victoria in Canada observed that constitutions in Thailand have been seen as nominal rather than normative. That is, they have served to validate the power of the ruling group, rather than lay down ground rules that everyone must obey. "Most political commentators have accepted that the role of a constitution in Thailand has been to legitimate the authority exercised by the then-dominant political forces," McDorman said. This is one reason why the country has had a new constitution virtually every time that power has changed hands.

In 1992 the people of Thailand broke from this history when popular resistance to the dictator-turned-prime minister General Suchinda Kraprayoon caused the government's downfall and the beginning of some years of reforms, culminating with the 1997 Constitution of Thailand.

"The 1997 Constitution made significant changes to the management of criminal justice in Thailand"

On 11 October 1997 the people of Thailand realised a popular aspiration towards government based upon a rational set of standards applied to all persons, rather than one set of standards for rulers and another for everyone else.

The 1997 Constitution was unprecedented. It was the first to be written by the people of Thailand for the people of Thailand. The assembly that wrote the draft was itself elected by popular vote, not handpicked by some general. The drafters met and discussed the shape and contents of the constitution with people all over the country. Hundreds of interest groups were established to raise and carry forward discussion on and around the drafting. Social debate and exchange flourished. In 2001 Dr Thanet Aphornsuvan of Thammasat University wrote that

> The new Constitution reflected the crystallization of 67 years of Thai democracy. In this sense, the promulgation of the latest constitution was not simply another amendment to the previous constitutions, but it was a political reform that involved the majority of the people from the very beginning of its drafting. The whole process of constitution writing was also unprecedented in the history of modern Thai politics. Unlike most of the previous constitutions that came into being because those in power needed legitimacy, the Constitution of 1997 was initiated and called for by the citizens who wanted a true and democratic regime transplanted on to Thai soil.

Among other things, the 1997 Constitution made significant changes to the management of criminal justice in Thailand. For the first time, the rule of law truly became a part of the supreme law. Dr. James Klein of the Asia Foundation in 2003 described how,

> Thailand's fifteen previous constitutions had been subservient to code and administrative law designed by the bureaucracy to regulate individuals in society by restricting their fundamental rights and liberties... Thai politicians, the military and senior civilian bureaucrats had always reserved for themselves the power to interpret the meaning of law and the intent of the constitution.

As a result of public dissatisfaction at this state of affairs, Dr. Kittipong Kittayarak, a former director general of the Department of Probation has written how the 1997 Constitution

> Put great emphasis on overhauling the criminal justice system. The timing of the drafting of the Constitution also coincided with public sentiments for reform, triggered by public dissatisfaction of criminal justice as a result of the wide media coverage on the abuse of powers by criminal justice officials, the infringement of human rights, the long and cumbersome criminal process without adequate check[s] and balance[s], etc. The public also learned of conflicts in the judiciary and other judicial organs which at times were spread out and, thereby, deteriorated public faith in the justice system. With such [a] background, the members of the Constitutional Drafting Assembly used the occasion to introduce a major overhaul of Thai criminal justice.

The 1997 Constitution sought to make itself the basis of law, with government agencies subordinate to it, rather than vice versa. This was nothing short of a revolutionary change, and it was bound to bring conflict and problems. So the Constitutional

Court and some independent agencies--notably the Election Commission--became mired in controversy. Why should this be surprising? The development of new institutions, particularly where they challenge established authority, is by its very nature provocative. And before September 19 Thailand's senior courts were addressing this conflict: a conflict that in essence was over whether society should be founded upon the rule of law or the rule of lords. They had public support and the backing of His Majesty the King. So what has changed since then? And where are they now?

"The judiciary, historically by far the weakest leg of the state in Thailand, was at last beginning to flex some muscle"

Together with the many complicated institutional changes that followed came psychological changes: among judges, lawyers and the public. The higher courts in 2006 for the first time took a lead role in deciding issues of national importance. Courts at all levels were increasingly willing to invoke constitutional rights directly, and consider arguments on human rights principles. The notion of public interest litigation was becoming known and accepted among legal practitioners. People were gaining confidence in the capacity of the courts to address the many problems facing their society. The judiciary, historically by far the weakest leg of the state in Thailand, was at last beginning to flex some muscle.

When protestors against the Thai-Malaysian gas pipeline project were prosecuted, they were acquitted after asserting their rights to assemble and express their opinions freely under the constitution, as were local administrative officers sued by a company for organising meetings against a proposed phosphate mine. Officials of the Anti-Money Laundering Office were found guilty of breaching the constitutional right to privacy of five social activists whose bank accounts and other personal financial details they had illegally investigated. A lawyer sued the public prosecutor for denying him a job because of a physical disability; the court decided that he had suffered discrimination in breach of the constitution.

There were also many innovations. Radio and television broadcasting were identified as national resources to be used in the public interest (section 40): the ground upon which media rights campaigner Supinya Klangnarong successfully stood in court against the huge resources of the former prime minister's telecommunications empire. Government departments had to inform people of any project that may affect their local environment or quality of life before giving it approval (section 59): the basis for a 2004 judgment against the industry minister and overturning of a mining concession in Khon Kaen that had not first been subject to public debate.

New innovations encouraged new thinking and behaving. Jinthana Kaewkhao, the organiser of a protest against a power plant concession in Prachuab Kiri Khan, won her case after the court defended not only her rights to free assembly and speech but also her right to participate in the management and preservation of natural resources under section 46 of the new

constitution. The court went on to observe that this and other new provisions in the law were specifically intended to develop a democratic administration that obliged greater involvement by ordinary persons in public and political life than had earlier charters.

"Good constitutions do not die simply because bad governments abuse them"

The 1997 Constitution marked a great advance in the thinking of people in Thailand on constitutional issues and the management of their society. It enriched the behaviour of millions. It also constituted a great advance in the notion of consensus. Whereas "consensus" had earlier been understood in terms of patronage--what the elite decided on behalf of everyone else--it was now understood as mature agreement among the general public. Ordinary people throughout the country soon demonstrated a better grasp of the true meaning of consensus than had the traditional authorities.

The 1997 Constitution was also of importance to many far beyond Thailand. It set an example to a region plagued by authoritarianism and the un-rule of law. As Professor Andrew Harding from the University of London has written, "Thai public law reform should be regarded as being of great significance in the context of the development of the new constitutionalism in Asia and the developing world generally."

The 1997 Constitution was flawed, and it was attacked. Thailand was not transformed overnight, and in fact it experienced many setbacks in the five years of government by Thaksin Shinawatra. But his government's concerted assaults on constitutional institutions and principles can in no way be compared to what was done by the Thai military in a matter of hours on September 19.

Genuine constitutionalism means ground rules that everybody must obey. Genuine constitutionalism means that even army generals answer to the law. It means that ultimately the army is subordinate to other parts of government. It was this that the military could not stomach.

Good constitutions do not die simply because bad governments abuse them. The Constitution of India was not destroyed by Indira Gandhi's dictatorial emergency rule in the mid 1970s; it was used by the people to oppose and defeat her. The Constitution of Nepal did not die despite the efforts of King Gyanendra to reimpose absolute monarchy; again people fought back and restored their democracy. Nor is the Constitution of the United States of America dead, despite the immense abuse of powers by the Bush administration. So it is also for Thailand. The 1997 Constitution was not killed by the Thaksin government, as some people have said; nor can the army get rid of it; however, it may try.

The interim constitution introduced by the regime--a characteristic of military takeovers in Thailand--is an attempt at pushing the country back towards nominal constitutionalism. It secures the power of the coup group while trying to give the opposite impression. As informed observers have already noted

since it was announced on October 1, the charter gives the remodelled junta--which with it changed its name from "Council for Democratic Reform" to "Council for National Security"--authority of appointment and decision making over the heads of any new government. Apart from appointing the prime minister, and chairperson and deputy chairperson of the temporary parliamentary assembly, under it the junta appoints a 2000-member body which will select 200 persons from among its ranks, among whom the generals again select 100, who are responsible for setting up a 35-person constitution drafting group, among whom 25 will be drawn from the 100 and ten will be handpicked by, yet again, the junta. Questions over the criteria and procedure for selection of the 2000, 200, 100, 35, 25, ten or whatever numbers of persons for whatever posts remain wholly unanswered, and largely unasked.

All this pointless whittling down of persons in order to write a new permanent constitution is apparently intended to distract attention from the fact that it is the junta deciding who does what. It is also apparent that suggestions from law experts to make changes to the document while it was still in draft, which reportedly had as its main author the same person as the 1991 interim constitution, were ignored. It is not surprising that academics and other legal professionals have expressed grave concerns. Of section 34, which allows the junta to call the council of government ministers for a meeting in which to air its views any time it pleases, former senator Thongbai Thongpao wrote in his Sunday Bangkok Post column that it "is not very clever" as it "spoils the pledge of non-interference in the civilian administration". A cartoon on the independent news website Prachatai put the situation more simply: the constitution drafting assembly is sealed off by a barbed wire fence; two ordinary citizens are left to cling to the fence and shout from the outside.

The interim constitution, like others of its type, also gives all pronouncements by the military regime the force of law, and grants them immunity from prosecution for any coup-related actions. By mid-October there were 36 such announcements and 28 such orders listed on the website of the Council for National Security, the renamed coup group. Apart from scrapping the former government, the 1997 Constitution and Constitutional Court, they have imposed martial law, repealed earlier laws, amended the Royal Thai Police Act 2004, restricted free speech and movement, banned political gatherings, and set up new bodies.

SOURCE: PRACHATAI

Extracts from the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006)

(Countersigned by General Sonthi Boonyaratglin, Leader of the Council for Democratic Reform, 1 October 2006)

Section 7: The King appoints one member of the National Legislative Assembly as its President and one or more, upon the resolution of the National Legislative Assembly, as its Vice Presidents... The Chairman of the Council for National Security shall countersign the Royal Command appointing members, the President and Vice Presidents of the National Legislative Assembly.

Section 14: The King appoints the Prime Minister and not more than thirty-five other ministers, upon the advice of the Prime Minister, to constitute the Council of Ministers charged with the duty of carrying out the administration of State affairs. The King has the prerogative to remove the Prime Minister, upon the advice of the Chairman of the Council for National Security, as well as to remove ministers, upon the advice of the Prime Minister. The Chairman of the Council for National Security shall countersign the Royal Command appointing or removing the Prime Minister...

Section 19: There shall be a Constitution Drafting Assembly to draft the constitution consisting of the 100 persons appointed by the King in accordance with the procedures prescribed in this Constitution. The Constitution Drafting Assembly shall have one President and not more than two Vice Presidents who are appointed by the King from the members of the Constitution Drafting Assembly in accordance with its resolution. The Chairman of the Council for National Security shall countersign the Royal Command appointing the President and the Vice President(s) of the Constitution Drafting Assembly...

Section 20: The National People's Assembly shall consist of no more than 2000 members appointed by the King, all of whom shall be of Thai nationality by birth and not less than eighteen years of age. The Chairman of the Council for National Security shall countersign the Royal Command appointing the members of the National People's Assembly...

Section 23: Upon receipt of the list of nominees to the Constitution Drafting Assembly from the National People's Assembly, the Council for National Security shall select 100 persons from the list and submit it to the King to graciously appoint the members of the Constitution Drafting Assembly. Should the National People's Assembly be unable to carry out its duty within the timeframe set... the Council for National Security shall select 100 persons from among the members of the National People's Assembly and present a list of these 100 persons to the King for further appointment. The Chairman of the Council for National Security shall countersign the Royal Command appointing the members of the Constitution Drafting Assembly.

Section 24: Should the office of any member of the Constitution Drafting Assembly be, for any reason, vacated during the period when the performance of the Drafting Assembly's tasks under this constitution is not yet complete, the Chairman of the Council for National Security shall select a replacement...

Section 25: In preparing the Draft Constitution, the Constitution Drafting Assembly shall appoint a Constitution Drafting Committee, consisting of 25 eminent persons who may or may not be members of the Constitution Drafting Assembly elected in accordance with its resolution and 10 eminent persons who may or may not be members of the Constitution Drafting Assembly, on the advice of the Chairman of the Council for National Security...

Section 32: Should the Constitution Drafting Assembly not complete the Draft Constitution within the time period prescribed... or the Constitution Drafting Assembly does not approve the Draft Constitution... or the people voting in the Referendum... reject, by majority vote, the promulgation of the Draft Constitution, the Constitution Drafting Assembly shall cease to function and the Council for National Security shall hold a joint meeting with the Council of Ministers to consider and revise one of the previously promulgated Constitutions of the Kingdom of Thailand within thirty days as from the date of the referendum and present it to the King for signature to promulgate as the Constitution...

Section 34: For the benefit of the maintenance of national security and public order, there shall be a Council for National Security consisting of the persons stipulated in the Announcement by the Council for Democratic Reform No. 24 dated 29 September B.E. 2549 (2006)... The Leader, Deputy Leaders, Members, Secretary-General and Assistant Secretary-General of the Council for Democratic Reform shall be Chairman, Vice Chairmen, Members, Secretary-General and Assistant Secretaries-General of the Council for National Security, respectively... Should the Chairman of the Council for National Security or the Prime Minister deem it appropriate, he may request a joint meeting of the Council for National Security and the Council of Ministers to consider and resolve any problems related to the maintenance of national security and public order as well as to consult on other matters from time to time.

Section 36: All announcements and orders of the Council for Democratic Reform or orders of the Leader of the Council for Democratic Reform issued as of 19 September B.E. 2549 (2006) until the date of promulgation of this Constitution, be they in any form or enforced in a legislative, executive, or judicial manner, shall continue to be in force. These announcements or orders as well as any actions taken under them, whether before or after the promulgation of the Constitution, shall be deemed lawful and constitutional.

Section 37: All matters that the Leader and the Council for Democratic Reform, including any related persons who have been assigned by the Leader or the Council for Democratic Reform or who have obtained orders from the persons assigned by the Leader or the Council for Democratic Reform pursuant to the seizure of State administration on 19 September B.E. 2549 (2006) to take actions prior to or after said date for enforcement of legislative, executive, judicial purposes, including meting out punishment and other administrative acts, whether as principal, supporter, instigator or assigned person, which may be in breach of the law, shall be absolutely exempted from any wrongdoing, responsibility and liabilities.

Normally functioning non-independent courts & the antithesis of common sense

"The independence of judges cannot simply be declared; It is by the effective functioning of institutions and maintenance of safeguards that judges obtain true independence"

A few years ago, some senior United Nations staff in Cambodia met with a government minister to discuss the state of the country's courts. They expressed concern about their lack of independence, and asked what intentions the government had to address this problem. "Don't worry," the minister told them simply, "I will make them independent."

Apparently suffering similar confusion, the interim prime minister, General Chulanont Surayud, has said that his government "is committed to restoring the rule of law" through reforms to administration of justice, the police and anti-corruption agencies. Similarly, Thai diplomats have insisted that since the coup "the courts... function as normal, with the exception of the Constitutional Court". The Constitutional Court has of course been suspended in the absence of the 1997 Constitution. But meanwhile section 18 of the new Constitution of Thailand (Interim) 2006, which was signed into law by the head of the military junta, holds that: "Judges are independent in the trial and adjudication of cases in the name of the King and in the interest of justice in accordance with the law and this Constitution." Section 35 goes on to order the appointment of a new tribunal in place of the Constitutional Court, comprising of judges from the two remaining senior courts.

These provisions in fact do nothing to ensure the independent functioning of courts in Thailand. The independence of judges cannot simply be declared. It is by the effective functioning of institutions and maintenance of safeguards that judges obtain true independence. The declaration in this so-called constitution is also itself directly contradicted by the order to replace a superior court with a tribunal, and stipulation of its membership, on the signature of a military officer who obtained power by force.

Above all else, the independence of judges is ensured by security of tenure. This means that judges cannot be removed and appointed on the whims of the executive or any other part of government. It means that courts cannot be opened and closed on the prerogative of any one person or agency outside of the judiciary. It means that judges, once appointed, are not easily or quickly removed.

Innumerable commentaries and precedents established around the world recognise security of tenure as vital to the integrity of the courts and maintenance of the rule of law. In the Federalist Papers, three framers of the United States constitution note that "nothing will contribute so much as this to that independent spirit in the judges". It follows that the 1985 UN Basic Principles on the Independence of the Judiciary have declared: "Judges, whether appointed or elected, shall have guaranteed tenure."

The 1997 Constitution of Thailand, while by no means perfect, laid down clear guidelines with checks and balances designed to protect judges' independence, through procedures for appointment and maintenance of tenure. It recognised the principle of independence through serious efforts to see it obtained via institutional arrangements. The interim constitution has no such contents. Nor does the junta have any genuine interest in such matters. Its appointing of a new constitutional tribunal instead defies the very notion of judicial independence. Its orders to various government agencies to go after members of the former government reveal that its interests are limited to the exercise of "justice" as justification for its own illegal acts, rather than to uphold any notions of the rule of law.

"Inseparable from the rule of law is the notion of parliamentary sovereignty"

Another remark by the interim prime minister seemed to have an unintended meaning. He said that on the one hand, "I am not a politician and I am not bound by special interests." On the other, he added that, "I have the authority and the power that comes with being an appointed prime minister to act quickly and decisively." General Surayud has made a virtue out of a vice: the fact that he is unencumbered by any political parties and an elected parliament, he says, is a good thing.

Inseparable from the rule of law is the notion of parliamentary sovereignty. This means that an independent parliament alone has the power to pass acts, free from interference, with effect in law. Those acts may then fall within the exclusive purview of the courts. In this way the judiciary too is strengthened, and its role reaffirmed as the arbiter of the law.

The prime minister's assertion that he is free to do what he needs to do to uphold the rule of law is a non sequitur. Only a head of government bound by the institutions of the rule of law, among them a functioning parliament and courts, can uphold the rule of law. His very position, and his assertion of his authority to act upon it, is itself a violation of the rule of law.

In the absence of a sovereign parliament, who is making the law in Thailand? Certainly no one answerable to its people: an unelected assembly of military and police officials, bureaucrats and academics is acting on their behalf. No evidence of the rule of law there, either.

A military coup necessarily displaces the foundations upon which the rule of law operates. Where an army unilaterally takes power by force and abrogates the national constitution, it is acting illegally to undermine everything upon which the courts stand. In an interview with The Times newspaper, a senior spokesman for the junta has admitted as much. "[The coup] is against the law... But sometimes, to break the deadlock, someone has to do something," Major General Thawip Netniyom is reported as having said.

That "sometimes someone has to do something" is a neat phrase, because it can be used to justify anything. When the "someone" is an army clique and the "something" is a coup, a

range of generic justifications must follow: the administration was corrupt; the nation was at risk; the people lacked unity. Hence the purported solutions: remove the administration; rescue the nation; re-impose unity.

"For as long as the higher judiciary legitimises illegal takeovers of power, there will be illegal takeovers"

Certainly, legal systems are complicated, imperfect and time-consuming. That is because the management of a modern state, with many competing interests and demands, is complicated, imperfect and time-consuming. To bypass all of this because "sometimes someone has to do something" is not to solve any problems. It is to throw justice into the rubbish bin. And with it go the principles upon which human rights are protected, international laws written and courts established. This is not stability; it is not rule of law: it is its antithesis. It is dictatorship.

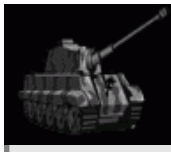
The Nation newspaper of October 8 reported Professor Worachet Pakeerut of Thammasat University as saying that coups would continue in Thailand for so long as the courts there recognise the amnesties that perpetrators pass for themselves. Worachet had said that there "was a discrepancy in the Thai judicial system that recognised law written by people in power even though the law was against morality and people's common sense".

This "discrepancy" is the crux of Thailand's problems. For as long as its higher judiciary legitimises illegal takeovers of power, there will be illegal takeovers. For as long as the orders of generals are written into law through new constitutions, there will be fictional constitutionalism.

How can an unconstitutional act be made constitutional simply by saying that it is so? How can an illegal act be made legal by declaring it thus? This is not legal pragmatism, as suggested by some; it is patent absurdity. It is the opposite of common sense; it is nonsense. It is also a blatant breach of international law and obligations to which the new government has promised to adhere: just one among many contradictions that have emerged since the coup.

The highest form of contempt of court is the extralegal removal of a judiciary and legislature, as happened in Thailand on September 19. Where superior courts meekly accept such an action as a done deal, they lose the public confidence needed to address all issues of national concern.

There is a small precedent that could be used, if the senior judiciary in Thailand would have the stomach to try. In March 1993, after the 1991 coup group had already been removed from power by public protest, the Supreme Court of Thailand found that a committee set up to investigate the former government was unconstitutional, and in so doing it overruled order 26 of the coup group as illegal. The time has come to build upon that example, and overrule some more. The most important job for the superior courts now is not to rule on the former government; it is to rule on the present one.



THAILAND MILITARY COUP 2006
FICTION vs. FACT

(Adapted from AHRC webpage: http://thailand.ahrchk.net/fiction-fact)

FICTION: "There was no other way to avert a national tragedy"
FACT: The military regime has not produced any evidence to show that widespread violence was imminent, as it has claimed. There were certainly worrying conflicts, some of them planned, between supporters and opponents of the caretaker government. However, there is nothing to prove that these would have threatened national security.

FICTION: "The majority of people in Thailand support the coup"
FACT: There is no way to verify this statement. The coup group has used images of people in Bangkok giving flowers and food to soldiers as propaganda, nationally and internationally, to claim that it had popular backing. But opponents and critics of the coup have been banned from organising protests or other actions. Talk shows, community radio stations, websites and other avenues for free public expression have been shut down or closely monitored. The media has been ordered to "cooperate" with the regime, and has largely complied.

FICTION: "The military will step down after one month"
FACT: The coup group, renamed the Council for National Security, is set to remain in power until a new government is elected; at least one year. In the meantime, its leadership has done exactly what it accused the previous government of having done: it has promoted its own people to positions of authority. General Sonthi has himself also become director of the powerful Internal Security Operations Command, a post normally reserved for the prime minister.

FICTION: "A civilian prime minister will be selected within two weeks"
FACT: The new prime minister is a retired careerist general and personal friend and colleague of the coup leaders who led troops involved in the May 1992 massacre, for which no military officers have ever been called to account.

FICTION: "An interim civilian legislature will include persons from all social sectors"
FACT: The interim legislature has been rightly named "the assembly of generals". Out of 242 of the 250 members named so far, 76 are serving or retired generals and senior officers. Most other members are bureaucrats, businesspeople and some academics. By contrast, there is one labour representative, and four from political parties.

FICTION: "The military will be placed under the interim constitution and the Council for National Security will be limited to specific security issues"
FACT: The interim constitution makes the Council for National Security the most powerful body in Thailand, with the means to control every aspect of the country's political workings while the law remains in effect.

FICTION: "The interim constitution will fully guarantee civil liberties and rights"
FACT: The interim constitution has no guarantees of rights and liberties. A generic provision protecting human dignity and rights as per customary practice and international obligations is meaningless, as it is without substance, lacks any institutional means for enforcement and is anyhow contradicted by reality.

FICTION: "Many law experts looked at the interim constitution and were very happy"
FACT: The advices of law experts on the interim constitution were largely ignored. The version passed is virtually identical to the interim constitution of the 1991 coup group. It has been strongly and repeatedly criticised by law experts.

FICTION: "General elections will be held within one year, if not sooner"
FACT: The minister responsible for the office of the prime minister has estimated that it may be 17 months before elections can be held. Like its predecessors, the military regime is now looking for ways to extend its tenure.

FICTION: "One of the first tasks of the interim government will be to end martial law"
FACT: The intention of the junta is to retain martial law for as long as possible. Meanwhile, emergency regulations remain in force in the south, despite the government's claims that it seeks peace with insurgent groups there, and the earlier condemnation of these regulations by a United Nations rights expert.

FICTION: "The courts are independent"
FACT: The Constitutional Court has been recomposed as a tribunal and set the task of finalising earlier cases on constitutional violations by political parties. Like military regimes the world over, the coup group is messing with the higher judiciary for its own purposes, with the consequence that the entire judicial system is compromised.

FICTION: "The government will continue to meet all its international obligations"
FACT: Thailand's international human rights obligations were underpinned by the 1997 Constitution. In its absence, there is no legal foundation for compliance, and the institutions for protection of human rights in Thailand have been sorely damaged. Ongoing restrictions to freedom of speech, assembly, movement and other civil rights all breach international law, as does the amnesty that the coup leaders have granted themselves.

FICTION: "This is only a brief intervention to restore and strengthen democracy"
FACT: This is the biggest fiction of them all. It is also patent nonsense. Democracy is not strengthened by military coups. Nor does this coup group have any such intention. Having scrapped the only truly democratic constitution that the country ever had, however imperfect, it is now acting to reinforce established authority against the growth of other parts of society which were outside of its control. The true intention of the coup group is to restore and strengthen the role of the armed forces in the political life of Thailand. This is the opposite of democracy.

Extrajudicial killings & human rights abuses in the Philippines

Hong Kong Mission for Human Rights & Peace
in the Philippines

Following reports of widespread and continuing killings of persons in the Philippines, concerns have been growing around the world, including in Hong Kong. The information reaching the international community concerning these events alleges that the killings, which appear to specifically target left-leaning political activists, human rights defenders, members of the clergy, students, lawyers and journalists, have caused hundreds of casualties in recent years, with the problem continuing unabated at present. These reports have given rise to increasing concern on the part of individuals and organizations in Hong Kong, leading to a desire to better understand the problem and to inform Hong Kong society about these events, in order to lend a hand in doing whatever is possible to bring about an end to these killings.

To gain an improved understanding of the problems, the underlying causes and ongoing realities in this human rights crisis, it was decided that a fact finding mission should be conducted by members of Hong Kong's civil society. The fact-finding mission, which was held on 23 to 28 July 2006, and was entitled the Hong Kong Mission for Human Rights and Peace in the Philippines, was designed to be multi-sectoral--comprising of representatives from the various sectors that are being targeted by the killings, as

Text adapted from report of Hong Kong Mission for Human Rights & Peace in the Philippines, 23-28 July 2006, organised by the Hong Kong Campaign for the Advancement of Human Rights in the Philippines, in cooperation with the secretariat of the International Campaign to Stop the Killings in the Philippines. The mission comprised of representatives from the Asian Human Rights Commission; Asian Students Association; Hong Kong Bar Association; Hong Kong Christian Institute; Hong Kong Journalists Association; Justice and Peace Commission of the HK Catholic Diocese; St. John's Cathedral, and United Filipinos in Hong Kong, and in addition journalists from the South China Morning Post newspaper and Yazhou Zhoukan magazine. The full report is available online at: http://www.pinoyhr.net/reports/missionreport.pdf

listed above. The mission was organized in order to add to efforts already being made by the growing global campaign to stop the extrajudicial killings in the Philippines.

"Interviewees consistently described the perpetrators as having worn ski masks and camouflage garments"

The purpose of the Hong Kong Mission was to gather information on the extrajudicial killings and abductions in the Philippines. The Hong Kong Mission spent the week travelling in Central Luzon to conduct interviews with various government departments and officials, different non-governmental organizations, and victims or the families of the victims who have been abducted, killed or subjected to controversial prosecution by the State.

Patterns of killings as described by interviewees

The Hong Kong Mission met a number of representatives from various human rights non-governmental organizations. There was consensus among the NGOs that the killings were part of the government's plan to rid itself of the opposition parties or those considered to be in opposition to the Arroyo administration. NGOs report that there is a pattern of a sharp increase in the number of killings where there are military detachments.

The civilian interviewees consistently described the perpetrators as having worn ski masks, and camouflage or green garments. The killings described by the family members of victims or witnesses were committed by using guns. Some interviewees were able to confidently state that military men were responsible for the killings. All interviewees stated that those killed or abducted had affiliations with parties or organizations that were labelled by the government as "communists" or thought by the perpetrators to be associated with the New People's Army (NPA).

The killings appear to be targeting anyone suspected of being a member of the NPA illegal armed group. These suspicions, however, in many cases seem to be arbitrarily levelled against persons from the legal "leftist" political spectrum, without credible substantiating evidence being available to confirm their involvement in any illegal and/or armed insurgent activities. It has been suggested that these killings are being perpetrated in an effort to eradicate both the armed resistance to the government as well as its legitimate political opposition. The implementation of this alleged policy, which amounts to a grave violation of democratic principles as well as human rights, is, according to many sources, attributable to Armed Forces General Palparan, who is also known as "the Butcher" in certain circles.

While it was not possible for the fact-finding mission to ascertain beyond all possible doubt that the state is responsible for many or all of the killings in the Philippines, as it cannot replace the state institutions that are meant to conduct investigations and deliver justice, it must be said that the problem of extrajudicial killings is continuing unabated and that the perpetrators are not being brought to justice. The state is therefore, at the very least, failing to protect its citizens.

The Hacienda Luisita killings

The fact-finding mission travelled to Hacienda Luisita on July 26th, 2006 and met with victims' relatives and local officials. The situation in Hacienda Luisita continues to be problematic to date, but was, in 2004, the scene of one of the most infamous cases of killings in the Philippines.

On 6 November 2004, at around 12pm, some 5000 mill and farm workers from the Cantral Azucarera de Tarlac Labor Union (CATLU) and United Luisita Worker's Union (ULWU) held a protest in front of the gate of the Central Azucarera de Tarlac sugarcane plantation.

The workers are 'co-owners' of the 4915.75 hectares of land inside the Hacienda Luisita Inc. (HLI) that are classified as agricultural land. As farm-worker-beneficiaries and part of the Stock Distribution Option (SDO) scheme, they are entitled to 33.296 per cent of the SDO's outstanding capital stock, under the Comprehensive Agrarian Reform Program.

The workers protested against the measures imposed on them, which hampered their livelihood. They protested about the massive land-use conversion in the hacienda, the implementation of the "voluntary early retirement program" in 2000 by HLI and the continued reductions of working days. These measures had resulted in the laying-off of more than 1000 farm workers since 1989.

On October 1, 2004, 327 farm-workers, including nine officers of ULWU, were sacked by the HLI management. The efforts by the CATLU to collectively bargain with the management regarding their demands for wage increases and benefits drew to a stand still.

These issues prompted the protesters to stage a picket in front of the gate of the Central Azucarera de Tarlac, which started on 6 November 2005. As the tension grew, several attempts were made by the police and the military to disperse the protesters, but these failed. The protesters stood their ground until a violent confrontation between protesters and the military and police forces broke out on 16 November 2004. Seven people were killed and ten people were severely injured, while some 200 other protesters required hospitalisation.

Memorial to Hacienda Luisita dead

To date, the investigations into these killings have not led to any conclusive results or any perpetrators being identified or prosecuted, despite there being a large number of persons who witnessed the attacks.

Killing of judges and lawyers

Human rights organization Karapatan recorded the total number of extrajudicial killings under the Arroyo administration as being 704 from 20 January 2001 to 8 July 2006. Of the 704, approximately 290 were members and leaders of progressive party organizations.

According to Codal [Counsels for the Defence of Liberties], 10 judges and 15 lawyers have been killed since the Arroyo administration took office.

Representatives of Codal indicated that the number of killings had recently increased dramatically and that many lawyers have received death threats. Lawyers targeted by the killings and threats are generally human rights lawyers, including some who were or are involved in high profile cases against the government. A personal interview was conducted with a lawyer involved in helping the farmers of Hacienda Luisita. This particular attorney expressed that he was being subjected to harassment and felt that his life is in danger.

At the meeting with Codal, two well-known examples were given to show the blatant attacks on lawyers and judges. Attorney Feldido Dacut was a prominent human rights lawyer and was killed on 15 March 2005. Representatives of Codal expressed their shock at having learnt that the attorney had been killed in a busy place in the middle of the day. The other example given was the assassination of Judge Gingoyon, who ruled on a case involving allegations of corruption against the government in the construction of the airport. Judge Gingoyon ruled against the government and ordered it to pay 14 billion pesos. In addition to these two examples, other members of Codal present at the interview indicated that they have received death threats and are subjected to surveillance by unknown men suspected to be either from the military or the police.


General Razon

Contrary to the figures given by Codal, the Philippines National Police (PNP) Task Force Usig indicated that there were only a total of 16 judges and lawyers killed during 1999–2006. Of these 16, 11 were judges and four were state prosecutors. General Avelino I Razon Jr, the head of the Task Force Usig, expressed that there were "no significant killings of lawyers" and that every country would have a number of judges or lawyers killed for a variety of reasons. He further indicated that the PNP had no figures concerning the number of suspects found for these cases. When questioned on whether there was an independent task force set up to investigate the killing of lawyers and judges, General Razon indicated that there was none. Upon further questioning, General Razon reiterated that there was no special task force set up to investigate the killing of lawyers and judges, and he expressed that he would have knowledge of such a task force had such a task force been established.

This information is contrary to what was told to the International Fact Finding Mission (IFFM). In its report published on 24 July 2006 entitled "From Facts to Action: Report on the Attacks against Filipino Lawyers and Judges", the IFFM was told that a new task force called "Task Force Judges, Prosecutors and IBP Lawyers" (Lawyer's Task Force) was formed on January 17, 2006.

"Church workers have been killed even though they were transforming their faith into concern for the society and assisting those in need"

Killing of church workers

Of the more than 700 persons reported as having been killed for political reasons since 2001, 21 have been church workers, including nine pastors and a priest. Furthermore, a priest of the Iglesia Filipina Independiente (IFI; Philippine Independent Church) and his wife survived an assassination attempt. A number of other church workers have also received death threats and faced harassment from persons believed to be connected with the military or the police.

All of the victims share much in common. They were human rights advocates, members of progressive organizations, and vocal critics against militarization, logging, mining and other projects deemed by the locals as being destructive to the environment or as threats to their livelihoods. The church workers in question were also contributing to the betterment of society, but in carrying out such work, have been associated with leftist movements and targeted as such. These people have been killed or threatened even though they were engaged in transforming their faith into concern for the society and assisting those in need. The killings of persons engaged in assisting those most vulnerable sectors of society can only have a negative impact on society as a whole. Two examples of individual cases documented by the fact-finding mission follow.

Fr William Tedena of the IFI was killed near his church by two masked men on motorcycles in March 2005. He had been supporting the peasant beneficiaries of the Hacienda Luisita to claim their land, which had promised to them under the Comprehensive Agrarian Reform Program. He supported the peasants by supplying rice to them. In his sermons, he strongly condemned the abuse of power by the military in region.

Rev. Fr Eleuterio "Terry" J. Revollido is a priest from the IFI who is also the Chairperson of Bagong Alyansang Makabayan (Bayan; New Patriotic Alliance) in Pangasinan province. The organisation's vice chairman, Mr. Mariano Sepnio and its general secretary, Mr. Jose Doton, were killed in March and May 2006 respectively. Recently, Fr Terry was informed by his neighbours that there were suspicious looking men on motorcycles that appeared to be engaged in surveillance of the seminary where he works. There were also unusual movements of men for successive nights, who reportedly spent several hours in the vicinity of the seminary. Although his personal security is under threat, he has refused to leave the country, as he feels he cannot give up his work for the church or for Bayan.

The killing of Father Isaias Sta. Rosa

At around 7:30pm on 3 August 2006, armed men entered the house of Pastor Isaias's brothers, Rey and Jonathan. The perpetrators later went to Pastor Isaias' house taking his brothers with them. When his wife Sonia opened the door, three armed, hooded men forcibly entered the home and ordered all those inside to drop to the floor. They then grabbed Pastor Isaias, and beat him while trying to force him to admit that he was in fact a person named "Elmer" who they were searching for. Pastor Isaias denied being that person and told them to check his identification card.

Pastor Isaias was then taken outside, while his family remained indoors. When his family were certain that the armed men had left, his wife Sonia rushed outside. They found the dead body of Pastor Isaias lying in a nearby creek, some 40-50 meters away from their residence in Barangay (village) Malobago, Daraga, Albay. He had suffered six gunshot wounds, three of which hit his chest, two hit his thigh and another hit his foot.

Evidence collected points to the Army's 9th Infantry Division being responsible for having shot and killed the 47-year old pastor outside his house. The evidence linking the military to the killing is very strong, as the body of one of the members of the group of ten masked perpetrators was found dead next to the pastor's. The local police have identified the body as being that of Corporal Lordger Pastrana. On his body were found: an identification card showing that he was a member of the 9th ID, based in Pili, Camarines Sur; a 45-caliber pistol; a cellular phone allegedly taken from Sta. Rosa's house; and a mission order dated July 22, 2006 that was signed by Major Earnest Mark Rosal of Camp Matillana, Pili, Camarines Sur.

Pastrana is believed to have been one of the gunmen, but it is thought that he was accidentally shot by his own men while they were trying to subdue a fleeing Sta. Rosa. The corporal reportedly received a bullet in the right side of his body, while the pastor died of six gunshot wounds.

The killing of Bishop Alberto Ramento

Prominent human rights defender Bishop Alberto Ramento was killed by unidentified men at his convent in Tarlac City. Prior to his death Bishop Ramento reportedly complained that he had been receiving death threats because of his advocacy activities in favour of human rights.

Sixty-nine-year old Bishop Ramento was found dead in his room on the 2nd floor of the parish of San Sebastian, Espinoza Street, Tarlac City at around 4am on 3 October 2006. He had been fatally stabbed seven times. Initial police investigation reports point to the incident as being a mere case of robbery with homicide. However, the bishop's family and his fellow clergy-members believe that his murder was premeditated and politically motivated.

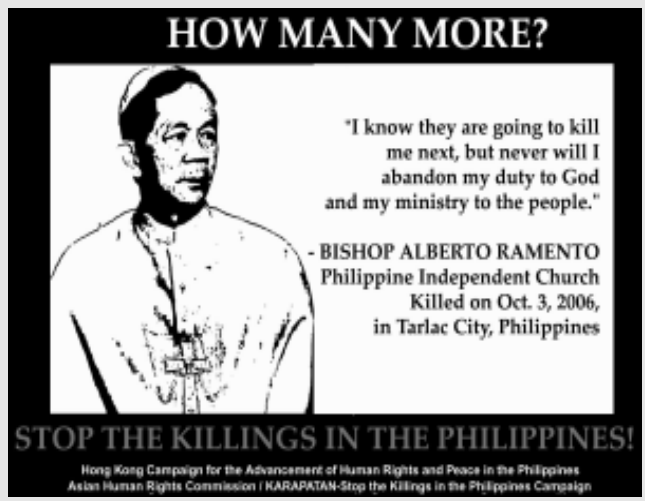
Bishop Ramento had reportedly received several death threats before his killing and told his family, "I know they are going to kill me next. But never will I abandon my duty to God and my ministry to the people."

Bishop Ramento was a champion of the poor and publicly criticised the Arroyo administration for its failure to stop the killings in the country and to launch a genuinely independent investigation into them. In an open letter to President Arroyo on 7 September 2006, the IFI Executive Commission, in which Bishop Ramento was a member, called on the president to voluntarily step down because of the failure of her government to stop the increasing number of extrajudicial killings in the Philippines. Bishop Ramento also openly opposed the attempts by President Arroyo to amend the country's constitution in order to change the political structure of the Philippines from a presidential system to a parliamentary model of government.

Bishop Ramento served as a convener of Pilgrims for Peace and was also a provincial leader of the human rights group Karapatan, one of the most active local organizations on reporting the ongoing extrajudicial killings in the Philippines. Tarlac City is the area where now-retired General Jovito Palaparan, known as the 'butcher', was formerly assigned, and there were a number of serious cases of killings and disappearances allegedly carried out by military personnel there, making this a particularly sensitive region. Bishop Ramento was also the chairperson of the board of the Workers' Assistance Centre, a labour group in Rosario, Cavite Province. In addition, he was a strong supporter of the farm workers of Hacienda Luisita.

Police investigators have been quick to declare his death as a case of robbery and homicide. Two days after the killing, the PNP pronounced Bishop Ramento's case "solved" following the arrest of four alleged suspects in Tarlac City - all of whom had criminal records. While the PNP insists Bishop Ramento's brutal murder was not politically motivated, his family believes otherwise. To counter public opinion to this effect inside the country and abroad, the police resorted to labelling accusations that his death was politically motivated as being "propaganda".

Whether or not Bishop Ramento's murder was politically motivated, his killing is an example of a failed protection system and the unwillingness of the police authorities to acknowledge this fact. The PNP, in particular the Tarlac City police, cannot exonerate themselves from their obvious failure to afford protection to Bishop Ramento, who had been the subject of continual death threats.



Killing of human rights defenders

> "Human rights defenders frequently admitted to having received death threats"

One issue that is of particular concern is the fact that the killings and other related human rights abuses, including death threats, are clearly targeting human rights defenders. Human rights defenders are those persons who, through their work, are engaged in promoting and protecting the rights of others within society. These are not necessarily just persons working for human rights organisations, but may include lawyers, journalists, union workers, student activists and members of the clergy, among others.

Human rights defenders do not have special rights above and beyond those of other members of society, but their protection is of great importance as the role they play within society is crucial in ensuring that poor or marginalised persons' rights are protected. If these persons are targeted due to their work, not only is it a loss to society in terms of the demise of these persons, but it also engenders a loss for those that they support and for the human rights climate and fabric of society in general. It was with this special need for protection in mind that the international community created the United Nations mandate on human rights defenders within the organisation's human rights Special Procedures--the Special Representative of the Secretary General on Human Rights Defenders.

Human rights defenders with whom the fact-finding mission spoke frequently admitted to having received death threats. Human rights defenders are also thought to have been included in the so-called Order of Battle lists issued by the military, which are blacklists that include the names of individuals that the military are seeking on suspicion of being rebels. Due to security reasons relating to the risks that individuals run in pursuing human rights cases, the members of fact-finding mission have decided to not divulge the identities of at-risk persons that were interviewed during the mission. The need for this has been underlined by the recent killing of Bishop Alberto Ramento. This need also illustrates the level of insecurity that exists in the country.

Killing of journalists

According to the International Federation of Journalists and the National Union of Journalists of the Philippines, 82 journalists have been killed since 1986; over 50 during President Gloria Macapagal-Arroyo's time in office. During the previous two years, the number of such killings has been above 10 per year. From January to July 2006, there have already been nine killings.

Media monitoring organisation Reporters Sans Frontieres has recently reported that the situation in the Philippines has worsened. The country now lies 142nd in the world in the organisation's global press freedom index. RSF stated that the Philippines "was three places down with continuing murders of journalists and increased legal harassment, including by President Gloria Arroyo's husband."

In fact, members of the media have already sought assistance from local police, and demanded that the police take the murderers to court. Unfortunately, all of those arrested in connection with the killings appear not to be the leaders or masterminds behind the killings. In some cases it has been revealed that even when the perpetrator revealed the identities of their leaders to the police, the police stopped investigating the cases without providing an explanation.

"Only a very low proportion of cases has been investigated thoroughly"

Task Force Usig

Task Force Usig (TFU) was set up on 13 May 2006 with a mandate to investigate political killings in the Philippines. According to TFU, it is mandated to "provide the focus and resources to immediately investigate, solve and prosecute the perpetrators, as well as safeguarding the lives and limbs of high-risked personalities, such as party sectoral members and media practitioners".

TFU stated that they had on their records 101 cases of killings of party-list members: 27 of these had reportedly been investigated; 74 were still being investigated. With regard to cases of killings of journalists and persons working in the media sector, TFU was working on 26 individual cases and claims to have investigated 20 of these, with six still needing to be investigated fully. The status of the cases that were still under investigation remains unclear, but these cases represent 80 out of 127 cases--some 63 per cent. Given the reports from victims' relatives and concerned groups, who claim that in the majority of cases the police have failed to investigate cases properly if at all, there are concerns that many of these cases remain at a very early stage of investigation.

Although TFU was only formed in mid-May 2006, as a body that solely comprises of members of the police, it draws upon the entire register of activities of the police in terms of investigations that had been carried out concerning the cases spanning back to 2001. It is evident through the figures provided that only a very low proportion of cases has been investigated thoroughly. Added to this is the fact that the cases under consideration by TFU only represent a fraction of the over 700 cases of politically motivated killings that have been identified by many sources, including members of the Philippines' Congress, and local and international groups. There is little doubt as to the scale of the problem of these killings. For example, according to figures provided by prominent members of the House of Representatives (which are in the same range as human rights groups' estimates) there were a total of 704 extrajudicial killings between 20 January 2001 and 8 July 2006. This includes over 290 members and leaders of progressive organisations: for example 113 members of Bayan Muna, 36 members of the Anakpawis party (Party of the Toiling Masses) and three members of the Gabriela Women's party. Added to these 290 victims are numerous cases of journalists, lawyers and judges, members of the clergy, with a

large portion also being persons that are unaffiliated with any movement but have been targeted due to suspicion of being sympathisers or members of the NPA.

"There are concerns about whether any investigations conducted by Task Force Usig will conclude that the killings are politically motivated and are being carried out by state actors"

There are concerns about whether any investigations conducted by Task Force Usig will conclude that the killings are politically motivated and are being carried out by state actors, even if this is in fact the case. These stem from concerns with regard to the independence of the body. TFU is comprised solely of members of the police, which makes it highly unlikely that it will find that members of the police are guilty of having committed any killings as part of their active, official duties. The same is expected with cases allegedly committed by members of the military, who wield extensive power in the country. Indeed, TFU admitted that it shares information with the military concerning its investigations. In the only case thus far that has led to a conviction in court--the case of killing of journalist Edgar Damalerio--the person found guilty was a policeman, but no connection was made between him and the state. For all the other reported killings, no convictions had been made at the time of the fact-finding mission. Hundreds of killings remain unsolved, with the perpetrators enjoying impunity for their actions.

Despite the fact that TFU is tasked with investigating political killings, the head of the task force repeatedly told the members of the fact-finding mission during the interview that there is no government policy of politically motivated killings of opposition party list members, journalists or activists. According to him, no members of the armed forces or the police have killed any such people. Such a statement from the head of a unit that is tasked with investigating such killings is inappropriate before all cases have been fully investigated. This is pre-judging the findings of any investigation and leads to the suspicion that the unit is tasked with attempting to cover up any state responsibility for such acts. It is therefore a concern that TFU will only fully investigate or resolve cases where the findings will exonerate the state, or will investigate in such a way as to skew the findings in such a way as to cover up the state's involvement.

Another significant point that resulted from the fact finding mission's interview with TFU leadership was that when asked about the status of investigations into the forced disappearances on 26 June 2006 of two female university students--Karen Empeño and Sherlyn Cadapan--that were allegedly perpetrated by the armed forces, the head of TFU stated that they were not investigating this case as it did not fall with the Task Force's mandate. TFU only investigates cases where a body has been found, according to General Razon. This raises a key question: who then is tasked with investigating cases of forced disappearance? One assumes that it must be the regular police system, but this has already been exposed as being incompetent at investigating such cases--TFU was set up specifically to investigate the killings in the country, as the police had thus

far failed to do so. There is little reason to believe that the police will exhibit any greater competency in dealing with forced disappearances.

Forced disappearances are in general synonymous with killings, albeit without traces of the victim being found. This implies that the perpetrators of killings need only to ensure that no bodies are found to ensure that no proper investigations are launched into the forced disappearances. According to the figures available from NGO sources, there have been a total of over 180 forced disappearances since 2001 in the Philippines, with none of the victims in question having "surfaced". It can be assumed that most of these persons have likely been killed. The lack of efforts to investigate these disappearances as a priority is a glaring problem and cannot be explained away due to issues concerning scopes of mandates. The government needs to ensure that effective, impartial and independent investigations are launched into these cases of disappearance, as hopes remain that some of these persons are still alive. It may not be enough to extend TFU's mandate, as there are already concerns with regard to its independence and effectiveness. Any body that is tasked with investigating the allegations of politically motivate killings should also cover forced disappearances.

"The effectiveness of TFU should not be measured by the number of cases that it has investigated, but rather by the frequency with which these investigations have led to successful prosecutions"

Furthermore, TFU claims that the witness protection system in the Philippines is working, although when asked about the status of investigations into one of the country's highest profile case of killings, the Hacienda Luisita killings in 2004, in which seven demonstrating workers were shot and killed and some 200 persons were injured (see further details concerning this incident below), TFU claimed that investigations were not advancing because witnesses were not forthcoming. This indicates that the witness protection system is not working. When pressed, the head of TFU claimed that witnesses were not forthcoming because the Communist Party of the Philippines/ NPA had perpetrated the shootings, but this does not stand to reason as, in such a case, there would be no reason for the witnesses to fear being under police protection--quite the opposite.

TFU also claimed that they had a so-called "solution efficiency" of 77 per cent concerning the 26 cases of slain journalists. By this they mean that they consider their job as being over, but in reality all this means is that they have completed investigations and charges have been filed against a suspect. It does not mean that the trial has been conducted and that the suspect has been found guilty and sentenced. TFU is simply doing away with the presumption of innocence. The effectiveness of TFU should not be measured by the number of cases that it has investigated, but rather by the frequency with which these investigations have led to successful prosecutions and the total number of such prosecutions. When measured this way, TFU's results can only be considered as being an abject failure.

"Investigations are also not an end in themselves—perpetrators must be prosecuted"

The legal system in the Philippines suffers from a critical lacuna that enables the current human rights crisis in the country. This lacuna is the lack of a credible, permanent body within the criminal justice system that is specifically designed and mandated to investigate all allegations of crimes committed by state-agents, notably members of the police and armed forces, or any proxies thereof. Such bodies are by nature different than those that look into crimes by ordinary citizens. Without such a system, the investigation of killings and forced disappearances and other human rights violations is by its nature open to being compromised and dysfunctional. The police system is tasked with carrying out criminal investigations into crimes committed by Filipino citizens. Such a system will naturally fail to function when it is tasked with investigating the police itself, or indeed other state agents, such as members of the military.

As it stands, Task Force Usig clearly does not comply with these requirements, for the following reasons:

• The lack of independence and credibility of its members;

• It is not adequately resourced to carry out the number of investigations required in an appropriate time-frame;

• It is not evaluated based upon the extent to which prosecutions result from its investigations, as shown by its self-professed "solution efficiency" statistics;

• It clearly suffers from political impediments, as are illustrated by the unit head's statement that there is no government policy of politically motivated killings of opposition party-list members, journalists or activists, which shows clear political bias despite the fact that the majority of cases have not even been investigated, let alone prosecuted;

• There is no effective witness protection mechanism in place, which is illustrated by the fact that the unit's head explained that the lack of progress in investigations should be blamed on the lack of forthcoming witnesses.

Due to mounting local and international pressure concerning the lack of investigations into the killings, on 1 August 2006 President Arroyo called upon Task Force Usig to complete the investigation of 10 cases in 10 weeks. While it is true that many have been calling for the authorities to take measures to ensure that the cases of killings are investigated, the effort made by the President in this regard is derisory. At the time of this statement, there was on average one killing being perpetrated every two days in the Philippines. With a total of over 700 allegations of such killings pending concerning the period spanning 2001 to mid-2006, it would take Task Force Usig over 14 years to investigate the backlog of cases at this rate. 10 cases in 10 weeks would not even match the number of cases being perpetrated within that time-frame. Investigations are also not an end in themselves – suspected perpetrators must be prosecuted and found guilty for the whole process to have any value in terms of delivering justice.

The disappearance of Sherlyn Cadapan, Karen Empeño & Manuel Merino

Two student activists from the University of the Philippines, Sherlyn Cadapan and Karen Empeño, were reportedly forcibly disappeared along with a farm-worker on 26 June 2006. The two students were staying at a house in Purok 6, Barangay (village) San Miguel, Hagonoy when armed men, believed to be from the military, forcibly abducted them. Sherlyn Cadapan was pregnant at the time of the incident. One witness related that during the abduction Cadapan was kicked in the stomach by one of her abductors. Empeño was reportedly blindfolded using her own shirt after it had been taken off her by one of the abductors.

When farm-worker Manuel Merino confronted the attackers to help the victims during their abduction, he was also bound and abducted along with the two students. Witnesses relate that the victims were seen being taken away by the perpetrators in a service vehicle bearing license plate number RTF 597 in the direction of a nearby town in Iba, Hagonoy. The whereabouts of the victims remain unknown to date.

The military denied having the three persons in custody. However, the various witness testimonies, which have identified military personnel as having abducted the three persons in question, along with the presence of the vehicle used to carry out this act within the military headquarters, point to the military's involvement.

A person whom the military allegedly illegally arrested but later released on 28 June 2006, Alberto Ramirez, has claimed that Manuel Merino is being used by the military as a guide. The service vehicle used in transporting Ramirez following his arrest had the same license plate number as the vehicle used in abducting the three victims. Ramirez was reportedly taken to an army detachment in Barangay (village) Mercado, Hagonoy, Bulacan. Upon his arrival at the army detachment, Ramirez was asked whether he knew Cadapan and Empeño, which he denied.

On July 12, the UP Diliman University Council passed a resolution expressing concern with regard to the abduction and disappearance of two of their students. Department of Interior and Local Government Secretary, Ronaldo Puno, and Department of National Defense Secretary, Avelino J. Cruz, were requested by the school authorities to help locate the two students.

Despite these requests and concerted activities on the part of the families of the victims and several human rights groups to find the three disappeared persons, their whereabouts and fates remain unknown.

The military has since reportedly stated that the two students were members of the NPA, however the administration of the University of the Philippines has denied any such accusations and confirmed that they were both students on its register. The Supreme Court of the Philippines has also released an order for the military to release Empeño and Cadapan, but the military has thus far taken no action concerning this order.

Melo Commission

"There are also serious concerns about the Melo Commission's independence"

On 21 August 2006 the president established a new commission of inquiry, headed by former Supreme Court Justice Jose Melo, to investigate the killings. Coming just a few weeks after having ordered Task Force Usig to carry out the aforementioned investigations, the Melo Commission represents a tacit admission of the lack of effectiveness of TFU. There are also concerns with regard to this latest commission's independence and ability to deliver justice concerning the killings.

The commission was established under Presidential Administrative Order No. 157, and is to report to the president on "action and policy recommendations, including appropriate prosecution and legislative proposals if any, aimed at eradicating the root causes of extrajudicial executions and breaking such cycles of violence one and for all". It can also call on the Armed Forces of the Philippines, PNP, the National Bureau of Investigation, the Department of Justice and any other law enforcement agency to assist it in carrying out its mandate. The commission was to also include National Bureau of Investigation Director Nestor Mantaring, Chief State Prosecutor Jovencito Zuño, Roman Catholic Bishop Camilo Gregorio and state university official Nelia Gonzales. Bishop Gregorio later turned down the opportunity to join the Commission and was replaced.

Unfortunately, there are also serious concerns about the Melo Commission's independence. Many view this as yet another hollow attempt by the authorities to appear to be taking action, to appease critics, without taking the measures that serious nature of this crisis requires.

All of the Melo Commission's members have been appointed by the president. The commission itself has no contempt powers, meaning that it has no power to charge anyone with contempt if they refuse to cooperate with a subpoena to appear before the commission. It also has no prosecuting powers and no witness protection powers. It has begun its investigation by hearing high-ranking police and military officials instead of hearing the victims' families and witnesses, reinforcing fears felt by individuals if they testify against the state.

Commission on Human Rights of the Philippines

The members of the fact-finding mission met with officials of the Commission on Human Rights at their offices, notably Commissioners Eligio Mallari, Quintin Cueto III and Dominador Calamba II and Atty. Mojica.

In response to a series of questions relating to the spate of extrajudicial killings in the Philippines and the CHR's actions concerning these, the members of the CHR stated that they only have the power to investigate case but could only make recommendations for prosecutions as a result of their investigations.

One of the commissioners blamed the witnesses for not coming forward, thus hampering their investigations. This was a surprising statement, because it is clear that witnesses are not coming forward because they fear reprisals, with the onus being on the CHR and other bodies or mechanisms within the state to provide a secure means for such witnesses to come forward. The lack of a functioning, credible witness protection system must be blamed for the lack of witnesses, not the witnesses themselves. One commissioner expressed frustrations and claimed that the commission could only bark but could not bite.

> "The CHR is reduced in effectiveness as its recommendations are reviewed by several bodies"

In order for the CHR to be able to carry out its mandate more effectively its commissioners must be appointed in a transparent way, so as to guarantee their independence from the authorities: currently commissioners are appointed by the president. The CHR is also reduced in its effectiveness due to the fact that when it recommends that criminal actions be launched as the result of its investigations, the recommendations are reviewed by several bodies, which often results in these recommendations not being implemented. Under the existing rules on criminal cases, should the CHR recommend the filing of criminal charges against members of the police, the military or any other alleged perpetrators, public prosecutors are given the authority to review the findings before the charges are filed. The CHR's findings can either be rejected or approved by them. When the alleged perpetrators are members of the police or the military, the Office of the Ombudsman, the National Police Commission, the Judge Advocate General and other quasi-judicial officers are also given authority to review the CHR's findings. This system of review leads not only to delays in the process, but frequently results in the rejection of a case before the charges can be filed in court.

Conclusion

The fact-finding mission was present in the Philippines for five days. In this relatively limited time it was able to speak with a significant number of different actors in the country, including members of the authorities as well as members of groups that are being targeted by the killings. The purpose of the mission to the Philippines was to attempt to conduct an impartial and unbiased investigation into the killings in order to establish the reality of the situation first-hand. What can therefore be said of this reality?

1. It is clear that there is a serious and continuing problem of politically-motivated extrajudicial killings and forced disappearances in the Philippines;

2. These killings are targeting persons from the left of the political spectrum and those working in favour of human rights and the poor or marginalised sections of society;

3. The killings are being perpetrated in a fairly consistent manner, by armed, typically unidentifiable men using similar modus operandi;

4. Witnesses and victims' family members consistently accuse the military or persons acting on their behalf of having perpetrated these crimes;

"The failings in the witness protection system are a hindrance to conclusive investigations and prosecutions"

5. In the case of the killing of Father Sta. Rosa, there is clear evidence that members of the military were involved and had been ordered to carry out such an operation;

6. The authorities are failing to investigate these most grave crimes with any credible effort or results, leading to a deep climate of impunity;

7. Task Force Usig lacks independence, has an overly restrictive mandate in terms of forced disappearances, and its leader has made statements that lead to the belief that the unit is attempting to cover up the State's involvement in the killings, rather than carry out its mandate in good faith. The Melo Commission also appears to be ineffective;

8. A permanent body with a clear mandate, enforceable powers, independence and sufficient resources is required in order to ensure the investigation and subsequent prosecution of all State-agents against whom there are allegations of crimes and human rights violations;

9. The failings in the witness protection system, notably concerning resources, independence and effectiveness, are proving to be a hindrance to conclusive investigations and prosecutions. The lack of public trust in and use of this system by witnesses exposes a flaw in the authorities' logic: if, as is suggested by the authorities, the killings are being perpetrated by the NPA, then civilians would surely have no problems seeking protection from the authorities. The lack of public trust in this system tends to indicate that the authorities are not willing to provide protection to individuals. This, in turn, suggests that the authorities are complicit in the killings;

10. At the time of the fact finding mission, the authorities had not even denounced the killings publicly. While this has been done since that time, it remains disappointing that such action was only taken once international condemnation began to grow;

11. The authorities have also consistently failed to collaborate with international actors, for example United Nations experts on the specific human rights violations in question here. Such behaviour also tends to indicate a lack of good faith and potentially complicity in these human rights violations on the part of the state.

Recommendations

Evidence collected during the fact finding mission indicates that the Armed Forces of the Philippines and other state-actors or proxies may well be engaged in a campaign to destroy not only illegal armed leftist groups, but also members of the legal "leftist" political movement. This campaign is also targeting journalists, lawyers, church workers, human rights defenders and any

persons working in support of the poor and marginalized people in the country, which the authorities reportedly arbitrarily consider as being "Enemies of the State." The persons targeted have in numerous cases been subjected to death threats thought to emanate from state-actors before being killed. The damage to the social fabric of the Philippines will likely be significant and long term if this situation is not remedied. The people already live under the shroud of violence, fear and injustice. In light of this, the government of the Philippines is called upon to:

"The killing of any lawyer, judge, journalist or media worker, member of the clergy, or human rights or political activist for reason of their work or profile cannot be tolerated by any society"

1. Vigorously condemn all killings and forced disappearances and immediately order the Armed Forces of the Philippines, Philippine National Police, and any proxy or paramilitary forces operating under their authority or with their backing, to ensure that no further killings of civilians occur.

2. Promptly and impartially investigate the killing or disappearance of any member of society. In particular, the persecution of persons for reason of their political affiliation, political beliefs or work in favour of human rights, must be investigated and prosecuted effectively and efficiently. The killing of any lawyer, judge, journalist or media worker, member of the clergy, or human rights or political activist for reason of their work or profile cannot be tolerated by any society.

3. Ensure that there is a fully and verifiably independent body for investigating any allegations of human rights abuses, notably concerning past and ongoing extrajudicial killings and forced disappearances. This body should be able to receive and launch investigations concerning criminal cases as well as initiate criminal proceedings against individuals. The fact-finding mission has serious concerns regarding the police's ability to conduct effective investigations, as well as the independence and effectiveness of Task Force Usig.

4. Provide the investigating body with a clear and legally-binding mandate and powers from the president that have also been approved by the proper legal authorities, comprised of persons whose integrity in directing investigations in a thorough and impartial manner should not be in question, as well as independent and competent investigators, with all resources required to carry out its mandated activities.

5. Enable the investigating body to conduct investigations for the purpose of launching prosecutions, with the body's performance being evaluated based on the extent to which prosecutions are launched. No prior political approval or impediments should be created to obstruct the legal process emanating from investigations conducted by this body. Implied in this is that investigators are aware that they are responsible only to the prosecuting and judicial authorities and only in the manner recognised in the law on due process in the country. Any interference in the body or its activities must be an offence punishable under the law.

6. Establish a fully independent, well resourced and secure witness protection system under the aforementioned investigation body, to ensure that witnesses are willing and able to participate in investigations and legal proceedings concerning human rights violations, in particular the extrajudicial killings and forced disappearances in question in this report.

7. Guarantee that all perpetrators found guilty of having carried out or ordered extrajudicial killings or forced disappearance receive appropriate punishment in line with domestic law and international law and standards.

8. Guarantee adequate reparation to the victims or their families, in line with international standards.

9. Guarantee that Task Force Usig and the PNP clarify whether or not a Lawyer's Task Force exists and explain the reason for the conflicting information on the existence of such a task force.

10. Ensure that the Department of Justice refrains from adopting aggressive prosecution tactics that compromise the integrity of the judicial system.

11. Halt the use of blacklists such as the so-called "Order of Battle" that brand individuals as being "Enemies of the State" without substantiating evidence to support these accusations, as this may lead to extrajudicial actions being taken against these persons.

12. Provide adequate and effective protection to all persons who receive death threats, to guarantee their personal security and ensure that they do not become the next victims of extrajudicial killings.

13. Ensure that individuals and organisations are able to carry out their work without risks, threats, impediments, and that these individuals are not killed as a result of or in connection with their work, notably if this work is related to the freedoms of expression and opinion, political freedoms and human rights.

14. Live up to the Philippines' pledges to the international community and cooperate fully with the United Nations human rights mechanisms, ensuring that the government responds fully and in good faith to communications by the United Nations Special Rapporteurs, as well as issues standing invitations for these procedures to conduct visits to the country, notably the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Working Group on Forced Disappearances.

15. Invite international experts and organisations to assist in the fact-finding and investigation process and cooperate fully with them in this regard.

16. Without delay become a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance and ensure the full implementation of all other international instruments to which the Philippines is party.

Rule of law a better way to combat corruption in Cambodia than rule by decree

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In May 2006 the World Bank announced that it had uncovered misuse of funds in seven projects in Cambodia funded by its grants and loans. In June it confirmed that there had been fraud and corruption in three of the projects, and decided to suspend funding for them. These three projects are being implemented by the Ministry of Land Management, Ministry of Rural Development, Ministry of Public Works and Transport, and Ministry of Industry. The bank requested the government to make prompt repayment of USD 7.6 million, and urged it to address the problems identified in these projects and deal "head-on with corruption".

This is the third big case of fraud and corruption in projects funded by international aid over the last three years in Cambodia, and the second in World Bank-funded projects. In 2004, the World Food Programme discovered that USD 1.2 million of its aid had gone missing. In 2005 it succeeded in getting the government to pay back USD 900,000, in three annual installments. The year before, the World Bank discovered misuse of funds in a project to demobilise 30,000 soldiers. The Cambodian government was then forced to repay USD 2.8 million or have money for other projects cut.

Corruption, the cancer eating Cambodia

Corruption in the Cambodian public sector is nothing new. The UN peace-keeping force that ruled the country in 1992-1993, officially called the United Nations Transitional Authority in Cambodia (UNTAC), found that many pieces of equipment handed over to the Cambodian government or about to be shipped out were stolen. At a meeting in 1994 a senior minister who is still in the government said that government officials had handled the UNTAC equipment left behind for the government like "highway robbers".

"The drafters of Cambodia's new constitution were aware of the extent of corruption, and felt the need to prevent it; but this cancer has since continued to grow unabated"

The drafters of Cambodia's new constitution and international aid agencies together with their local partners were aware of the extent of corruption, and strongly felt the need to prevent it right from the beginning. But this cancer of Cambodian society, as one prime minister put it, has since continued to grow unabated. The World Bank noted in its 2004 Country Procurement Assessment Report that "corruption pervades public sector activities" in Cambodia.

The idea of fighting corruption was enshrined in the Cambodian constitution of 1993 itself. Upon taking office, all top elected officials, government ministers, members of the parliament and senators must take an oath of office--whose text is an annex to the constitution--in which they pledge, among other things, to "oppose all forms of corruption". Successive Cambodian governments have, since the promulgation of that constitution, repeatedly pledged to fight corruption, enact an anti-corruption law and even set deadlines for such enactment.

Two initiatives to tackle corruption were begun at almost the same time in 1994-1995 after a government had been formed under the new constitution. One came from a local non-governmental organisation, the Centre for Social Development (CSD), with support from the Asia Foundation, and the other from the Asian Development Bank (ADB).

The CSD initiative was aimed at mobilising public opinion and ultimately to enact an anti-corruption law. Many national seminars have been held on the issue, at times presided over by the prime ministers or their colleagues, not to mention many smaller meetings. There have been study tours for concerned senior government officials and lawmakers to countries in the region, including Singapore and Hong Kong, both of which are renowned for their effective anti-corruption laws and agencies. A law was drafted and redrafted well before the adoption of the UN Convention against Corruption. Lately, an American organisation named PACT has taken over the redrafting of the same law, to bring it up to the convention's standards. At time of writing, the promised deadlines for the enactment of that law have repeatedly passed and the final draft has not seen the light of day. The ultimate goal of this initiative has remained as elusive as ever.

The ADB initiative was aimed at giving technical assistance to develop legislation and guidelines to streamline procedures so as to prevent corruption in public sector procurement in general and in the management of foreign aid for development projects in particular. However, it also did not lead to a law as had been envisioned. The Cambodian government in 1995 issued a sub-decree (or government executive order, an *anoukret*), which ranks fourth in the hierarchy of rules to govern the country, behind the constitution, or any law or royal decree.

The 1995 Sub-Decree Governing Public Procurement had its legal parentage in a provision of the budget law of 1994, that,

> Expenditures from the general budget and special treasury account are ruled by public procurement procedures which are defined and organized by decree issued by the Council of Ministers, based on proposals by the Ministry of Economy and Finance.

In 2003, the World Bank found the 1995 sub-decree "inappropriate" and the reference article in the budget law of 1994 "very brief and general". The bank said that "efficient and transparent public procurement is a vital component of economic growth", which should have its own sovereign law.

"Despite its preference to see the development of strong institutions for the rule of law, the World Bank still finds rule by decree expedient"

The World Bank, expediency & rule by decree

Despite its 2003 findings and its preference to see the development of strong institutions for the rule of law, the World Bank still finds rule by decree expedient: its report recommends that the sub-decree "be quickly strengthened as an interim measure" while a sovereign procurement law is being drafted. It says that it chooses "practical ways" to cut down on corruption in public procurement "over the relatively short term", while the enactment of a law on public procurement would take several years.

But there are no assurances that any "improvement" of the 1995 sub-decree would curb corruption and that there would be no further sub-decrees and ministerial orders to amend and dilute this improved sub-decree and create a confusing environment conducive to fraud and corruption as has happened in the past.

The World Bank's approach in fact supports the political culture of the Cambodian ruling elite, a culture in which the idea of a strong executive and the concomitant practice of ruling by decree are entrenched. In this culture, laws are drafted in general terms and the government is free to adopt detailed rules for their enforcement.

Regulations are not subject to constitutional provisions that apply to laws. Parliament can exercise control of their legality only through questions to concerned ministers. But so far there have been no such questions and it is highly doubtful whether parliament has kept any track of regulations adopted by the government. The plethora of sub-decrees and ministerial orders pertaining to public procurement adopted subsequent to the 1995 sub-decree speak to this fact. There has been only one occasion when a court has overturned government regulations, when an influential company challenged a government decision in court and won. Organisers of demonstrations have challenged the government ban on their demonstrations in court, but the court has always dismissed their cases.

The prime minister himself arbitrarily exercises his prerogatives outside cabinet to issue written or verbal orders--sometimes as annotations on proposals submitted to him--which affect the constitutional rights of people or even court judgments. For instance, in May 2006 he overrode a court judgment in Siem Reap province, which had ordered the return of land to the forestry department after it had been illegally occupied by a group of

soldiers and civilians. Spurred on by the prime minister's order, which was made in a public speech, villagers in the same areas started to clear forestland to occupy or sell to other people and make some money. Similar orders have been issued secretively with the aim of stopping or suspending the execution of court judgments. Later in the same month the prime minister issued an order to "take the land from rich, powerful officials to give to the real poor, landless farmers as social land concessions" without prior due process of law, either to ascertain the illegitimacy of ownership of land and how it had come about.

"It is doubtful that the government has set up any mechanism to ensure that regulations comply with one another"

Sometimes the prime minister has made verbal orders on the spur of the moment. These are afterwards interpreted differently by parties to the conflict he had meant to solve. In October 2004 he made a public pledge to give land to the poor during ongoing land conflicts. Inspired by this pledge and interpreting it to mean that the prime minister favoured them, some poor and not-so-poor villagers went to occupy the land of some wealthy people in the seaport Sihanoukville, claiming that the owners had illegitimately acquired it.

Government departments have also issued ministerial orders or regulations (*prakas*) to detail rules to enforce specific laws or specific provisions of laws under their jurisdiction. These occupy the fifth rank in the hierarchy of rules. Like sub-decrees, they are outside of constitutional purview and typically do not warrant judicial intervention.

It is doubtful that the government has set up any mechanism to ensure that regulations comply with one another. For instance, the ministry of commerce has issued--invariably in exchange for kickbacks--orders to grant companies monopoly licences to import specific products, regardless of whether or not they the economic principles stipulated in the constitution. Armed with such orders, companies can get--mostly through bribes--police and customs authorities to enforce them and prevent other companies from competing with them and importing the same products, even secondhand or used products. They can charge high prices and make a high profit at the expense of consumers. There has been no court challenge to such orders so far.

The political culture in Cambodia also includes a general perception that the government has the right to administer penalties for breaches of its regulations. Any order can provide for administrative penalties for any breach of its provisions, but some also stipulate criminal penalties for breaches as specified by a law or laws under which or for the enforcement of which it was issued. For example, the 1999 Sub-Decree on the Control of Water Pollution provides in article 34 for criminal penalties for breaches of its provisions, as per the 1996 Law on Environment Protection and Natural Resource Management. Other regulations variously mention criminal penalties under law in general terms or do not specify any law at all. On top of the lack of specifics, those regulations are silent on which authorities are responsible for informing the police or prosecutors whenever any criminal

offence has been suspected. It cannot be expected that the police or prosecutors will be informed of such an offence as a matter of course. Even if informed, it is still difficult to initiate any investigation in the absence of specifics. For its part, the 1995 sub-decree provides for administrative sanctions such as dismissal and suspension for any breach of its provisions. It allows that such breaches may be criminal offences under law, but refers their determination and the related criminal liability of their authors to criminal justice.

> "It is not clear as to whether or not the police and the prosecutor can initiate any action by themselves immediately after a corruption case involving government officials has been made known to them"

Non-prosecution & problems of authority

In Cambodian criminal justice it is not clear as to whether or not the police and the prosecutor can initiate any action by themselves immediately after a corruption case involving government officials has been made known to them, although the prosecutor can order the police to conduct an investigation, and give guidance.

In fact there are two other institutions which can conduct investigations into such a case: the Ministry of Parliamentary Relations and Inspection, and the National Audit Office, whose responsibility is to audit the accounts of all government departments and government-funded organisations, including the accounts for projects funded by foreign aid.

The auditor-general has not initiated any investigation into the World Bank-funded projects on the ground that all his investigators have been tied up with other work, implying that if investigators were available, he could have ordered an investigation without the bank asking it of him. However, the auditor-general is a parliamentary officer appointed by--and responsible to--the National Assembly. He does not have extensive powers though under the Audit Law. He does the auditing of public accounts and write reports on them, which he then submits to the assembly, and the Senate. If there is any irregularity in the accounts of any public entity, he must report it to parliament, the government, and the concerned entity. He has no power to call the police or the prosecution to investigate an irregularity. He cannot publish all his findings either, as he is not allowed to include in his published reports detailed information which is contrary to national interests, such as information affecting national security, defence, territorial integrity, the country's international relations or legitimate commercial interests of any organisation or individual. The government decides on which information falls into these categories, and it is not difficult for it to declare reporting on fraud and corruption as classified information. The law also is silent on the action required of the national institutions to which the auditor-general reports on fraud and corruption in the management of public funds. The law leaves the government free to prosecute or not.

Even where Cambodian authorities have clear-cut legal authority to prosecute the authors of crimes, the officials responsible for initiating action still at times refer cases they have made to their superiors, including the prime minister, to

seek their advice before acting. For instance, in May 2006 customs officers arrested employees of a shipping company and impounded its two ships and one trailer boat. They also identified fellow officers who had colluded in smuggling gasoline into the country. The director-general of the Customs Department, Pen Siman, claimed his department had gathered all the evidence needed for prosecution, yet despite having the authority to prosecute smugglers, still he sought advice from Prime Minister Hun Sen on what course of action to take.

"Corruption, fraud and embezzlement are not automatically addressed by Cambodia's existing criminal law"

Limited jurisdiction & impunity

Financial offences in general--and misuse of public procurement funds in particular, such as corruption, fraud and embezzlement--are not automatically addressed by Cambodia's existing criminal law. This is because the law was intended only as a transitional measure during 1992-1993, and it specifies as possible offenders the parties to the peace process and others working on their behalf. Now that period is well over and the terms of the law are no longer applicable. Although the law was used to indict seven judges and prosecutors for corruption in 2005 and 2006, its jurisdiction over the authors of crimes who are not such officials or members of political parties can be contested on these grounds. Furthermore, the criminal offences provided for in the law may not cover all the elements of breaches identified in the 1995 sub-decree.

The patronage system and concomitant executive control of all institutions by the ruling Cambodian People's Party also ensures that impunity is the rule and punishment the exception. Even where persons are punished, it is mostly by way of administrative sanctions that are not commensurate with the offences committed. For instance, upon the discovery of fraud and corruption in the World Bank-funded projects, only the director of one of these projects, Mua Kimsan, was removed from his position. Even then, he denied that his removal was linked to alleged corruption. In this case, as in others, administrative sanctions were used to blunt criticism and soothe public opinion, rather than uphold the law.

Punishment may be only temporary. Sooner or later reprimanded officials are rehabilitated and appointed to equivalent or even higher positions, unless they are not members or supporters of the ruling party, or former members. For instance, in 1999 Sam Sotha, director-general of the Cambodian Mine Action Centre, an internationally-funded landmine clearance organisation, was removed from his position for corruption. He was later appointed as secretary-general of the Cambodian Mine Action Authority, thanks to his close connections with the prime minister's circle. In 2000 Judge Oum Savuth of the Municipal Court of Phnom Penh was charged with bribery and the illegal release of offenders, and was removed from his position. He was subsequently appointed to the Court of Appeal and then became a member of the Supreme Council of the Magistracy, the highest body governing the judiciary. The seven

judges and prosecutors mentioned above were later acquitted of wrongdoing, and although the appeals process is continuing they have all been reinstated.

Punishment is inconsistent and discriminatory. In May 2006 Prime Minister Hun Sen removed Nhep Bunchin, Minister of Labour, for alleged corruption while the Ministry of Parliamentary Relations and Inspection was still investigating his case. His dismissal was generally seen as politically motivated, because Nhep Bunchin is a member of the Funcinpec party, which is the junior coalition partner of the CPP. Many of his colleagues had been removed from their government positions since February 2006. In the recent case of fraud and corruption in the World Bank-funded projects, not one of the four ministers responsible for the projects has faced any punishment or criminal investigation.

"With the persistence of rule by decree together with the many lacunae in the law, public sector activities in Cambodia are practically outside of the jurisdiction of the courts"

Conclusion

With the persistence of rule by decree together with the many lacunae and flaws in the law, public sector activities in Cambodia are practically outside of the jurisdiction of the courts. However well conceived and drafted they may be, decrees will not reduce corruption to an acceptable level. Swindles in financial management and procurement will persist, and the Cambodian people will continue to benefit much less from foreign aid than they should, but they will still have to shoulder the burden of repayment to the World Bank and other donors.

Expediency and rule by decree have encouraged corruption and maladministration in Cambodia. There is an urgent need to phase out rule by decree and establish the rule of law to govern all public sector activities, and indeed the country as a whole. The public sector must be under the jurisdiction of the courts. The courts, together with judges and prosecutors, must be free of executive control and corruption, as well as affiliations to political parties. They should be allocated adequate resources to perform their duties. They should also be assisted by a strong and independent legal profession.

There should be no more delay in the enactment of the long-awaited anti-corruption law and the public procurement law proposed by the World Bank. The laws that are the bricks and mortar of the judiciary also cannot be delayed any longer: the penal code; code of criminal procedure; civil code; code of civil procedure; organic law on the organization and functioning of courts; law on the amendment of the Supreme Council of Magistracy; and, law on the status of judges and prosecutors.

Certain existing laws, beginning with the Audit Law, must be amended to extend the jurisdiction of courts over public sector activities. The Audit Law must specify clearly the powers and duties of the auditor-general and his subordinates to inform the police and prosecutors when they suspect any criminal irregularity in the accounts that they investigate, and initiate their own investigations. All censorship of national audit reports

must end. Reports must also be sent to the prosecutor-general of the Court of Appeal for any course of action to take if criminal irregularity is detected. The improved 1995 Sub-Decree Governing Public Procurement, and any eventual law following from this decree, must specify criminal penalties for breaches. Whenever a criminal irregularity is identified, the prosecutor-general or any other prosecutor must initiate action to bring its author to justice.

"There are no more grounds left upon which to claim that Cambodia has no people to build and run strong institutions for the rule of law"

Mechanisms and procedures should be instituted to ensure the constitutionality and legality of government and ministerial regulations. The National Assembly must exercise its control of government activities. It needs to keep track of regulations and ensure that they conform to the laws it has enacted. It needs also to set up a mechanism for people to complain against regulations affecting their constitutional rights. Laws and regulations should be published in an official gazette, which should be made available at specified locations, for public access. There should be an office where all regulations must be registered before they can come into force. The office should also be publicly accessible.

There are no more grounds left upon which to claim--as the World Bank and other donors have done year after year since 1993--that Cambodia has no people to build and run strong institutions for the rule of law, especially the judiciary. The public officials now in office have been continuously trained and retrained by international and local organisations at great expense for the last 13 years. They should have by now attained knowledge and skills in their respective fields at the level of graduates from technical or vocational colleges. Furthermore, Cambodian universities have produced hundreds, if not thousands, of graduates every year, some of whom have received higher diplomas from foreign universities. The claim that the people of Cambodia are not capable of running their country according to the rule of law is nothing more than an excuse for the wanton maladministration that rule by decree has perpetuated in its stead.

[*Continued from front inner cover*]

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.

Sadly, article 2 is much neglected. There is a dearth of relevant international jurisprudence, and hardly any mention of it in the enormous volumes of annual literature on human rights.

There is a reason for this neglect. In the 'developed world' the existence of basically functioning judicial systems is taken for granted. This does not mean that these systems are perfect; in some instances they may face serious problems. But those from countries with developed democracies and functioning legal systems may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. As persons from such countries guide the global human rights movement, vital problems outside their experience do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

Other difficulties also arise. One is the fear to meddle in the 'internal affairs' of other countries too intimately. State parties especially can create many obstacles for those trying to go deep down to the roots of problems. Thus, inadequate knowledge of actual situations may follow from the nature of interactions and the monitoring system itself. A further and quite recent disturbance is the portrayal of national human rights institutions and their equivalents as surrogate agencies for dealing with article 2 related issues. Some state parties may agree to new national human rights institutions taking on this role because they know that by doing so they may avoid criticisms of a more fundamental nature.

Human rights are implemented via institutions of justice: the police, prosecutors and judiciary. If these are not functioning according to the rule of law, human rights cannot be realized. In most Asian countries, these institutions suffer from grave defects. These defects need to be studied carefully, as a means towards strategies for change.

After many years of work, the Asian Legal Resource Centre began publishing *article 2* to draw attention to this vital provision in international law, and to raise awareness of the need to implement human rights standards and provide effective remedies at the local level in Asia. Relevant submissions by interested persons and organisations are welcome.

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