article 2
of the International Covenant on Civil and Political Rights
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diagnoses of the

non-rule of law

in Asia

with case studies of

Burma & Sri Lanka

& critiques of the

UN Human Rights Council

article 2 of the International Covenant on Civil & Political Rights:

"3. **Each State Party to the present Covenant undertakes:**

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

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

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

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Reflection on article 2 of the ICCPR: The role of human rights activists in diagnosing the lack of effective remedies

Basil Fernando, Director, Asian Human Rights Commission & Asian Legal Resource Centre, Hong Kong

A basic premise in human rights work is that a right without an effective remedy is not a right at all. Where there are violations of human rights, there must be remedies. Most of the human rights problems in less-developed countries—less developed from the point of view of the rule of law—stem from remedies for rights being inadequate or non-existent.

For example, a country may say that people have a right not to be extra-judicially executed. However, if a person is extra-judicially killed, the country's legal system may not yet have developed a method to stop any attempt by the state to extra-judicially execute a person. That the state has not yet developed a system to stop state agencies' extrajudicial executions means that the right not to be extra-judicially killed is a mere abstraction that in real life does not apply.

This example can be applied to every other civil and political right. These include rights against illegal arrest, illegal detention, punishment without fair trial and the use of torture; the right to express one's opinions freely, to associate freely, and to elect a government freely. All these rights must be safeguarded by measures that guarantee them effectiveness. Where rights are violated, the legal process must provide a person with the means to obtain a remedy. Therefore, the idea of an effective remedy is integral to the protection of rights envisaged in the entire civil and political rights framework.

The essence of the work of a human rights activist too is about protection. It is about trying to build the capacity to protect rights whenever threats to them arise. Human rights education, particularly in countries where the legal systems have not yet been thoroughly developed in terms of the rule of law and

democratic institutions, must therefore concentrate on helping activists to think through how their country systems for protection of rights can be improved.

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) deals with the implementation of the rights agreed upon by states parties to the covenant. It postulates that the government is under an obligation to provide an effective remedy for the realisation of rights in the covenant. According to article 2, an effective remedy requires legislative, judicial and administrative measures.

"If domestic law does not provide the means to obtain remedies then those involved in human rights activism must work to bring about legislation"

Legislative measures

The domestic law should provide avenues for remedies. This means both laws that clearly articulate the rights that they are supposed to protect, and also that contain procedures by which a person can protect his or her rights. Without law, no effective means exist to protect rights. State officers will not act unless laws impose obligations to do certain things in response to complaints about violations of rights.

Therefore, in working for human rights, activists must examine whether domestic laws provide avenues so that rights can be realised. If domestic law does not provide the means to obtain remedies then those involved in human rights activism must work to bring about legislation by influencing legislators through electoral processes, or by any other means. In the process, they can educate the population about the need for law so that people will get involved. Human rights activists when developing strategies should think about various ways by which education can mobilize public opinion to achieve legislative change. How to motivate public opinion for legislative change is one of the most important functions of human rights activism.

Judicial measures

Once legislative changes are made, the possibility of effective judicial action is integral to the realisation of rights as envisaged in article 2. When people cannot get their rights enforced there is no way for them to get effective remedies for violations of rights, even if the legislative measures exist.

In human rights activism it is very important to understand the judicial process and the methods by which it can be used to protect human rights in accordance with article 2. The judicial process is not just a matter for lawyers. It is a matter for all citizens concerned about their human rights.

The reason that the possibility of a judicial action is essential to the realization of rights is that the whole notion of achieving rights is associated with the idea that consequences follow when they are not respected. Government officers who are dealing with various issues need to have the sensation that if they do not respect human rights then they will be called to account.

> **"Activists should study budgetary allocations and find out where they are adequate, where they are inadequate and where they have not been made at all"**

Therefore, human rights activists should ask themselves, "If this right is not respected what will be the legal consequence? Is there a legal consequence already in the law which is enforceable?" If the answer is no, then if a law exists there is a big gap between the rights on paper and in reality, and it is the duty of the human rights activist to work to close the gap. This is not a small or trivial matter. It is a huge area of human rights work that needs in-depth understanding. If human rights activists do not understand this area or take it lightly, then they will not be able to work in a meaningful way. In all societies there are all kinds of obstacles for the development of judicial remedies, but human rights activists have to concern themselves with those issues if they are to honour their claim to be engaged in the work of human rights.

Administrative measures

The next aspect of the right to an effective remedy is the obligation of the state to provide administrative measures for the achievement of rights for its citizens. Legislation for a right and even the availability of a judicial remedy will be of little meaning unless the government provides the administrative measures necessary for the achievement of a right.

Administrative measures include the provision of finances necessary for the proper protection and implementation of a right. The government needs to provide money so that various activities to protect and implement a particular right can be done by state agencies as well as non-state actors. State agencies protecting and implementing a right should have the budgets they need to employ officers of necessary competence to do the tasks required at salaries commensurate to their skills and experience. They need facilities: offices and buildings, vehicles, communication equipment, money for overheads and so on. If these basic finances are not provided, then there will not be any or enough officers to carry out the duties necessary to see that a particular right is realised.

In countries where the rule of law and democracy are not established or are only minimally established, there are enormous deficiencies in administrative measures for protection of human rights. Without the necessary administrative institutions, it is almost impossible for a citizen to exercise his or her rights as envisaged by article 2. Rights may be recognized by the legislature, but when there are no officers to do the necessary work, or where there are too few, or officers that lack the requisite skills for the posts, then virtually nothing can take place.

What must human rights activists do to ensure that there are adequate budgetary allocations to achieve rights? Activists should study budgetary allocations and find out where they are adequate, where they are inadequate and where they have not been made at all. If human rights organizations do not have this kind of knowledge, it will not be possible for them to advocate effectively

for improvements of allocations to achieve particular rights. They may speak about the need for more money, more staff and more administrative measures in general terms, but they will not be able to make a serious contribution to the debate and make a real difference unless they can go into this aspect of the work in detail.

Again, public engagement is essential if the state is to be pressed into providing sufficient funds for the implementation of a right. Human rights activists, once apprised of the facts for themselves, need to be able to communicate them to the general public and point out various needs that are not being met. They should be able to identify where funds are not being made available, the persons responsible for making them available, and should also be able to speak intelligently and cogently about the size and nature of allocations needed if a particular right is to be protected and effective remedies afforded.

"Mere repetition of the philosophical principles on which rights are based and enumeration of the sufferings of people in the absence of rights will not realize those rights"

Conclusion

Human rights organizations have in the past done very little of this sort of work. They have often spoken on the philosophical bases and justifications of rights, and the sufferings that people endure because of the absence of rights. These are all necessary aspects of human rights work. However, mere repetition of the philosophical principles on which rights are based, the legal and moral principles on which rights were founded; and, enumeration of the sufferings of people in the absence of rights, will not realize those rights. Realisation of rights means that effective remedies exist in accordance with the provisions of article 2, that is, the legislative, judicial and administrative measures sketched here.

The role of human rights activists in the advocacy and advancement of legislative, judicial and administrative measures is essential for the achievement of rights and for the continued relevancy of human rights organisations insisting that states respect, protect and fulfil these rights. Human rights advocacy in our time is essentially all about engagement with the public on the one side and the state on the other in a conversation with both, at once urging and educating for effective, meaningful change. Ultimately, our work in all fields of human rights boils down to our capacity to effect changes to legislation, judicial processes, and above all, the budgetary arrangements of the state with which to secure particular rights.

A three-part study on the crisis in institutions for administration of justice in Sri Lanka and its consequences for the realisation of human rights in Asia

Basil Fernando, Director, Asian Human Rights Commission & Asian Legal Resource Centre, Hong Kong

This year I was able to complete my work on the relationship between the crisis in institutions for administration of justice and its consequences for the realisation of human rights in Asia. This work consists of three publications. The first was *The phantom limb*, which was published in 2009. It was followed by *Recovering the authority of public institutions*, which was also published in 2009. This year the work was completed with another publication, *Sri Lanka: Impunity, criminal justice and human rights*. Though all three books are studies of Sri Lanka, they are intended as case studies of a problem common to almost all parts of Asia, except for some places like Hong Kong and South Korea with comprehensive rule of law systems.

Stating the problem

The phantom limb: Failing judicial systems, torture and human rights work in Sri Lanka (AHRC, Hong Kong, 2009, 80 pp)

The first publication is perhaps the most important one in its articulating of the basic understanding of the problem. A medical doctor who attended a presentation I made on the absence of institutions for administrations of justice and its impact on human rights suggested the term "phantom limb". In response to my speech, he said that the situation I described was known as the phantom limb syndrome. An amputee who has lost a limb continues to imagine that he has that limb and even feels pain in the limb. The problem of institutions for administration of justice is similar. Because certain institutions were formed at certain times in history, particularly colonial times, this has

given rise to the feeling that these institutions still exist and function more or less as before. In this way they become phantom limbs.

The problem is related to external appearances versus inner realities. A professor from China once said that judges are given the external appearance of being judges; however, they may not have actual judicial power or proper training and competence. In my work in Cambodia at the beginning of the new period with the 1993 elections supervised by the United Nations, I was able to study the external appearance of judges and prosecutors as against the inner reality. The educational level of these judges was around grade 8, due to the upheaval in the country of the prior decades. The system had been designed and created by the Vietnamese, who were working according to the Soviet model. The people who were given various tasks in the courts were those that did well in the political party work as organisers. The system was the opposite of a liberal democratic one, in that it was the task of a court to defend the state and not the individual. The very meaning of the Cambodian word for 'trial' when translated into English was 'sentencing session'.

"People from outside Cambodia wanted to believe that a justice system existed in the country and that if some education was given to judges then they could function like judges in a liberal democracy"

People from outside Cambodia who wanted to begin a new system at the time also wanted to believe that a justice system existed in the country and that if some more education was given to these judges then they could function like judges in a liberal democracy, which is what the 1993 Constitution declared the country to be. However, other than via the introduction of some new words there was no change in daily reality. Within a few months of extensive human rights education, people started coming to the United Nations' offices to ask where they could get the protection for the rights about which they had been educated. There were no police stations that would register their complaints, and the system of policing was one of intense surveillance. The prosecutor's role was still to defend the state. Close interaction with the system and the justice minister revealed that "judgements" were actually written before trials were held. When this matter was discussed with the minister he clearly said that they did not have qualified judges and the only educated people they had were in the interior ministry. Those people could write better judgments than the judges who sat to hear the cases. He went on to say that people brought to court were guilty. Thus, the people coming from abroad who wanted to believe that the system could be transformed from a Soviet-style one into a liberal democratic one through some training programmes had to ignore the fact that there were no foundations in the system for any kind of criminal justice where individual liberty could be defended. Some external changes could give the appearance that

there were also internal changes, but in fact these changes did nothing to alter fundamentally how the judicial institutions in this country operated.

> **"When people are in a country where justice institutions are phantom limbs, they have a sensation of legality which, in fact, is an imaginary legality"**

Through my job I became profoundly aware of the tremendous contradictions in this situation. It was from this insight and the insight I also gained in Sri Lanka before leaving it in 1989 at a time that thousands of people in the south were being forcibly disappeared that I understood what the absence of justice meant.

This same situation of there being the appearance of a judiciary but no real capacity in the judiciary to protect the individual is visible in many other countries in Asia. For example, there is no such thing as a judiciary in Burma anymore. In that country through a highly sophisticated process which has gone on over some decades the system of courts has been shaped to play a useful role on behalf of the military. The military completely controls this system, so there is no basis for any kind of distinction between the executive and the judiciary. Though the courts function as if they have jurisdiction to make inquiries into the legality and the legitimacy of things they do not have any such power at all. To a lesser extent, the same types of problems can be found in other places, like Bangladesh, and even in certain respects in much more advanced but still heavily restricted systems like those in Thailand and the Philippines.

When people are in a country where justice institutions are more like phantom limbs, they have a sensation of legality which, in fact, is an imaginary legality. People in disputes may believe that they can obtain some kind of justice by resorting to the courts, and many people do in fact pursue legal cases. However, as they interact with the system they slowly discover that what at first looked like reality is illusory. The system is not only unwilling but also incapable of delivering anything that might be called justice. However, there is nothing to replace the belief that they once had in the system. There is nothing that people can do when they are made victims. They can go to a lawyer, who will still just advise them of the various actions they can take within the framework of the law, irrespective of its reality or unreality.

At this point, belief in the justice system goes from being an empirical and rational exercise to a type of religious experience. Holy men whom people visit for solutions to their problems give instructions on all kinds of things that people can do to create some hope that things will work out to their advantage. The administration of justice in many parts of Asia today may create that kind of hope; however, there is nothing to connect hopeful expectation to reality. The suggestions made by lawyers and other professionals to persons hoping to obtain justice are no more likely to result in success than the suggestions of mystics and oracles. But because there is no other option, people do not like to admit that this is the reality, and instead they cling to beliefs that their interventions will have some desired effect. While

everything tells them that a course of action will not bring the type of redress that they want, they resort to it for want of alternatives.

The frustrating experience of people seeking but not obtaining justice is prevalent in most Asian countries. The sensation of sheer powerlessness in the face of wrongdoing is commonplace.

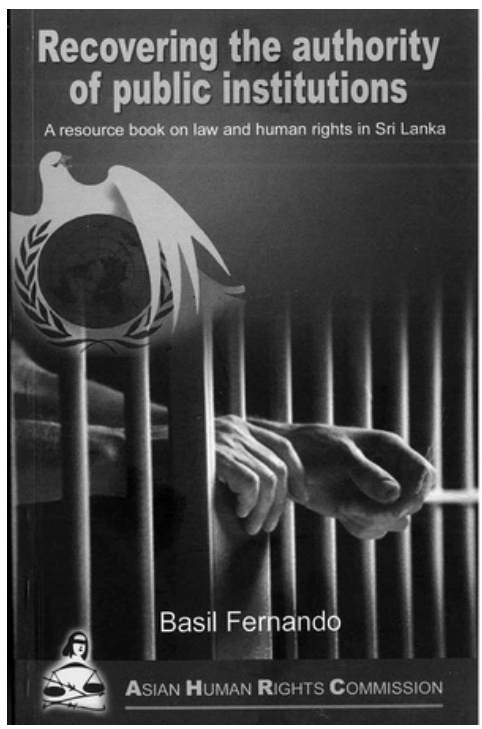
> "The frustrating experience of people seeking but not obtaining justice is prevalent in most Asian countries"

Illustrating the problem

***Recovering the authority of public institutions: A resource book on human rights in Sri Lanka* (AHRC, Hong Kong, 2009, 545 pp)**

The second part of the study was a book detailing 200 cases out of about a thousand recorded by the Urgent Appeals programme of the AHRC on the widespread use of torture and attendant abuses at police stations in Sri Lanka, and the incapacity of citizens to get any kind of legal redress for these abuses. Each case is part of many years of work to document the facts properly as well as to search for some form of justice by way of complaints or legal action or by resorting to international agencies, such as the United Nations. In some cases the litigants have been going to court for over eight years in the hope that they might obtain some kind of relief. However, the legal process only compounds the agony of the citizen who has already been subjected to injustice by agents of the state. The citizen having been subjected to abuse at the hands of law enforcement agencies finds that no other part of the state apparatus can or will protect him. The general failure of the administration of justice renders the individual powerless.

I used this part of the study to illustrate the problem through the empirical evidence that is found in the hundreds of cases documented. These cases together clearly establish that lawlessness has spread throughout the entire administration of justice. The details are overwhelming. The only option left to the government and others who do not want to admit the problem is to prove that the facts presented are untrue. Despite many attempts to do so, state agencies have not succeeded in challenging the factual evidence that has been brought about by way of the details of torture and other human rights abuses in these and hundreds of other cases.



Aside from the cases themselves, the book contains a lengthy section in which I have tried to explain the circumstances in which lawlessness has emerged as the dominant feature of the administration of justice in Sri Lanka. So-called anti-terrorism laws have

encouraged anarchy within the system and have caused chaos in the social and political life of the country.

"When a system has become dysfunctional it cannot achieve even its basic objectives"

The book also contains commentary on various laws and related institutions such as police investigation divisions, the attorney general's department and the judiciary. It explores the deficiencies existing within these institutions as well as the causes of the failure of justice within Sri Lanka. The failures of justice in individual cases can thus be linked to these institutional failures. The book as a whole is extremely detailed and heavy on factual information so as to establish that the allegations made about the failure to implement human rights in Sri Lanka can be proved with reference to existing publicly-available documentation.

Drawing conclusions

Sri Lanka: Impunity, criminal justice and human rights **(AHRC, Hong Kong, 2010, 164 pp)**

In this third book the consequences of the phantom limb in criminal justice and its effects on human rights are explained and an attempt is made to draw some conclusions. The consequences are discussed in terms of abysmal lawlessness and zero status of citizens; militarization and human rights in South Asia; loss of liberal democratic constitutionalism, and impunity. Each of these aspects is detailed in separate chapters.

The first chapter takes up the difference between a rule-of-law system and a non-rule-of-law system through study of the basic legal infrastructure in a liberal democracy with an institutional framework of police, prosecution and judiciary. When these institutions are functional they are able to ensure the basic framework of the rule of law. This is not an ideal situation. A functional state is not a perfect one. The term 'functional' simply means that the system is operating overall to reach its basic objectives. When a system is functional, defects or faults can be reviewed and over time, at least the more glaring ones can be corrected.

By contrast, when a system has become dysfunctional this implies that it cannot achieve even its basic objectives. This is not simply a problem of defects. It is a problem characterized by incapacity to resolve practically any difficulty besetting the system, as a result of which the system is completely overwhelmed and incapable of operating. This is the situation of the policing, prosecution and judicial systems in many Asian countries today. In those countries the minimum requirements of a rule-of-law system cannot be realised because of institutional dysfunction. The people of these countries do not have the protection of the law, even though there may be external appearances to the contrary.

The consequence of institutional dysfunction I have described as abysmal lawlessness. The idea of abysmal lawlessness is explained in a chapter in the third book, which attributes to it the following features: lost meaning of legality; predominance of

the security apparatus; disappearance of truth through propaganda; the superman controller; destroyed public institutions; and zero status of citizens. I also outlined these features in an essay published in *article 2* at the end of last year (vol. 8, no. 4, December 2009).

The militarisation that accompanies institutional dysfunction is an especially important feature of the non-rule-of-law systems found across Asia, and in a separate chapter in the last part of the study I examine the spread of militarization and its consequences.

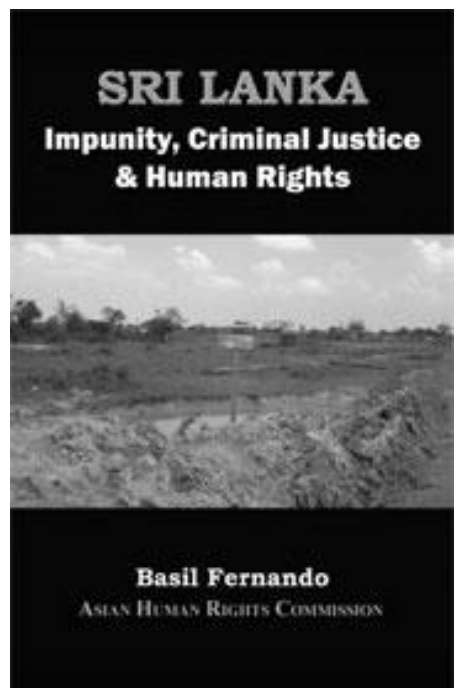
"The militarisation that accompanies institutional dysfunction is an especially important feature of the non-rule-of-law systems found across Asia"

Certain trends and patterns in public and social life reveal a rise in militarization of state institutions. These include widespread kidnappings; loss of legal protection in matters of arrest, detention, searches and other areas of state interference in personal life; judicial corruption; undermining of civilian policing; diminishing respect for women; loss of the importance of the individual; obstacles to the realisation of contract and tort, and loss of memory, language and attitudes.

The meaning of militarization is dealt with politically, legally, socially, financially and ethically. Politically, the very notion of the separation of powers loses its meaning. The state bases its legitimacy on the use of force rather than on the basis of consent.

Legally, the rule of law is displaced. Arbitrary orders through emergency regulations and anti-terrorism laws replace coherent legislation. In fact, the executive acquires such power that it need not justify its actions before any forum.

Socially, reason too is gradually displaced. Instead of consensus-building through rational discourse there is propaganda. The distinction between truth and falsehood becomes thinner and eventually is lost altogether. Language changes, facts and figures lose significance, and the media becomes a no-fact zone.



Financially, as law and language lose their significance so too the notion of auditing for accountability ceases to be relevant. The distinction between private and public ownership is blurred. The state interferes in every financial transaction on behalf of private interests. Private ownership of property loses its certainty, except for those few who are outside of the system.

Ethically, crime becomes relative. The absolute prohibition on killing ceases to connote anything of importance to society; murder becomes a lesser evil. Violent measures to settle disputes are justified because no institutions provide remedies. Life is cheapened. The devaluation of life affects personal and family relationships. Abuse and distrust of others becomes the norm and powerlessness becomes an excuse for compromise, no matter how morally unacceptable.

"The night, when it comes, causes havoc —but faithful records of that havoc are essential for the recovery of the conscience"

How can we escape from the cycle of militarisation? History does provide us with examples. First, the capacity to understand the shock and shame suffered under these circumstances, as well as collective shock and shame, needs to be uncovered and inculcated. In the aftermath of World War Two, people in Germany suffered various illnesses. Alexander and Margarete Mitscherlich studied these ailments and wrote a book called *The inability to mourn*. What they discovered was that the capacity of both the individual and the society to recover was dependant on the capacity of people to admit to their plight and mourn for what had happened. Only in this way could they find a path to recovery.

This first step is closely associated to the second: that the problems with public and legal institutions must be discussed boldly and relentlessly to bring about change and restore some public confidence that someone is doing something to address what has gone wrong. This means documenting in as great detail as possible every incident of abuse, and developing databases and information centres for the purpose. Elie Wiesel, the Nobel Prize laureate, recalled the advice of the rabbis at the height of the holocaust who told people to make records of everything they saw happening to others or themselves. The literature that survived through this process provided the basis for later reflection and helped the recovery process legally, socially and spiritually. One remarkable document of this nature was the diary of Anne Frank. There is no alternative to dedicated documentation of injustice and abuse. The night, when it comes, causes havoc—but faithful records of that havoc are essential for the recovery of the conscience.

Turning to how a dysfunctional legal system is associated with emergence of widespread impunity, the third book in the study tracks how Sri Lanka has left the orbit of constitutionalism. It shows how the autonomous civil service was destroyed through the 1972 Constitution and how civil servants were brought under direct control of the executive president through the 1978 Constitution. With this change the entire civil service was politicised and recruitment, promotion, transfer and disciplinary control were all made the subjects of political considerations. This feature of the system spread into policing, the attorney general's department, and also into the judiciary. Judicial independence has been undermined through interference in the appointment of senior judges, who lost the protection they needed to perform their tasks in accordance with a rule-of-law state.

The last part of the book begins with the attempts of civil society organisations to battle with Sri Lanka's dysfunctional system by various means. Litigating to protect civil rights in a dysfunctional system often does not lead to any improvement for individuals; however, it can help in the discovery of details, exposing previously hidden defects and contributing to understanding of the methods by which power is abused. The chapter deals with cases pursued for several years in the courts and the lessons

that have been learned about the system through these cases. In an interview published in this section, I make the following comment:

> The ultimate success for human rights remedies lies in winning public opinion in favour of... redress. For many reasons, previous and existing social attitudes directly or indirectly support various practices of repression by the state. That police torture is necessary for public security and stability for instance, is an inbuilt social prejudice prevalent in Sri Lanka. Another inbuilt perception is that torture victims are bad criminals. Our work and approach attempt to demonstrate that these prejudices are in fact contrary to reality, and that law enforcement without torture can create a far better community spirit, both within the community and the law enforcement agencies. Moreover, the entire society will benefit from a legal system that has adequate remedies for human rights violations.
>
> This kind of social discourse cannot be carried out without practical participation in the litigation process. It is not possible for instance, to introduce adequate legal remedies by merely teaching human rights or enacting new laws. Litigants must go to court to demonstrate the difficulties involved in actually obtaining these remedies. The root causes of such difficulties should also be analyzed and explained. It is only through this process that you can condition sectors of society and the state to appreciate the meaning of adequate remedies for human rights in terms of article 2 of the International Covenant on Civil and Political Rights.

"That police torture is necessary for public security and stability is an inbuilt social prejudice prevalent in Sri Lanka; another is that torture victims are bad criminals"

In a chapter entitled "Sri Lanka: A murder tolerating nation" the book explores how inhibitions against killing have been abandoned in order to achieve some political objectives, and the social impact is discussed. The policy to kill is explained thus:

> There was a deliberate policy to kill the arrested persons instead of detaining them. Besides the incapacity to keep large numbers of persons in prisons, there would also have been the political issue of holding large numbers of political prisoners, which would inevitably lead to considerable protest regarding their release. Such demands would come from various political parties and human rights organizations within the country, as well as from the international community. This would create a political problem with several repercussions for the government.

The results of killing for political purposes are described as follows:

> This approach of eliminating political opponents paved the way for killings to become common in the society at large. Killing is a pragmatic approach to get away from all legal methods and consequences. If a property dispute is to be dealt with legally for instance, it may require cases to be filed in court and the cases themselves may take a long time.

The basic message was that the legal process was cumbersome and dispensable. Killing could be used much more easily to deal with disputes without all the problematic consequences of law. The law was marginalised and killing normalised. This situation has become the status quo in Sri Lanka, virtually destroying all guarantees of life that are normally available within a civilized society.

"While there is some talk about truth and reconciliation, what meaning does it have where there is no possibility of guaranteeing any kind of legal entitlement?"

The situation of the north and east, where a prolonged military conflict had even more disastrous consequences, is taken up from a rule-of-law viewpoint. In a country where dismal lawlessness characterizes ordinary life in non-conflict zones, it is not difficult to understand how much worse life has been made in areas beset by one of the most bedevilling and devastating wars in the world of recent decades. Now that direct military conflict has ended, the government has approached the problem of reconstruction in the north and east as one with an economic solution. It has characteristically neglected the legal and institutional arrangements to stabilize conditions and give people in these areas any prospects for the defence of their human rights.

The reestablishment of stability in the north and east will require a working policing system, able to guarantee security to the people rather than commit further abuses. When the entire policing system of the country has collapsed how can this sort of institutional development take place in the north and the east? While there is some talk about truth and reconciliation, what meaning does it have in the absence of any kind of security and protection for citizens, and in an environment where there is no possibility of guaranteeing any kind of legal entitlement? These are the sorts of problems that have to be addressed if some semblance of security is to be restored to the populations of these areas.

The role of the UN Human Rights Council on rule-of-law problems in Asia

Asian Legal Resource Centre, Hong Kong

The Asian Legal Resource Centre and its sister-organisation, the Asian Human Rights Commission, document hundreds of cases of torture each year in the Asian region. The eradication of torture must be at the heart of any realistic attempts to improve human rights in any given country, yet, the Special Rapporteur on torture, Manfred Nowak, has noted the Council's failure to act on his study on torture and his report to the 13th session of the Council (A/HRC/13/39/Add.5).

The ALRC is disappointed to note that despite so many members of the Council ritually repeating the mantra of "cooperation" in the Council, it is clear that States are failing to cooperate in practice with the Special Procedures. The Rapporteur notes in his report concerning communications that "While the majority of Governments replied in one way or another, serious investigations into the allegations of torture and ill-treatment which actually led to sanctions against the officials responsible were only conducted in exceptional cases." Some governments have even completely failed to respond to communications. Similarly, the fact that a significant number of requests for country visits remain pending after many years is an indicator of a failure of cooperation by States with the Council's mechanisms. The ALRC is, for example, particularly concerned that the government of India has still not invited the Special Rapporteur to conduct a country visit, despite a request having been pending since 1993.

Of major concern is the fact that country-specific conclusions and recommendations by the mandate have never led to any specific resolutions or recommendations by the Human Rights Council. The members of the Council

This article comprises of submissions that the Asian Legal Resource Centre made to the UN Human Rights Council at its 13th and 14th sessions, in February and May 2010. All submissions from these and other sessions are available on the ALRC website: www.alrc.net

are all responsible for this serious failure and are urged to move beyond the gamesmanship and empty rhetoric that have been witnessed to date in the work of the Council and to begin to have a tangible impact at the country level concerning human rights.

"The Council needs to move beyond the superficial discussions that have been the hallmark of its work to date and tackle the substance of issues in a tangible and verifiable way"

The fight against torture would be an appropriate place to start. The practice of torture is at the crux of most grave human rights abuses. It is a typical means through which the state violently impacts on the individual. Torture forms an essential link in the chain of grave human rights abuses, from arbitrary and incommunicado arrests and detentions, through to forced disappearances or extrajudicial executions. In tackling this practice with the seriousness that it evidently requires, the Council would begin to show that it is relevant and valuable. A failure to do so will convey the opposite message.

The Council clearly needs to move beyond the superficial discussions that have been the hallmark of its work to date and tackle the substance of issues in a tangible and verifiable way. The Council is hiding behind excuses, such as the desire to avoid selectivity, in order to avoid taking any action. Instead of freezing in the headlights, the Council should address all allegations of grave human rights violations as and wherever they surface in order to ensure that it cannot be accused of selectivity over time.

The Rapporteur notes that the problem of torture and ill-treatment is global. Victims of torture all need the support of the international system, regardless of their nationality. Addressing torture across the board therefore cannot be deemed selective. Beyond this, the key is not to engage in simply denouncing torture and making use of allegations of abuses for political posturing, but to make constructive and effective use of the information already made available by the Special Rapporteur, which is regrettably being ignored at present, in order to take concrete action to support governments in the eradication of torture.

The ALRC applauds the work of the Special Rapporteur and welcomes his report and study on the phenomenon of torture, which concisely presents many of the issues that the ALRC has also encountered through its work in Asia. As noted in the report, despite torture being amongst the gravest of human rights violations and despite its absolute prohibition, torture and ill-treatment are widespread practices in the majority of the countries on our planet. This is particularly true in Asia, where torture is endemic and practiced systematically, including in fighting ordinary crime, in the majority of the region's nations.

In addition, the ALRC welcomes the efforts made by the Special Procedures as part of the "Joint study on global practices in relation to secret detention in the context of countering terrorism" (A/HRC/13/42). The ALRC notes that the report has included a number of examples from the past in several Asian nations and wishes to highlight one issue that is not contained therein. The ALRC has informed the Council and the Special Procedures on

several occasions about its identification of some 52 secret detention and torture centres in Pakistan. The ALRC urges the relevant Special Procedures and the Council to address this issue as a matter of urgency and take all necessary steps to ensure that the Government of Pakistan closes these centres immediately and investigates and renders justice concerning all related allegations of abuse stemming from these centres.

"Torture is most frequently practiced in the context of investigations concerning petty crimes"

While acknowledging the value of the attention given to the specific issue of torture as part of counter-terrorism, the ALRC recalls the Special Rapporteur's finding that "most victims of torture are not political prisoners or suspected of having committed political 'crimes', but ordinary persons suspected of having committed criminal offences. They usually belong to disadvantaged, discriminated and vulnerable groups, above all those suffering from poverty." The ALRC urges the Special Procedures and the Council to find ways to give particular attention to the chronic, endemic and systematic nature of torture, as this aspect of the phenomenon is being overlooked despite it representing the greatest component of the problem of torture.

It is important to take into account that torture is most frequently practiced in the context of investigations concerning petty crimes. The ALRC has documented numerous cases in which torture is used in order to extract money from hapless victims. In Bangladesh, for example, Mr. Abdul Razzak, a law graduate, was arrested without any legitimate reason on 21 October 2008, and detained at a police station in Kartun for several days. He was charged with the abduction of a young girl, a charge which had no basis in fact. Between October 21 and November 12, Razzak's family had to pay bribes to police officers and others on 16 occasions. This case is indicative of so many in Bangladesh, in which arbitrary arrests and torture are used by officials simply to make money. The ALRC has documented cases showing the nexus between torture and extortion in numerous countries in Asia, including, inter alia, India, Myanmar, Pakistan, Sri Lanka and Thailand.

In many Asian States, torture is not even a crime. As an example, the ALRC has also submitted a written submission to the 13th session of the HRC concerning the specific need to criminalize torture in Bangladesh. Even in countries where torture is criminalized, such as in Sri Lanka, which adopted a law by way of Act No. 22 of 1994, or the Philippines, which has recently adopted a law against torture, these laws have not been implemented in practice and torture continues to be practiced endemically and with impunity.

The use of torture for gathering information, for extracting confessions, or for intimidating persons is prohibited by the Convention Against Torture. That notwithstanding, torture is being used systematically as the main method of investigation

in many Asian nations. The AHRC has documented thousands of such cases of torture in Asia and published a compilation and analysis of 200 cases in Sri Lanka in early 2009.

"Membership in the Council should be contingent on verifiable actions by governments to criminalize torture and to reform justice delivery mechanisms to ensure effective implementation"

Importantly, the Rapporteur notes in his report that the criminal justice systems in most countries are not functioning properly and that there is a lack in many country settings of a specific crime of torture in accordance with the definition in article 1 of the CAT. These factors represent major obstacles to the realisation of the protection against torture. While the ALRC urges all states to ratify the Convention against Torture and its Optional Protocol, ratification devoid of full implementation is of little value in practice. Beyond ratification, there is a need to criminalize torture and to provide adequate political will and resources to ensure the implementation of domestic and international laws and obligations. This is sadly lacking in most Asian nations at present. No will has been shown to eliminate the use of torture by equipping officers with other methods of investigation, such as better training in interrogation techniques, providing better equipment for investigations, and providing forensic and other technologies for use in criminal investigations. The failure to develop a proper methodology for investigations is often a result of the failure by states to invest adequate funds in the administration of justice, including investigation systems, professional prosecution staff and the judiciary.

Membership in the Council should be contingent on verifiable actions by governments to criminalize torture and to reform national justice delivery mechanisms to ensure the law's effective implementation. The lack of procedural safeguards, of complaints mechanisms, of independent bodies for the investigation of torture and obstacles to the right to a remedy and adequate reparation in practice have all been highlighted by the Rapporteur in his report. The ALRC urges the Council to include a technical assessment of all of these issues in states' Universal Periodic Reviews and throughout the body's other work.

The Special Rapporteur has also noted that the fight against impunity is the key battleground. He has stated that "impunity is one of the main reasons why torture is so strongly entrenched—In most States I visited, impunity was close to total, despite an undeniable, sometimes routine, widespread or even systematic practice of torture. In a few countries, the Government was not able to provide me with one single case in which a perpetrator of torture had been held accountable under criminal law and punished with adequate sanctions." The ALRC's experience of the problem of torture in Asia confirms the prevalence of impunity and also mirrors the Special Rapporteur's findings concerning the non-existent or severely limited right to remedy and adequate reparation.

The ALRC therefore urges all United Nations members, notably actual or future members of the Human Rights Council, to ensure that they establish a legal framework that unambiguously

prohibits and sanctions torture. The Council should ensure that its members have verifiably implemented the criminalization of torture. The idea that a State can be engaged in any form of effective protection of human rights, let alone to the level required for credible membership within the UN's apex human rights body, without such action, is laughable.

> **"The continued failure by the Council to act upon such expert input places the relevance and credibility of the Council under serious risk"**

The Council must also ensure the implementation of recommendations by the Special Procedures. The ALRC welcomes the suggested establishment of a Global Fund for National Human Rights Protection Systems. The abject lack of any action resulting from the recommendations of the Special Rapporteur on torture should act as a wake-up call. The continued failure by the Council to act upon such expert input places the relevance and credibility of the Council under serious risk.

Finally, the Council is urged to ensure that a competent, independent mandate holder is selected to follow in the footsteps of Manfred Nowak when his tenure as Special Rapporteur comes to an end later this year. The Council must make a strong selection, taking into consideration the proposals of non-governmental organisations, to show that it is working to make amends for its inaction concerning torture to date and to continue the tradition of able and competent mandate holders concerning this crucial issue.

Council failing to address situations of widespread forced disappearances

The Asian Legal Resource Centre is gravely concerned by the fact that, despite regularly receiving information concerning widespread and numerous cases of forced disappearance, including many in the Asian region, the Human Rights Council has failed to take effective action to have a tangible impact on the prevention of further abuses on the ground.

The Council's much-vilified predecessor, the Commission on Human Rights, was nevertheless able to take action based on reports of widespread disappearances that lead to their reduction. For example, in establishing an office of the High Commissioner for Human Rights in Nepal, the Commission took action that contributed to a significant reduction in the number of disappearances in the country, which had previously had the highest number of disappearances in the world. Faced with similar situations of mass disappearances in Sri Lanka and Pakistan, where thousands have allegedly been subjected to forced disappearance by the state, the Council has remained wholly ineffectual.

Oversight and monitoring of critical situations remains a key element in preventing disappearances. Those countries in Asia that have forced disappearances have all failed to provide effective systems for witnesses and relatives of victims to register complaints and for effective investigations to be conducted into allegations of disappearances. The investigating authorities, particularly the police, are complicit in routinely refusing to

register complaints. The lack of effective investigation engenders impunity concerning this grave human rights violation. Those committing disappearances—frequently the security forces—have been encouraged as a result to ignore standard legal procedures on arrest and investigation and instead arbitrarily detain and disappear individuals that they seek to question or have under their control.

In Sri Lanka, the government has admitted to having "removed" 10,000 internally displaced persons from IDP camps to question them about their links to the LTTE after the conflict concluded in May 2009. The military-run IDP camps have not issued any public records concerning the identities and number of persons being held there. This has provided an open invitation to either the security forces or those working for them to remove persons on the pretext of questioning without a trace. Disappearances have therefore been enabled by systemic lacuna on the part of the state. Custodial interrogations should have been conducted under investigation procedures defined by law. These have been deliberately ignored, and not for the first time in the country. This type of removal and disappearance was common during the JVP suppression campaigns between 1987 and 1991, which resulted in 30,000 disappeared persons.

The breakdown of the rule of law, the corruption of law-enforcement agencies and the absence of effective protection mechanisms have combined to enable mass disappearances carried out with impunity in Sri Lanka. Accompanying such practices has been the emerging phenomenon of abductions for ransom. The case of a 6-year-old girl, Varsha Jude Regi, who was abducted in exchange for money in March 2009, illustrates the failure by the government to ensure that its citizens' right to life, security and liberty are protected. Abductions are being perpetrated by hooded persons in white vans, some of whom have been identified as being police officers.

Also in Sri Lanka, child rights defender Mr. Sinnavan Stephen Sunthararaj was abducted and disappeared in May 2009. He had previously evaded an attempted abduction in February 2009 by persons riding in a white van. They were identified as being Special Task Force officers. Despite complaints, no credible investigation has been conducted in the case of Pregeeth Ekanaliyagoda, a journalist and political analyst, who was abducted in September 2009, and reportedly detained handcuffed in an unknown location underground before being released. He again went missing on 24 January 2010.

In Pakistan, the government has admitted to the Supreme Court that around 1600 persons disappeared in 2008 and the Balochistan Provincial Ministry issued a list that contains 992 names of missing persons on 10 December 2009. The disappeared are thought to include 168 children and 148 women. The police are complicit in these disappearances, as police officers typically refuse to register First Information Reports regarding cases of

disappearances, eliminating the prospect of having these cases investigated, and therefore enabling impunity. The aforementioned list issued by the ministry resulted from it making a public appeal for people to report missing persons. However, despite the Supreme Court and the ministry now having lists of disappeared persons, there is only a small chance that any of these will be investigated, the victims' whereabouts located or those responsible prosecuted.

"In Pakistan, the government has admitted to the Supreme Court that around 1600 persons disappeared in 2008"

The country's notorious Inter-Services Intelligence has allegedly been involved in orchestrating the disappearance of dozens of persons that they had trained as Jihadis in Pakistani-held Kashmir, Azad Kashmir. The ISI reportedly recruits, trains and sends Jihadis into Indian-occupied Kashmir to conduct espionage. Jihadis that return to Pakistan after completing their assignments and that refuse further assignments have reportedly been disappeared. Between July 2009 and February 2010 around 15 such cases have been reported to the ALRC. The ALRC has documented numerous other cases of forced disappearances allegedly perpetrated by the intelligence agency, which is able to carry out these grave rights violations with impunity due to a lack of civilian oversight, the police's refusal to register complaints, and the lack of a system of accountability for the military and the intelligence agencies. Despite the democratic change of political leadership in the country, the military remains above the law and able to enjoy impunity for past and ongoing human rights abuses.

In Nepal, although cases of disappearance have dropped, as mentioned above, the military interferes in and undermines the investigation of forced disappearance cases. In the case of Maina Sunuwar, a 15-year-old girl who disappeared in February 2004, it took four years for Major Niranjan Basnet of the Nepal Army and his three co-accused to be charged in court for illegally arresting, disappearing, torturing, raping and murdering Maina Sunuwar. The military initially obstructed numerous attempts by the police to investigate the case and to retrieve the victim's body. The Kavre District Court issued an arrest warrant against the alleged main perpetrator, Major Basnet, on 10 February 2008. Despite this, he was allowed to be sent to Chad in September 2009 as part of the United Nations peacekeeping mission. He was finally repatriated on 12 December 2009 to face trial in Nepal, although concerns remain as to whether justice will ultimately be done.

In the Philippines and Thailand, although the police may register complaints of disappearances there are no domestic legal remedies for relatives of victims seeking the prosecution of those responsible as enforced disappearance has yet to be criminalized. Despite evidence often linking the police and the military to the disappearances, such cases are typically not effectively investigated and impunity prevails.

In Thailand, the police only act on reports of forced disappearance 48 hours after the person was reported as missing. In cases of forced disappearance, time is of the essence, so to treat such cases as simple missing person cases is evidently problematic. In the Philippines, the police also routinely tell those who report disappearances even before investigating the complaint that their loved ones may just have eloped with their lover, and tell them to just wait until they return home.

Numerous enforced disappearances of human rights and political activists remain unresolved in the Philippines. From January 2001 to December 2009, local human rights organisation KARAPATAN documented 205 cases of forcible abduction and disappearance. In two of these cases, concerning Jonas Burgos, who was abducted and disappeared in April 2007; and James Balao, who disappeared in September 2008, evidence links their disappearances to the security forces.

Despite this, no progress has been made in locating their whereabouts. On 19 January 2009, a court in La Trinidad, Benguet, ordered the government, in approving the writ of amparo Balao's relatives had filed, to "disclose where (Balao) is detained or confined (and) release (him)". Despite the court's findings that the police and military had "failed in conducting effective investigation of (Balao's) abduction", none of those responsible have been held to account. This case illustrates that even if the court reveals the police and the military's failure in carrying out effective investigation concerning cases of disappearance, no punishment is imposed.

Similar problems are encountered in the case of Somchai Neelaphaijit, a prominent human rights lawyer who was forcibly disappeared in March 2004 in Thailand. Despite eyewitness testimony that Police Major Ngern Tongsuk was among a group of police who abducted Somchai, the Criminal Court in Bangkok on 12 January 2006 convicted him alone for coercion. He was later released pending an appeal but has reportedly fled the country after faking his death. The failure to promptly resolve Somchai's disappearance has also exposed witnesses and Somchai's family to continuing threats and intimidation since 2004. On 11 December 2009, Mr. Abduloh Abukaree, one of the key witnesses in the continuing investigation by the Department of Special Investigation into Somchai's case disappeared while returning from a teashop near his home in Ra-ngae district, Narathiwat Province.

Asia remains the scene of a significant proportion of the world's cases of forced disappearance and while there is no functioning effective regional human rights mechanism, the onus is on the Human Rights Council to take action to address such serious and widespread human rights violations. The Human Rights Council needs to go beyond cursory examinations of certain crises and show that it can have a tangible impact in protecting human

rights in line with its mandate. If it is to avoid losing all credibility, the Council needs to take action to protect individuals from serious human rights abuses. The root causes that enable serious violations of human rights on a massive scale, such as the patterns of forced disappearances seen in Sri Lanka and Pakistan, need to be understood and addressed.

> **"The Human Rights Council needs to go beyond cursory examinations and show that it can have a tangible impact in protecting human rights in line with its mandate"**

The ALRC therefore urges the Human Rights Council to study and review the complaints and investigation mechanisms of all states under review by its Universal Periodic Review. Ratification and implementation of the International Convention for the Protection of All Persons from Enforced Disappearance, including the criminalization of this practice, should be a precondition for membership in the Council. All the states mentioned here should also be urged to extend standing invitations to the Working Group on Enforced or Involuntary Disappearances and to cooperate fully with this mechanism. Furthermore, all necessary support must be provided to the Working Group on Enforced or Involuntary Disappearances, which continues to play a key role in addressing cases and situations involving forced disappearance. Finally, the Council should also develop a mechanism to ensure rapid, independent international investigations into all credible allegations of widespread and numerous disappearances in a particular country.

Council urged to do more to prevent arbitrary detention, the gateway to other grave abuses

The Asian Legal Resource Centre and its sister organisation, the Asian Human Rights Commission, have documented numerous arbitrary detentions throughout the Asian region in the year preceding the 13th session of the Human Rights Council. Cases, notably from Bangladesh, Cambodia, India, Indonesia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka and Thailand, show a consistent and widespread pattern of abuse of authority by law enforcement agencies concerning illegal and arbitrary detention. Arbitrary detention is not an exceptional measure in many Asian settings, but is endemic, engenders a climate of fear and is a gateway violation that enables a chain of abuses, including torture and forced disappearance, which continue to blight the region.

The prevalence of arbitrary detention in the Asian region is a reflection of failing justice systems. It is an immediate and visible symptom of suppressive policing systems and ineffective justice machineries. Arbitrary detention is directly proportionate to the absence of democratic space in a particular state. It is augmented by justifications provided by counter-terrorism, but finds its root in weak institutions and the lack of remedies available to victims.

For this reason, dealing with arbitrary detention in the Asian context requires adequate understanding of its root causes, notably corruption associated with law enforcement and impunity.

The unwillingness of states in the region to deal with problems concerning law enforcement agencies have only contributed to the further deterioration of the rule of law and the need for effective and meaningful attention to this problem by the international system, notably the Human Rights Council.

Arbitrary detention is widely utilised by the economic and political elites in most Asian nations, through state agents and institutions, to maintain social control and to retain their dominance within societal power structures. Numerous cases have been communicated by the ALRC to the UN Working Group on Arbitrary Detention, requesting intervention. Below are some examples that highlight issues such as corruption, the lack of remedies, negative trends in legislation and counter-terrorism, and the use of arbitrary detention to target migrants, silence political opposition, stifle media freedom and undermine the work of human rights defenders.

In Pakistan, on 26 April 2009, officers from the Airport Police Station in Rawalpindi (Punjab province), arrested Nadia (19 years old), Shazia Riaz (16) and Nazia (12) from their residence. At the police station, Station House Officer Choudhry Safdar and Assistant Sub-Inspector Basheer abused and assaulted the three girls. After four days of illegal detention, the police produced the girls before civil judge, Mr. Azmat Ullah, in Rawalpindi. The police accused the girls of helping their brother, Fazal Abbas, to abduct Ms. Kulsoom Baloch, the daughter of a wealthy businessman. In fact, Kulsoom had married Abbas against the wishes of her family. Kulsoom's family was using their influence with the local police to exact revenge on Abbas' family.

Corrupt law enforcement officers enter into pacts with the wealthy and influential and abuse their powers to illegally and arbitrarily detain innocent persons in this way in many Asian countries. Law enforcement agencies also often resort to arbitrary detention as part of criminal investigations, due to the absence of a functioning institutional and legal framework for proper criminal investigation and the lack of proper procedures to check arbitrary uses of power. The victims of arbitrary detention are often poor and therefore unable to afford legal protection to seek redress and combat impunity concerning excesses of authority by the State.

Mrs. Muliyana (24) from Natar, Indonesia, was arrested by the Jakarta Metropolitan police on 24 July 2009, detained for six days and tortured in order to force her husband, Mr. Azwan Effendi, to surrender to the police. He was suspected of involvement in a bank robbery. Despite Effendi having surrendered himself, the police continued to torture Muliyana, including using electric shocks on her stomach in front of her husband to get him to confess to the robbery and to locate the stolen money. The police released Muliyana without registering a case and charged her husband with robbery.

There is a serious lack of legal remedies available to victims of arbitrary detention in Asia. For example, there is no specific law that prevents a police officer from committing arbitrary detention in Nepal and Cambodia. In jurisdictions where there are legislative provisions, such as India, these are rendered void in practice through the inability of the justice delivery system to provide timely remedies and punish perpetrators. This weakness is exploited by governments to use arbitrary detention as a tool to silence political opposition.

“ There is a serious lack of remedies available to victims of arbitrary detention in Asia ”

There is a trend concerning legislative changes in India, Sri Lanka, Thailand, Indonesia and South Korea that favours extended periods of statutory detention, for which national security is used as an excuse. For instance, a person charged under the Internal Security Act BE 2551 (2008) in Thailand can be detained for a period of 30 days and the arresting authority is given wide-ranging discretionary powers that can infringe the fundamental rights of the detainee. While in most States the 24 hour norm is still the standard under the ordinary criminal procedure, newly-drafted statutes provide exceptions to this norm for periods ranging from 30 to 90 days of detention. National security and the concept of preventive detention are being used to justify an increasing number of arbitrary, lengthy detentions.

Arbitrary detention has also become an effective instrument to impart fear among human rights defenders. The state police in the Indian state of Manipur arrested human rights defender and environmental activist, Mr. Jiten Yumnan, on 14 September 2009, along with seven other local political activists to end a state-wide protest against the state government demanding investigation and prompt action against the police officers who had killed two persons. The detainees were charged under the provisions of a draconian law, the National Security Act, 1980. The police tortured Jiten in custody. After four months, the police released Jiten and withdrew the charges. Even though the victims want to pursue a case against the government and the police officers, they are afraid to do so since the courts in India will take at least a decade to decide the case, an inordinately long period during which the victims have no means to find protection from further persecution.

In a similar case reported from South Korea, the police arrested two human rights defenders, Mr. Park Lae-gun and Mr. Lee Jong-hoi, on 11 January 2010. Arrest warrants had been issued against Park and Lee for reportedly being instrumental in organising protests concerning forced evictions in Youngsan-Gu, Seoul. Several participants were reportedly killed by the authorities during a crackdown on the protests. The cases registered against Park and Lee and their arbitrary arrests represent serious violations of their rights and of South Korea’s obligations under the International Covenant on Civil and Political Rights (ICCPR).

> "Arbitrary detention is a gateway to a range of further abuses"

Arbitrary detention is also used to infringe media freedoms. On 2 April 2009, the AHRC reported the cases in Myanmar of Ms. Ma Eint Khaing Oo working for Ecovision Journal and Mr. Kyaw Kyaw Thant, a freelancer with Weekly Eleven, who were arrested by the authorities for arranging for victims of Cyclone Nargis to meet with officers of the International Committee of the Red Cross (ICRC) and United Nations Development Programme (UNDP) in Yangon. The authorities accused the journalists of inciting the citizens to stir up trouble and of creating animosity towards the government. Both were sentenced to two years' imprisonment with hard labour, but were released in September owing to external interventions.

During the past two years, the Government of Sri Lanka has used arbitrary detention as a tool to silence political opposition in the country. Recent events, particularly in connection with the presidential election, reveal shocking use of arbitrary detention as a tool of repression and revenge. The government has openly resorted to arbitrary detention of not only journalists and human rights defenders, but also of its own officials, including military officers who publicly condemned the government. During the civil war, human rights defenders who condemned breaches of international humanitarian law were either detained without charges for long durations or were charged with offences under the draconian Emergency (Miscellaneous Provisions and Powers) Regulation No 1, as amended vide gazette notification 1132/14.

Arbitrary detention is also used against migrants. For instance, it is widely used for mass arrests of Burmese refugees staying in Thailand. The government of Thailand uses arbitrary detention as an instrument to 'clean' the country of unwanted migrants, violating their rights and its obligations under the ICCPR in the process.

Governments in Asia are making use of the fight against terrorism to justify oppression within their states, contributing to the increase of arbitrary detention of persons in undisclosed destinations. The Working Group on Arbitrary Detention has repeatedly requested states not to resort to arbitrary detention as a tool for combating terrorism. In 2009, the existence of secret detention centres in India was exposed by the media, but the government continues to deny their existence. This is not a surprise, as the government has continuously failed to cooperate with most United Nations human rights mechanisms concerning human rights situations in India: a fact that has been reported by the Working Group on Arbitrary Detention in its report to the Council.

While arbitrary detention is itself a violation of human rights, it is also a gateway to a range of further abuses and should therefore be addressed as an important component in the prevention of grave human rights abuses. Arbitrary detention provides the mechanism through which state authorities can exert control over individuals, allowing for graver abuses to be perpetrated, often in secret locations and with impunity.

The ALRC has noted that except for a few jurisdictions like India and the Philippines, the writ of habeas corpus or its legal principles either do not exist in practice or are poorly developed in Asia. For instance, in Thailand, although an equivalent of the writ exists it is obstructed through a heavy burden of proof being placed on the petitioner. In most cases, state agencies simply deny having missing persons in custody and such petitions are dismissed. In other jurisdictions, such as in Sri Lanka, the courts themselves entertain a negative attitude towards the application of the writ. The ALRC has studied 800 such cases dismissed by the Sri Lankan courts during the past two years that led to this conclusion.

"Except for a few jurisdictions like India and the Philippines, the writ of habeas corpus or its legal principles either do not exist in practice or are poorly developed in Asia"

In light of the importance of the practice of arbitrary detention in limiting a range of human rights and enabling further grave abuses, the ALRC urges the Council to:

1. Provide more institutional as well as infrastructural support for the Working Group on Arbitrary Detention, considering its unique status as the only non-treaty-based mechanism whose mandate expressly provides for consideration of individual complaints;

2. Ensure that all States ensure full cooperation with the Working Group on Arbitrary Detention, including concerning individual complaints and appeals as well as by issuing standing invitations for country visits;

3. Assist the Working Group on Arbitrary Detention in identifying and addressing patterns in different regions, including Asia, of arbitrary arrests and their root causes, including weaknesses in justice institutions, as well as linkages with other rights violations, notably torture and disappearances; and,

4. Urge States to prevent violations of their mandatory obligations under the ICCPR on the pretext of national security and counter-terrorism.

Wide-ranging restrictions on freedoms of expression must be addressed

The Asian Legal Resource Centre wishes to highlight a number of restrictions to the freedom of expression ongoing in several countries in the Asian region. There are a number of situations in the region that are cause for concern with regard to this important right, affecting a range of countries with different levels of development, democracy and records concerning human rights.

At one extreme, in Myanmar, the absence of opportunities for free speech is nullifying the prospect for any notion of free and fair elections. The media have been prohibited from analysing the new laws and rules for the planned elections, or from saying anything about parties already registering for the ballot.

Furthermore, in countries in the Asian region that have a range of records concerning the respect for human rights, the ALRC has also noted worrying trends to curtail and violate the freedom of expression, pointing to a wide-ranging and complex problem affecting the entire Asian region in various forms.

> **"The ALRC has noted worrying trends to curtail and violate the freedom of expression, pointing to a wide-ranging and complex problem affecting the entire Asian region"**

In the Republic of Korea, for example, since the current government came to power, it has appointed a close supporter of the President as CEO of the Korean Communications Commission. Mr. Jeong Yeong-ju, the CEO of the Korea Broadcasting System, was also forced out of office and union members were dismissed for protesting against these developments.

Mr. Park Dae-sung—a blogger also known as 'Minerva'—was arrested on 6 January 2009 and detained until April 20 for publishing articles on the Internet, notably concerning gloomy predictions about the future of the Korean economy. In July 2008, the Ministry of National Defence labelled 23 books as being seditious. Mr. Park Won-soon, a human rights lawyer alleged illegal activities by the National Intelligence Service in an interview with a weekly magazine on 10 June 2009, and based on this the NIS sued him on September 14 for civil defamation, requesting 200 million Korean Won, or around USD 170,000 in damages. Several bills that will likely further undermine the freedom of expression have been introduced without adequate public discourse. They include measures to expand the number of internet portal websites that have to adopt a 'self-verification identity system' that registers the identity of users, as well as the creation of a new form of illegal act, known as a cyber insult.

Freedom of expression is greatly constricted in Thailand. Through the lesè majesté law (Article 112 of the Criminal Code) and the more recent Computer Crimes Act of 2007, a series of dissidents, journalists, and observers of politics have been threatened, intimidated, and in some cases, arrested and prosecuted. The Computer Crimes Act of 2007 was passed in order to address hacking, unlawful accessing of computers or network resources not in possession of the user, and intercepting of emails and other electronic data with the aim to commit theft or other criminal activities. The act gives authorities wide-ranging powers to search the computers of suspected users, as well as to request information from internet service providers about the identities of owners of computers with particular IP addresses. Since its inception, the act has been used to silence opposition and intimidate journalists and other citizens.

In April 2009, Suwicha Thakor was sentenced to ten years in prison under both the lesè majesté law and the Computer Crimes Act for allegedly posting YouTube clips insulting to King Bhumipol, Thailand's 82-year-old monarch, to a web board. Compounding the dangers to freedom of expression contained within the two laws, full information about all of the pending and prosecuted

cases is not available, as to repeat information about the charges risks causing the speaker to be charged as well. Several exemplary cases illustrate the range of abuses possible under the two laws.

> **"Anyone active in dissident Thai politics online must wonder if, and when, there will be a knock at the door"**

Darunee Charnchoengsilpakul was sentenced to eighteen years in August 2009 for alleged crimes of lesè majesté she committed during speeches she made during political rallies in support of ousted former PM Thaksin Shinawatra in June and July 2008. When she was sentenced in August 2009, the court decision included transcripts of her comments. She never mentioned the monarchy or related institutions or individuals by name. However, as noted in the judgment, the court extrapolated the objects of her speech, as well as made conclusions about her intentions. On the basis of the court's extrapolation and interpretation, she was sentenced to eighteen years in prison. Of primary concern, she has significant untreated dental problems. In early 2010, the physician at the prison wrote a report explaining the seriousness of her condition and his inability to treat it with the facilities at the prison. Darunee's family filed an appeal for temporary release for her to seek care at a specialized clinic outside the prison. The appeal was denied, on the basis of the alleged severity of her crimes, and the non-life-threatening nature of her dental problems.

Under the Computer Crimes Act, computer users have been accused of committing crimes by circulating others' words and images, and web editors have been accused of not censoring others' words, or not doing so quickly enough. Chiranuch Premchaiporn, webmaster of the Thai and English-language progressive news site Prachatai, was arrested and charged on 31 March 2010 under the Computer Crimes Act for allegedly not removing offensive webboard comments quickly enough. She is currently out on bail, but could be sentenced to up to fifty years for her alleged crimes. On 1 April 2010, the government-majority-owned Mass Communications Organization of Thailand reported the arrest of Thanthawut Thaweewarodomkul, who "confessed to posting messages received from a person using a pseudonym on eight websites." The terms of the draconian lesè majesté law and the Computer Crimes Act mean that the alleged content of his crimes have not been made public, but other reports indicate that Thanthawut also maintained websites which cover the opposition red-shirt movement.

Increased arrests, charges and convictions under both the lesè majesté law and the Computer Crimes Act of 2007 represent a grave threat to freedom of expression and human rights broadly in Thailand. During the crisis between the opposition red-shirts and the government which began in late March 2010, the government announced extensive funding and other state resources being allocated for monitoring of websites and web boards. This means that anyone active in dissident Thai politics online must wonder if, and when, there will be a knock at the door.

> **"In Sri Lanka, since the end of the conflict the government has tightened restrictions on the media in order to silence any form of dissent or criticism"**

In Sri Lanka, since the end of the conflict the government has tightened restrictions on the freedom of the media in order to silence any form of dissent or criticism. Journalists have even been killed; the most infamous example concerns Lasantha Wickramatunga, the editor of the Sunday Leader who, a few weeks before his death predicted his assassination and pointed the finger at the government in the event that it should come to pass. He was killed on 8 January 2009; however, to date no effective investigation has been conducted and no-one has been prosecuted for this crime. An estimated 40 prominent journalists have left Sri Lanka claiming that their lives have been seriously threatened. For example, Poddala Jayantha, a senior journalist who is also the General Secretary of the Sri Lanka Working Journalists Association and a key activist of the Free Media Movement in Sri Lanka was abducted on 1 June 2009 in broad daylight near the Embuldeniya junction in Nugegoda. His legs were broken and he was thrown out of a white van. He survived but was forced to leave the country due to further threats.

Keith Noyer, another well-known journalist, was abducted after he wrote an article critical of some financial aspects of the Sri Lankan military. After resurfacing he fled the country. Many others have imposed self-censorship on themselves for fear of repercussions. Journalists who have visited the country have complained of various kinds of harassment. The overall situation is extremely threatening to all those who are engaged in the publication of material that challenges the government, particularly concerning the issue of corruption or the manner in which the security laws have been used.

In Indonesia, the Attorney General's Office has been engaged in acts of censorship. On 23 December 2009 the attorney general's office announced the banning of five books including an Indonesian translation of John Roosa's "Pretext for Mass Murder: The September 30 Movement and Suharto's Coup," a historical review of the political turmoil in the 1960s that resulted in millions of persons being imprisoned or killed. Other censored books include writings about human rights violations in the Papuan provinces and religious freedom. The office justified this claiming that such books risked "disturbing public order" or threaten "state unity".

The Indonesian Film Censorship Board (LSF) dates back to the colonial period in Indonesia's history and continues to ban movies, as recent cases show. Three documentaries about East Timor and one about Aceh were banned during a movie festival in order to avoid "social unrest", according to the authorities. The ALRC is concerned that the prohibition of these publications not only violates the fundamental freedom of expression but also fosters impunity by blocking public discourse on key human rights issues in Indonesia. Censorship by the office and the LSF is arbitrary and doesn't follow any objective standards or legal criteria.

Radio Era Baru - a radio station airing in the local language and Mandarin Chinese has been forcibly shut down by the police. The station had its equipment forcibly seized on 24 March 2010. The police and Batam Radio Frequency Spectrum Monitoring Agency officials, representing the Indonesian Broadcasting Commission, closed the radio offices in Batam, Riau Islands Province to stop broadcasts. An investigation by the National Human Rights Commission concluded that the move was in response to pressure from officials from the People's Republic of China, who objected to the station's airing of criticism of Beijing's human rights record. After a visit from Chinese officials in 2007, several Indonesian institutions and ministers received letters from Beijing, requesting a termination of the licence of the radio station. The Riau regional branch of the Indonesian Broadcasting Commission had refused to renew the radio's licence ever since, without a valid explanation. The matter is now being appealed in the Supreme Court. The closure of the radio station is of particular concern given its international character.

The Asian Legal Resource Centre is gravely concerned by the fact that it is currently witnessing serious attacks on the freedom of expression in many different contexts in Asia. These restrictions take many forms and are adapting to the level of development and means of communication available, either through direct prohibition, threats and attacks on the media, the censorship of publications, or even attempts to control online content and monitor or even punish the authors of such material.

The ALRC urges the Special Rapporteur on the freedom of opinion and expression to raise the above issues with the relevant governments. More widely, the ALRC urges the Special Rapporteur to conduct a study to evaluate the quantity, timeliness and quality of government responses to the mandate's interventions and recommendations—similar to the study carried out by the Special Rapporteur on torture—and urges the Human Rights Council to make the required resources available for this.

Access to justice and fair trials a distant dream in Nepal, India and Bangladesh

The Asian Legal Resource Centre welcomes the report by the Special Rapporteur on the independence of judges and lawyers and supports the need for increased efforts to improve human rights training and education for judges. In addition, the ALRC wishes to underline that education must be accompanied by structural and systemic reforms—notably concerning appointments, security of tenure and disciplinary mechanisms—as well as legal provisions to ensure the independence of the judiciary and to protect against corruption, without which education alone will not be able to improve the protection of human rights in many countries, notably those with which the ALRC is concerned in Asia. In this statement, the ALRC will

"Education of judges must be accompanied by structural and systemic reforms—notably concerning appointments, security of tenure and disciplinary mechanisms—as well as legal provisions to ensure the independence of the judiciary and to protect against corruption"

focus on concerns relating to obstacles to access to justice, the functioning of judiciaries and fair trials in Bangladesh, India and Nepal.

> "Corruption remains the major concern in the administration of justice in Nepal"

Nepal

The ten-year long Maoist insurgency has inflicted long-term damage on Nepalese institutions, notably the judicial institutions. The absence of a comprehensive and coherent legal framework and inadequate financial resources are the cause of such damage.

Since the country only has courts at the district level in its 75 districts, those living in remote areas have to travel for days to attend courts. Village Development Committees entrusted with limited juridical power can adjudicate petty disputes. Nevertheless, in numerous places the conflict that has affected the country in its recent past has led to the physical destruction of the VDC infrastructure and forced the VDC secretaries to flee to the cities. In addition, the prime minister dissolved the elected local bodies in 2002, further denying rural inhabitants access to justice.

The poor functioning of justice institutions denies the country's citizens their right to due process. According to information received in 2008, the backlog of cases in the country was estimated at around 50,000 cases and this has certainly not been reduced in the interim.

Corruption remains the major concern in the administration of justice in Nepal. Former Chief Justice Anup Raj has acknowledged the necessity to fight corruption and malpractices at all levels of the judiciary. According to the Transparency International's 2006 and 2007 Corruption Perception Index, the judiciary was deemed the institution most affected by corruption in Nepal. Groups or individuals with vested interests exploit this situation to the disadvantage of the most vulnerable groups. Equality in access to justice remains remote for disadvantaged groups, including Dalits, indigenous communities and women.

The police have been creating obstacles to the access to justice of those groups either by refusing to register cases or by pressuring victims into negotiated settlements with more resourceful perpetrators. In the case of Runchi Mahara, an 11-year-old Dalit girl who was raped and murdered in September 2009, despite strong evidence against the suspect, the police released the suspect, and refused to register a case or launch an investigation. Since the suspect received support from local ruling political party members, the victim's family had to withdraw the case. In the same month, the District Police Office of Morang pressured Ms. Somandevi Sardar, a 60-year-old Dalit woman who had been accused of witchcraft, beaten up and forced to eat human excreta by her neighbours, into finding a negotiated settlement with the perpetrators and to withdraw her complaint.

Extensive judicial powers granted to police officers by laws such as the Arms and Ammunitions Act, 1962 under which a Chief District Officer has the power to sentence people to up to six years' imprisonment, increase the risk of denial of justice and expose the vulnerable citizens to arbitrary arrest and detention. In 2009, this act was used in Morang District by the CDO to cover-up a case of torture by the police, by charging the victim, Mr. Sushan Limbu, under the act without hearing the lawyer's arguments.

"New constitutional provisions threaten the independence of the judiciary"

Although Article 116 of the Interim Constitution mandates that court orders are to be binding to all, in several cases court orders have not been implemented. For instance, in many torture cases in which the court ordered compensation, this was not paid. This system promotes impunity.

Civilian courts are denied the possibility of prosecuting army personnel suspected of having committed human rights violations, as in the case of Maina Sunuwar. Major Basnet, the accused in the case, received support from high political figures such as the defence minister [for details see: http://campaigns.ahrchk.net/sunuwar]. Civilian justice has proven unable to overcome the obstacles established by the army and the Maoists in several other instances. Therefore, impunity for human rights violations, which occurred both during and after the conflict, remains the rule.

The country also suffers from regular political interference in the course of justice. The International Crisis Group reported that in October 2008 the Maoist government withdrew 349 criminal cases filed against political party cadres.

In this context, lawyers and judges are vulnerable to threats and pressure, hampering their independence. In April 2009, the Young Communist League's cadres in Surkhet District physically interrupted a court hearing, demanding rigorous punishment of a suspect, and locked-up his lawyer, Mr. Nanda Ram Bhandari, in his chamber. Worryingly, the police refused to register any case against those who had hampered the trial.

Such practices have degraded the justice institution to such an extent that now the general public interfere in the process of justice. In 2009, a lawyer defending a person accused of having murdered a young girl, Khyati Shrestha, saw his house surrounded by ordinary citizens pressuring him not to take up the case.

New constitutional provisions further threaten the independence of the judiciary. The second amendment to article 155 of the Constitution requires parliamentary hearings for the recruitment of Supreme Court judges, even after the recommendation of the Judicial Council or of the Constitutional Committee. Given the current political turmoil in Nepal, not only does this disposition submit the judiciary to the fluctuations of political allegiances but also gives more leverage to political parties.

Bangladesh

> "Whenever power changes hands in Bangladesh, prosecutors are dismissed en masse and new officers are appointed on the basis political affinity"

Article 22 of Bangladesh's Constitution mandates that "the state shall ensure the separation of the judiciary from the executive organs of the state". In 1999, the Supreme Court directed the government to de-link the lower judiciary from the direct control of the government and place it under the supervision and management of the Supreme Court, a vital step required to ensure its independence.

Finally, in October 2007, the government de-linked the magistrates' and the sessions' courts from the direct control of the Ministry of Home Affairs and the Ministry of Law, Justice and Parliamentary Affairs and placed them under the management of the Supreme Court. However, most of the lower judiciary is presided over by the same officers who once worked directly for the government, limiting the judiciary's independence in practice.

The Judicial Secretariat and Judicial Service Commission required for dealing with recruitment, appointment, transfer, promotion and taking disciplinary actions against the officers of the lower judiciary are yet to be established in Bangladesh. In the absence of the Judicial Secretariat, the Ministry of Law, Justice and Parliamentary Affairs continues to perform this job, thereby effectively annulling any progress that could have been achieved by de-linking the lower judiciary from the government.

The government and politicians directly intervene in the functioning of the judiciary. On 11 April 2010, the President of Bangladesh appointed 17 additional judges to the High Court Division. Political allegiance and nepotism prevailed over merits and professional qualifications—most new recruits are closely linked to the ruling political elite, which will seriously affect the independence of the country's judiciary for years to come.

Two of the nominees had serious criminal charges against them. One is a suspect in a murder case and the other faced charges of arson and destruction of public property concerning the offices of the Supreme Court during a strike sponsored by the current ruling political party in November 2006. The government withdrew the charges before their appointment. When the media exposed the scam, the chief justice refrained from administering the oath to the two, although there is no guarantee that they will not be appointed when the public attention shifts elsewhere.

The appointment, promotion and transfer of government prosecutors also suffer from similar interference from the ruling elite, nepotism and widespread corruption. Whenever power changes hands, prosecutors are dismissed en masse and new officers are appointed on the basis political affinity. The attorney general's department demonstrated its high degree of politicisation in 2010 when it intervened in cases overriding bail orders of persons released from custody after being detained

arbitrarily due to political rivalry. The ALRC has recently published a book entitled "Politics – Corruption Nexus in Bangladesh" highlighting these and other issues.

India

Lack of adequate facilities, legal frameworks that provide absolute impunity nullifying the possibility of fair trial, court delays and extrajudicial executions continue to be the most challenging obstacles for seeking justice and redress for human rights violations in India. The absence of courts in the Indian state of Arunachal Pradesh is one example of India's neglect of justice institutions in general and in the north-eastern states in particular. Though Arunachal Pradesh has relatively low population density, it has only two Sessions Courts and has no High Court.

Within the judicial framework of the country, each district is entitled to have a Sessions Court where cases involving serious crimes like murder are tried. Additionally, every state is eligible to have a High Court. North-eastern states like Manipur, Meghalaya, Arunachal Pradesh, Sikkim, Mizoram, Nagaland and Tripura are denied this facility. Due to this individuals have to travel for days to reach the High Court at Guwahati, Assam.

The mandate-holder on independence of the judiciary has repeatedly noted that counter terrorism measures must not be used as an excuse to deny the right to fair trial (A/63/271, paras. 8-10; A/HRC/4/25, paras. 52-53; E/CN.4/2006/52; A/60/321, paras. 30-34). The Armed Forces (Special Powers) Act, 1958 used in several parts of India, the north-eastern states in particular (the law is not applicable to the whole of northeast but only in selected districts in the region, often covering large areas as in the case of the Manipur state) nullifies the right, since this law allows armed officers to shoot to kill on mere suspicion, a practice widespread and misused in the region, particularly in Manipur.

Additionally, the Manipur state police engage in an alarming number of extrajudicial executions, the latest of which was reported from Mao town of Senapati district. Extrajudicial executions are however not limited to the north-eastern states and are justified as 'encounter killing' in the rest of the country. In a country where extrajudicial executions are practiced by law enforcement agencies with statutory impunity, the concept of fair trial has no meaning.

The ALRC therefore requests the Council to:

1. Engage in dialogues with the governments of Nepal, Bangladesh and India to end corruption, ineptitude and neglect that hampers the functioning of justice institutions;

2. Require the Rapporteur to conduct independent studies and assist the Council to engage the states to address deep-rooted issues affecting justice and fair trial;

3. Request states to include detailed reports about justice institutions presenting realistic pictures of their fulfilment or denial of states' obligations under common article 2 of international conventions and find means to assist states, in particular Nepal, in rebuilding a justice framework;

4. Request states, India in particular, to annul legislation that hampers the very notion of fair trial; and,

5. To conduct in-depth studies with the assistance of internationally recognized independent experts and bodies available within the region and outside with a view to assist the states concerned to develop a dependable judicial framework to fulfil their obligations in providing effective remedies for all forms of human rights violations.

Diagnosing the un-rule of law in Burma: A submission to the UN Human Rights Council's Universal Periodic Review

Asian Legal Resource Centre, Hong Kong

This submission, pursuant to Human Rights Council resolution 5/1, which provides for civil society to participate in the Universal Periodic Review process of United Nations Member States' human rights obligations and commitments, concentrates on the features of legal, judicial and policing frameworks that enable the un-rule of law in Myanmar. The country lacks a normative framework to protect human rights under article 5 and articles 8 through 13 of the Universal Declaration of Human Rights. It lacks an independent and impartial judiciary. Its police force is militarized. Gross human rights abuse is systemic. Avenues for redress as envisaged in international standards are absent. Two major obstacles to implementation of human rights are the State's perception that the rule of law is a function of the executive and therefore that the role of the judiciary is to enforce policy rather than law; and, the accompanying systemic corruption in all parts of the State apparatus, especially in the judiciary and police. The Council should consider how it can work better within the United Nations system to apprise itself of the un-rule of law in Myanmar, and coordinate its activities with other parts of the system with a view towards substantive political change in the country, which must pre-empt any substantive change in the normative and institutional frameworks through which to implement human rights.

This article comprises of a submission that the Asian Legal Resource Centre made to the UN Human Rights Council in June 2010 for the Universal Periodic Review of Burma, which in the submission is referred to by its official name, Myanmar. All United Nations member states are required to submit themselves for the Council's new review process, which for Myanmar will be in early 2011. The ALRC has since 2008 made similar submissions on Bangladesh, Cambodia, India, Indonesia, Japan, Pakistan, the Philippines, Sri Lanka and South Korea. All submissions are available on the ALRC website: www.alrc.net

II. Methods

2. Specialist staff and associates of the Asian Legal Resource Centre have worked intensively on the situation of human rights and the rule of law in Myanmar over the last four years with which the Review process is concerned. In this time, the Centre has studied and documented hundreds of cases upon which the analysis in this submission is based. The Centre communicates regularly with human rights defenders and other persons inside the country, and with experts and knowledgeable concerned persons abroad. It follows closely media reports in Burmese and English from inside and outside the country. And, it has done extensive documentary research on the historical causes of the current un-rule of law in Myanmar.

3. The Centre has frequently communicated its findings to the Special Procedures, and has presented them in submissions to the Council at successive sessions. It has issued a number of special reports on Myanmar. An annexe to this submission contains a list of pertinent documentation.

III. Background

4. At independence in 1948, Myanmar inherited British colonial laws, policing and judicial systems. The police force was corrupt and violent; however, the courts checked abuses. Under the 1947 Constitution they exercised powers independently. The superior judiciary had a reputation for impartiality and concern for constitutionally-enshrined fundamental rights. After the military coup in 1962, the administration brought the judiciary under its control. It steadily degraded the entire institutional framework for the rule of law. In 1972, it abolished the professional judiciary and integrated the courts into the executive. It also brought specialized policing units under military intelligence. Citizens had no means for effective redress of fundamental rights without executive endorsement.

5. In 1988 following nationwide protests, the massacre of protestors and establishment of a new military regime, the administration laid down the basic blocks for the present-day legal, judicial and policing framework. It re-established a professional judiciary, but kept it under executive control through supervision of the Supreme Court. It has increasingly militarized the police force, and has also assigned other agencies—such as the fire brigade—policing and paramilitary functions. It has continued to assign the police a de facto military intelligence role. In recent years, as seen during the September 2007 protests, it has used auxiliary paramilitary forces of ambiguous legal status for security purposes. In 2008, it passed a new constitution that will come into effect after general elections that are expected before the end of 2010. A timeline of key events since independence is contained in the annexe.

“In 1988 following nationwide protests, the massacre of protestors and establishment of a new military regime, the administration laid down the basic blocks for the present-day legal, judicial and policing framework”

IV. Framework

A. The Normative Framework

6. The State is not a party to most international human rights treaties, including the International Covenant on Civil and Political Rights. Therefore in international law its human rights obligations in terms of the rule of law must be assessed in accordance with the Universal Declaration, in particular, articles 5, and 8–13.

7. The State has practically no domestic normative framework for the protection of human rights through the rule of law. Rather, it has a framework for the denial of rights through what the Special Rapporteur on the situation of human rights in Myanmar in 2003 correctly described as the "'un-rule of law' which presently affects most of the population in Myanmar" (E/CN.4/2003/41, para. 58).

8. Certain laws have limited provisions to protect the rights outlined in the Universal Declaration. These are mostly procedural delimitations on police powers under the Criminal Procedure Code and Evidence Act, and some broad guarantees under the Judiciary Law. Not only are these routinely ignored in reality—both deliberately as well as through the overall debasement of the legal system, and through the loss of judicial independence upon which they are premised—they are formally negated through jurisprudence, examples of which are in the annexe.

9. The preponderance of legislation in Myanmar is aimed not at the defence of human rights but at their denial. The State has retained and continues to use antiquated colonial-era and postcolonial statutes. Those include but are not limited to: Contempt of Courts Act, 1926, section 3; Emergency Provisions Act, 1950, section 5; Foreign Exchange Regulation Act, 1947, section 24(1); Immigration (Emergency Provisions) Act, 1947, section 13(1); Official Secrets Act, 1923, section 3(1); Penal Code, sections 124A, 153A, 186, 189, 211, 294, 295A, 332, 353, 505(b); Printers and Publishers Registration Law, 1962; the so-called State Protection Law, 1975; Tuition Law, 1984; and, Unlawful Associations Act, 1908, section 17(1). Since 1988, all laws have been passed as executive decrees, not through any legislative process. In this time, the laws that have been introduced to curtail human rights include: the so-called Anti-Subversion Law, 1996; Association Formation Law, 1988; Electronic Transactions Law, 2004; Organization Law, 1988; and, Television and Video Law, 1996. Some extracts of these laws and examples of cases decided under them are contained in the annexe.

10. The 2008 Constitution is in terms of human rights a norm-less constitution. Under its provisions, the armed forces are placed outside of judicial authority. The military, not the judiciary, is the constitution's guardian. The judiciary is separated from other branches of government only "to the extent possible". All rights are qualified with ambiguous language that

"The preponderance of legislation in Myanmar is aimed not at the defence of human rights but at their denial"

permits exemptions under circumstances of the State's choosing. For instance, the right not to be held in custody for more than 24 hours before being brought before a magistrate, which already exists in the Criminal Procedure Code, is under the new constitution delimited by an exception for "matters on precautionary measures taken for the security of the Union or prevalence of law and order, peace and tranquillity in accord with the law in the interest of the public, or the matters permitted according to an existing law" (section 376). This provision effectively legalizes arbitrary detention of the sort that is already rife in Myanmar. Other provisions that purport to guarantee rights do so only to the extent permitted by other laws, and in so far as they do not threaten the security of the state or contravene undefined standards of public morality. The constitution allows for rights to be revoked at any time and for their suspension during a state of emergency. The cumulative effect of these qualifications is to render all statements of rights meaningless. Some relevant sections of the constitution can be found in the annexe.

"To the very limited extent that norms exist for the protection of human rights in Myanmar, under the current institutional framework they cannot be enforced except in certain types of cases that correspond with state policy"

B. The Institutional Framework

11. To the very limited extent that norms exist for the protection of human rights in Myanmar, under the current institutional framework they cannot be enforced except in certain types of cases that correspond with state policy. The main features of the institutional framework that prohibit enforcement are the militarized functions of the police force, resulting in routine and systemic human rights abuses, and the non-independence of the judiciary.

12. The police force in Myanmar has two broad functions that correspond with those of other forces around the world. First, it secures public order, and second, it investigates crime. However, in Myanmar it does not perform these functions as a discrete professional civilian force but as a paramilitary and intelligence agency under command of the armed forces. Policing functions are also shared among other parts of the state apparatus, including with executive councils at all levels that supervise and oversee other agencies, and with other local bodies, including the fire brigade and a government-organized mass group. At the same time, specialized agencies, in particular the Special Branch, operate as proxies for military intelligence, rather than as autonomous investigators of crime. Consequently, the characteristics of policing and prosecutions in Myanmar include: routine arbitrary arrest and detention; common use of torture and other forms of cruel and inhuman treatment, and frequent deaths in custody; coerced signing of documents that have no basis in law; baseless and duplicated charges; and fabricated cases. The annexe to this submission contains examples to illustrate and support each of these points, as well as for those in the next paragraph, on the judiciary.

13. As the courts are subordinate to the executive, they can neither function in accordance with the laws that they purport to uphold nor in a manner that can defend, let alone implement human rights. Some of their features include:

a. **Closed and unreported trials**: The law ostensibly guarantees open trial, but politically-motivated cases are tried in closed courts inside prison facilities. Ordinary cases are held in public; however, a lack of media reporting and the enclosed character of the judiciary mitigate the usefulness of open trial even where it occurs.

b. **Procedurally-incorrect cases**: Breaches of legal procedure are routine in all types of cases. In politically-motivated cases, breaches occur because of the imperative to arrive at predetermined verdicts; in ordinary cases, because of the general debasement of the judiciary under the un-rule of law and because of endemic corruption.

c. **Evidence-less cases**: Accused persons in criminal cases in Myanmar are routinely imprisoned without evidence for the same reasons that cause procedural incorrectness.

d. **Denial of defendants' rights and targeting of defence lawyers**: The denial of the right to a defence occurs in two forms. First, defendants are unrepresented in court either because they are unable to afford or find a lawyer or do not know what one is (see 2009 report of the Special Rapporteur, A/HRC/10/19, para. 20); or because despite their efforts to obtain a lawyer they are denied one. Second, defendants are represented in court but the lawyer is unable to present the case in accordance with law. The judge may deny requests to call witnesses, deny cross-examination and threaten to or in fact take disciplinary or legal action against the attorney, by way of suspension or revocation of license, or threat of imprisonment for contempt of court.

e. **Lack of means for redress**: There are no effective means for redress to victims of human rights abuse through the courts in Myanmar, other than in certain types of cases that correspond with State directives, such as under the Anti-Trafficking in Persons Law. In these cases, the courts are effectively performing an administrative function, not a judicial one, by implementing policy that has been written into law. Where law does not correspond with policy, courts do not enforce it. Consequently, many legitimate complainants are instead themselves made the targets of counter-complaints and prosecution by state agents.

"Two major obstacles to the implementation of human rights in Myanmar are the political perception that the rule of law is an executive function, and the profound level of corruption throughout the entire State apparatus, including the courts and police"

V. Two major obstacles

14. Two major obstacles to the implementation of human rights in Myanmar are the political perception that the rule of law is an executive function, and the profound level of corruption throughout the entire State apparatus, including the courts and police.

"The Human Rights Council should acknowledge its limitations rather than make unrealistic proposals and issue recommendations that will not be implemented for want of an enabling environment, or that will give a false appearance of progress"

15. Since 1962, the perception of successive governments in Myanmar has been that the role of the judiciary is not to protect rights but to enforce State policy. Some examples of statements by officials during the last four years to this effect are contained in the annexe (see also Schedule I of the 2008 Constitution). The rule of law is shorthand for the State's use of law and institutions of law to achieve whatever ends suit its purposes. It does not constitute a normative basis for the building of a regime of rights. Nor does it signify the supremacy of law, or even adherence to law. Because this perception overrides specific qualities of the normative or institutional framework, it would be wrong to attribute to specific laws or agencies the authority to implement certain human rights. The authority of a law or institution is always delimited by a higher imperative, which means that the State party while passing laws, applying laws and establishing institutions to enforce laws does not itself feel beholden to those laws or institutions. Where its superior imperatives coincide with law, there is superficial coherence between policy and legality. But where superior imperatives contradict law, they override it and the underlying incoherence in the system is manifest.

16. The systemic incoherence that is an attribute of the un-rule of law in Myanmar engenders another major obstacle to the implementation of human rights: systemic corruption. Some brief examples of how corruption is embedded in the workings of ordinary courts and police stations around Myanmar are contained in the annexe. Successive governments in Myanmar, including the current administration, have themselves acknowledged the incidence of corruption either directly or indirectly, including in the judiciary. However, because this corruption is intimately linked to the un-rule of law that the government has formalised and institutionalised through the construct of rule of law as an executive function, it cannot be addressed in any meaningful way. On the contrary, anecdotal evidence points to its persistent increase with the privatization of state enterprises and market-style economics in Myanmar.

VI. A realistic approach

17. As substantive change to the situation of human rights in Myanmar will depend upon substantive political change, at present the Council has very limited means to get involved in the implementing of measures to protect and uphold rights there. The Council should acknowledge these limitations rather than make unrealistic proposals and issue recommendations that will not be implemented for want of an enabling environment, or that will give a false appearance of progress.

18. The Council should use the Review process to study how it can better understand and devise responses to the systemic features of the un-rule of law in Myanmar. Despite copious amounts of documentation narrating abuses of rights in Myanmar, the Council still has little detailed understanding of

the institutional arrangements enabling abuse and the extent to which these are embedded in all parts of the State apparatus. It has practically no information on the endemic corruption that affects all institutions with which the Council is concerned when addressing questions of human rights implementation. The Council's continued support for the mandate of the Special Rapporteur assigned to the country is commendable, and successive mandate-holders have played an important role in outlining the features of abuse and some of the obstacles to a regime of human rights in Myanmar; however, the mandate is limited by the amount of time that each rapporteur can devote to it, the limited resources and support for the mandate, and the fact that each new mandate-holder has to acquaint himself with the country before engaging with the issues and concerned persons. Therefore, the Council should not be satisfied with limiting itself to the work of the Special Rapporteur or other Special Procedures, but consider how it can use these and other mechanisms to work better within and through the wider United Nations system, to apprise itself of the facts, and coordinate its activities with other parts of the system with a view towards substantive political change of the sort that must pre-empt any substantive change in the normative and institutional frameworks through which to implement human rights. Its strategy should take into account and be coordinated with initiatives on Myanmar in other peak bodies, including the General Assembly and the Security Council, as well as the work undertaken by a range of UN agencies within Myanmar.

"The Council should not be satisfied with limiting itself to the work of the Special Rapporteur or other Special Procedures, but consider how it can use these and other mechanisms to work better within and through the wider UN system"

New campaign webpage: **Free Ma Sandar & Zaw Min Htun**

http://masandarburma.blogspot.com/

ANNEXE

I. Introductory note

1. This document is an annexe to the submission of the Asian Legal Resource Centre pursuant to Human Rights Council resolution 5/1, which provides for civil society to participate in the Universal Periodic Review process of United Nations Member States' human rights obligations and commitments, on the human rights and rule of law situation in Myanmar. For convenience, it has been organized according to the same headings as the original document to which it is annexed.

II. Methods

2. Pertinent documentation from the Asian Legal Resource Centre during the four-year period under review:

a. Submissions on Myanmar to the Human Rights Council (all available at www.alrc.net):

i. The absence of minimum conditions for elections (A/HRC/14/NGO/40, 25 May 2010)

ii. The limitations of the global human rights movement - a case study from Myanmar (A/HRC/14/NGO/39, 25 May 2010)

iii. Torture of detainees in Myanmar (A/HRC/13/NGO/56, 23 February 2010)

iv. Effects of endemic corruption in Myanmar's courts on rights of citizens (A/HRC/13/NGO/55, 23 February 2010)

v. Institutionalized denial of fundamental rights and the 2008 Constitution of Myanmar (A/HRC/12/NGO/21, 7 September 2009)

vi. Non-application of law and the cases arising from September 2007 in Myanmar (A/HRC/10/NGO/38, 25 February 2009)

vii. Targeting of defence lawyers in Myanmar (A/HRC/10/NGO/37, 25 February 2009)

viii. Political psychosis, legal dementia and systemic abuses of human rights (A/HRC/7/NGO/39, 22 February 2008)

ix. Utter lawlessness in the aftermath of September 2007 (A/HRC/7/NGO/38, 22 February 2008)

x. International community is failing the people of Myanmar again (A/HRC/6/NGO/18, 31 August 2007)

xi. Violent crime caused by the un-rule of law in Myanmar (A/HRC/4/NGO/66, 7 March 2007)

xii. Myanmar's degraded judiciary and a system of injustice (A/HRC/4/NGO/65, 7 March 2007)

b. Publications (all at www.article2.org)

i. "Burma's cheap muscle", in Special Edition: Use of Police Powers for Profit, *article 2*, vol. 8, no. 1, March 2009

ii. Special Edition: Saffron Revolution Imprisoned, Law Demented, *article 2*, vol. 7, no. 3, September 2008

iii. Special Report—Burma, Political Psychosis & Legal Dementia, *article 2*, vol. 6, no. 5-6, October-December 2007

III. Background

3. Timeline of key events concerning normative and institutional framework for the rule of law in Myanmar:

1947	Constitution of the Union of Burma passed
1948	Independence; new Supreme Court established
1958	First military coup; caretaker government detains thousands of alleged political and economic criminals; hundreds transported to remote island prison outside of judicial oversight; minimal judicial interference in work of military-headed government
1960	Return to civilian rule
1962	Second military coup; constitution suspended; chief justice imprisoned; Supreme Court and High Court merged; Special Criminal Courts set up to try cases outside of ordinary legal system
1965	Appellate bench set up to hear cases of Special Criminal Courts
1968	Former chief justice released from prison
1972	Professional judiciary abolished; system of courts with lay jurors established under control of executive councils at various levels
1974	Constitution of the Socialist Republic of the Union of Burma passed; apex court abolished; supreme judicial body established as a council of parliamentarians under control of single party; imposition of Martial Law and convening of military tribunals to try protestors
1988	Third military coup; constitution suspended; professional judiciary re-established under military executive control; re-establishing of Supreme Court; imposition of Martial Law and convening of military tribunals to try protestors
2000	Judiciary Law passed
2008	Constitution of the Republic of the Union of Myanmar passed

IV. Framework

A. The Normative Framework

[Text where in bold is for the purpose of highlighting salient parts of legislation and jurisprudence as adverted in the main submission.]

4. Key procedural rights under laws currently in effect:

a. Procedural guarantees of fair trial: ***Judiciary Law, 2000, section 2***—The administration of justice shall be based upon the following principles; … (e) dispensing justice **in open court unless otherwise prohibited by law**; (f) guaranteeing in all cases **the right of defence and the right of appeal** under the law…

> **"The administration of justice shall be based upon the following principles: dispensing justice in open court unless otherwise prohibited by law; guaranteeing in all cases the right of defence and the right of appeal under the law"**
> **—*Judiciary Law***

b. Procedural defence against arbitrary detention: ***Criminal Procedure Code, 1898, section 61***—No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period **shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours** exclusive of the time necessary for the journey from the place of arrest to [the police-station, and from there to the Magistrate's Court].

c. Procedural defence against torture:

i. ***Evidence Act, 1872, sections 24–26***—A confession made by an accused person is **irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise** having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him… **No confession made to a police-officer, shall be proved as against a person** accused of any offence against him… **No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved** as against such person.

ii. ***Criminal Procedure Code, sections 162, 164(1)***—**No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed** by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, **or any part of such statement or record, be used as evidence** (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such

statement was made... Any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the President of the Union may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this Chapter...

5. Examples of jurisprudence defeating procedural rights:

a. **Reversed burden of proof:** *Maung Maung Kyi v. Union of Myanmar*, [1991 BLR (SC) 103] Two brothers accused police in Yangon of torture in order to extract from one of them a confession over the stabbing murder of his aunt. According to the brother of the accused, when he visited him in the lockup he had a swollen face and had difficulty walking, and claimed to have been assaulted; however, the court rejected the allegation on the basis that when the accused was brought to give a confession after four days there were no signs of torture, and neither of the two lodged a separate formal complaint alleging the abuse. It also reasoned that as the material evidence corresponded to the contents of the confession then this suggested the reliability of the latter; even though had the police in fact tortured the accused and instructed him on how to confess then this would have ensured correspondence of facts in their accounts.

b. **Admittance of inadmissible confession:** *Union of Myanmar v. U Ye Naung and One* [1991 (MLR) Special 63] the full bench of the Supreme Court (Chief Justice U Aung Toe presiding) broke with both statute and all prior precedent by ruling that a confession obtained from military intelligence personnel without any judicial oversight was admissible in court in the absence of evidence from the defendant that it was not obtained through any of the means prohibited under section 24 of the Evidence Act. The court again reversed the burden of proof, by calling on the accused to present evidence that military intelligence had forced them to confess in a process that went on entirely without judicial oversight.

c. In the *U Ko Kyi case* [MLR (2005) SC 20] the Supreme Court considered the appeal of a person who had been convicted in a verdict relying on Ye Naung, from a testimony concerning alleged transactions in illicit drugs where the confession had again been made before military intelligence. In that case Justice Tin Aye found in favour of the accused but did not challenge the reasoning in Ye Naung but rather acquitted on the basis that whereas in Ye Naung a number of confessions linked the accused to the alleged crime in the latter case there was only a single confession of a co-accused, which he considered was insufficient to secure the conviction. Ye Naung has also been used to secure the convictions of prisoners of conscience who had been held and tortured in military intelligence custody in order to extract confessions that were subsequently used as evidence in court.

“In *U Ye Naung* the Supreme Court broke with both statute and all prior precedent by ruling that a confession obtained from military intelligence personnel was admissible in court”

"Aung Htun Myint was sentenced to three years' imprisonment because he went to document voting in the May 2008 constitutional referendum"

The Asian Legal Resource Centre has documented a number of these cases in detail but has not included them here as they date before the four-year period under review.

6. Examples of legislation that either directly curtail or are manipulated to curtail human rights, with accompanying examples of their application from the period under review:

a. ***Electronic Transactions Law, section 33:*** Whoever commits any of the following acts by using electronic transactions technology shall, on conviction be punished with imprisonment for a term which may extend from a minimum of 7 years to a maximum of 15 years and may also be liable to a fine: (a) doing **any act detrimental to the security of the State or prevalence of law and order or community peace and tranquillity or national solidarity or national economy or national culture.**

Case: Ngwe Soe Linn, 28, a resident of Ward 22, South Dagon Township, Yangon, was convicted of this charge and another and sentenced to 13 years in prison on 27 January 2010 in Yangon Western District Court Criminal Case Nos. 79 & 80/2009, Judge U Myint San (Deputy District Judge) presiding, heard inside Insein Prison, the charges based on an allegation that the accused had allegedly recorded and sent illegal video footage to a news agency abroad.

b. ***Immigration (Emergency Provisions) Act, 1947, section 13(1):*** **Whoever enters or attempts to enter the Union of Burma** or whoever after legal entry remains or attempts to remain in the Union of Burma **in contravention of any of the provisions of this Act or the rules made there under** or any of the conditions set out in any permit or visa shall be liable on summary conviction to imprisonment for a term [which may extend from a minimum of six months to a maximum of five years or with fine of a minimum of K. 1500 or with both].

Case: Aung Htun Myint (a.k.a. Aung Aung), 30, a freelancer with Seven Day News journal, residing in Ward 22, South Dagon Township, Yangon was sentenced to three years' imprisonment (Criminal Case No. 226/2008, Hmawbi Township Court, Judge Daw Amar [Special] presiding) on 27 August 2008 because he went to document voting in the May 2008 constitutional referendum. The police initially accused him of illegally taking footage of the voting and of damage in the area as a result of Cyclone Nargis. They took him to the township police station and then sent him to district security at around 5pm, who held him for around two days before returning him to the township police. The police subsequently accused him of illegally travelling to Thailand in January 2008 for video training. In court, the police presented the video cameras and other items that Aung Htun Myint had in his possession at time of arrest as the only material evidence. They said that it had emerged during interrogation that he had gone to Thailand illegally, but could give no details of the supposed offence.

c. ***Official Secrets Act, 1923, section 3(1):*** **If any person for any purpose prejudicial to the safety or interests of the State— (a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or… (c) obtains, collects, records or publishes or communicates** to any other person any secret official code or password, or **any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy**; he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of [the State] or in relation to any secret official code, to fourteen years and in other cases to three years.

> "Ko Zaw Htay was sentenced to 10 years in jail on 23 January 2009 because he allegedly sent abroad video footage of land that the armed forces had confiscated from local farmers"

Case: Ko Zaw Htay, 43, residing in Setyone Ward, Aunglan Township, Magwe Division, was sentenced to 10 years in jail on 23 January 2009 (Criminal Case No. 53/2008, Magwe District Court, Judge U Soe Win presiding) because he allegedly took and sent abroad video footage of land that the armed forces had confiscated from local farmers, who had lodged a complaint with the International Labour Organisation representative in Myanmar. The army arbitrarily detained Zaw Htay inside its compound from October 29, along with three villagers, and all four were allegedly tortured. Two were released and the remaining two were again allegedly tortured at the police station in Aunglan and forced to make confessions. They were only produced and charged before a judge on 11 December 2008, over six weeks after first being detained.

d. ***Organization Law, 1988, sections 3(c), 5, 6 and 7:*** Organizations that are not permitted shall not form or continue to exist and pursue activities… **The following organizations shall not be formed, and if already formed shall not function and shall not continue to exist**: (a) Organizations that are not permitted to register under The Political Parties Registration Law, 1988 or if permitted to register, the registration[s] of which have been cancelled by the Multi-party Democracy General Elections Commission; (b) **Organizations that attempt, instigate, incite, abet or commit acts that may in any way disrupt law and order, peace and tranquility, or safe and secure communications; (c) Organizations that attempt, instigate, incite, abet or commit acts that may [affect] or disrupt the regularity of state machinery**… Any person found guilty of committing an offence under Section 3 Sub section (c) or Section 5 shall be punished with imprisonment for a term which may extend to five years… Any person found guilty of being a member of, or aiding and abetting or using the paraphernalia of organizations that are not permitted to form or not permitted to continue in existence and provided in Section 3 Sub section (c)

or that are not permitted to form as provided in Section 5 shall be punished with imprisonment for a term which may extend to three years.

"Daw Win Mya Mya and four others were charged with promoting feelings of enmity after they attended an event where speeches were given that the government's roadmap for political change would not result in democracy"

Case: Ko Ko Gyi (a.k.a. Thein Than Htun) and 12 others were charged after they were apprehended in October 2008 in connection with the September 2007 protests under the Organizations Law and section 505(b) of the Penal Code (Criminal Case No. 52/2008; Yangon Southern District Court, District Judge U Htay Win, and Deputy District Judge U Win Myint presiding). The prosecution alleged that they had set up a new organization for which they had not obtained approval. The purported evidence was that the accused had participated in religious and cultural events, and had marched on the road after the government suddenly multiplied fuel prices in August 2007. Notwithstanding, the court found all of the accused guilty and imprisoned them from nine to 11 years each.

e. ***Penal Code, section 124A:*** **Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards [the Government** established by law for the Union or for the constituent units thereof,] shall be punished with transportation for life or a shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Case: Police arrested 34-year-old Ko Thiha on the night of 7 September 2007 south of Mandalay, near the town of Wundwin, over some allegedly inflammatory publications. They brought him to the Mandalay District Court (although by law it should have been initiated in the local township court) and charged him under sections 124A/505(b) of the Penal Code. The trial was held at a special court inside the Mandalay Prison. Thiha did not have a lawyer to represent him, even though he was entitled to have one as he was facing a life sentence. He was not able to call any witnesses or defend himself in court. The prosecution witnesses were not the ones present when Thiha was actually arrested. The police did not present any evidence to support the charge of sedition and instead called another judge who briefly testified that Thiha had made a confession before him, which was presented as evidence. However, Thiha claims to have never seen that judge before the trial. The hearings were all completed in a single day, and on 17 September 2007 after only ten days of investigation and trial the presiding judge, Win Htay, sentenced Thiha to 22 years in prison.

f. ***Penal Code, section 153A:*** **Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of [persons** resident in the Union] shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Case: Daw Win Mya Mya of Mandalay and four other persons were charged with promoting feelings of enmity and other offences and sentenced to between two and 13 years in prison (Criminal Case Nos. 605, 608, 609, 610/2008, Aungmyaytharsan Township Court, Assistant Judge Daw Baby presiding) on 24 October 2008 after they attended a political party event where speeches were given that the government's roadmap for political change would not result in democracy, and also as they had earlier met with foreign embassy officials and gave details about harassment by government personnel. Four separate cases were lodged against the accused even though they should have been combined into a single case against each as per the Criminal Procedure Code. The police lied to the court that they had arrested the five accused on 15 August 2008, when in fact Daw Win Mya Mya was taken into custody on 20 September 2007, and the other defendants in September and October 2007. The police presented no evidence that any of the accused actually said anything at the assembly on September 7, let alone that it would violate the Penal Code, only that they attended it. They also claimed that they made recordings of the assembly on September 7 and of other meetings, but in court the investigating officer said that they had not retained the cassettes on which the recordings had been made and had only copies of typed transcripts, which they submitted to the court in violation of the Evidence Act (sections 62-67). The supposed confessions of the accused that were extracted from them during interrogation were also submitted to court in violation of the Evidence Act (sections 26, 159).

"U Khin Maung Kyi was detained for obstructing a public servant because he repeatedly telephoned to complain about poor electricity supply"

g. ***Penal Code, section 186:*** **Whoever voluntarily obstructs any public servant in the discharge of his public functions** shall be punished with imprisonment of either description for a term which may extend to three months, or with fine… or with both.

Case: U Khin Maung Kyi, 45, resident of Panchangyaung Road, Ward 13, Hlaing Township, Yangon was detained by virtue of a pending one-year good behaviour bond against him (Restriction & Bond Act 1961, Criminal Miscellaneous Case No. 143, order for one-year bond given on 25 August 2009) while on trial (Criminal Case No. 705/2009, Hlaing Township Court, Assistant Township Judge Win Swe presiding) for obstructing a public servant because he repeatedly telephoned on 2 and 3 August 2009 to complain about poor electricity supply. The case was ultimately dropped, but he spent over a month in police custody awaiting the hearings, and he has continued to be required to report to the police under the bond.

h. ***Penal Code, section 189:*** **Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public function of such public servant**, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

> "U Sandadhika, a monk, was accused of insulting religion by allegedly planning to immolate himself in protest at the latest order to keep Daw Aung San Suu Kyi under house arrest"

Case: U Aye Myint of Seyone Ward, Aunglan Township, Magwe Division; detained at Thayet Prison, Magwe; convicted in Criminal Case No. 428/09, Aunglan Township Court, Judge Win Myint presiding, sentenced to two years' imprisonment on 24 September 2009 after an argument between the accused and two forestry department officials.

i. ***Penal Code, section 294:*** Whoever to the annoyance of others (a) does **any obscene act in any public place**, or (b) sings, recites or utters any obscene songs, ballad or words in or near any public place shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Case: Ma Sandar, 38, of Kyundaw Ward, Twente, Yangon, Criminal Case No. 117/2008, Twante Township Court, Judge Aye Ko Ko (Special) presiding, convicted to one year's imprisonment under this section and one month under section 353 for allegedly abusing police officers and local officials against whom she had earlier brought complaints of corruption. Shortly after release from imprisonment in 2009 she had another concocted case brought against her, together with her husband, on exactly the same charges which went before the same judge. She is currently again imprisoned (Criminal Case No. 651/2009, Twante Township Court, verdict given on 7 May 2010).

j. ***Penal Code, section 295A:*** Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [persons dent in the Union] by words, either spoken or written, or by visible representations, **insults or attempts to insult the religion or the religious beliefs of that class**, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Case: U Sandadhika, a.k.a. Nyi Nyi Lwin/ Nyi Nyi San, 36, monk of the Daysunpar Temple, Laygyunmandaing Monastery, Bago, was accused of insulting religion by allegedly planning to immolate himself in protest at the latest order to keep Daw Aung San Suu Kyi under house arrest (Criminal Case No. 507/09, Bahan Township Court, Judge Daw Toe Toe Yein [Special] presiding). Three men in an unmarked vehicle allegedly picked him up from near where the hearings were taking place on 11 August 2009 and took him to the Yangon North District Police Headquarters, where he was allegedly assaulted with a bamboo rod, causing injuries including a hernia. Sandadhika denied the allegations against him and the police admitted in court that they have no material evidence to prove the allegation. Nonetheless he was convicted and sentenced to two years' imprisonment.

k. ***Penal Code section 332:*** **Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or order that person or any other public servant from discharging his duty as such public servant**, or in consequence of anything done or attempted to be done by that person in the lawful discharge of

his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Case: Kyaw Win of Shwenant-thar Road, Bahan Township, Yangon and 13 others, in Criminal Case No. 265/2008; Yankin Township Court, Judge Htay Htay (Special) presiding; convicted on 24 November 2008 to three years' imprisonment each under this section and three months each under section 294 for their part in the September 2007 monk-led demonstrations.

l. ***Penal Code, section 505***: Whoever makes, publishes or circulates any statement, rumour or report— … (b) with **intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity**… shall be punished with imprisonment which may extend to two years, or with fine, or with both.

"Aung Aung Oo and three others were arrested for allegedly putting up stickers of Daw Aung San Suu Kyi in public places"

Case: Aung Aung Oo, 31, resident of Myinpyaingwin Road West, Tamwe Kyi Ward (B), Tamwe Township, Yangon and three others were arrested for allegedly putting up stickers of Daw Aung San Suu Kyi in public places, charged and sentenced to two years' imprisonment in Criminal Case No. 442/09, Bahan Township Court, Judge Khin Maung Htay (Special) presiding. The police allegedly only took possession of the stickers at the places of residence of the accused, not anywhere in public as required for the alleged offence. The men have since reportedly been convicted of a variety of other offences.

m. ***Printers and Publishers Registration Law, 1962, sections 17 and 20*** (unofficial translation): **Any person who sets up a printing enterprise or publishing business before first registering it** according to the provisions in section 6 shall be sentenced to [imprisonment for a term which may extend from a minimum of 1 year to a maximum of 7 years or fine which may extend from a minimum of 3,000 kyats to a maximum of 30,000 kyats or both]… Any person who **fails to comply with or who contravenes a byelaw enacted under this law** or an instruction issued by a person authorised under this law shall be sentenced to a term of [imprisonment for a term which may extend from a minimum of 1 year to a maximum of 7 years or fine which may extend from a minimum of 3,000 kyats to a maximum of 30,000 kyats or both].

Case: Pyi Phyoe Hlaing, (a.k.a. Athay Lay, Maung Win), resident of Sanchaung Township, Yangon and Ne Lin Aung (a.k.a. Lin Lin) were convicted of a range of offences (Criminal Case Nos. 99-102/08, Sanchaung Township Court, Judge Win Myint [Special] presiding) on 11 November 2008 and sentenced to 24 and 22 years respectively, because of alleged involvement in the September 2007 protests. They were both charged twice under the Printers and Publishers Law and were sentenced to the maximum seven years for each offence, totalling 14 years under the law, even though the charges should have been compounded as per provisions in the Criminal Procedure Code. The oral and

material evidence against the accused was, as recorded in court, obtained from the interrogations and searches of the bureau of military intelligence, not the police, who merely submitted the case in the closed court where the accused were tried.

"Ko Than Htun was convicted for having been allegedly found in possession of copies of a VCD showing footage of the extraordinarily opulent wedding of the daughter of Senior General Than Shwe"

n. ***Television and Video Law, 1996, sections 32(b), 36:*** Whoever commits one of the following acts shall, on conviction, be punished with imprisonment for a term which may extend to 3 years or with fine which may extend to kyats 100,000 or with both. In addition, the property which relate directly to the offence shall also be confiscated:- … **copying, distributing, hiring or exhibiting the video tape that has no video censor certificate** and small-sized video censor certificate with the permitted serial number with the exception of cases exempted under this Law… Whoever fails to abide by an order or directive issued by the Ministry of Information or Video Censor Board or the Video Business Supervisory Central Committee under this Law shall, on conviction, be punished with imprisonment for a term which may extend to 6 months or with fine which may extend to kyats 50,000 or with both.

Case: Ko Than Htun, 40, resident of Ward 5, Nyaungdone, Ayeyarwady Division, was convicted under the Television and Video Law (Criminal Case No. 319/2007, Nyaungdone Township Court, Judge Daw Saw Nwet Nwet Win presiding) and section 505(b) of the Penal Code for having been allegedly found on 20 March 2007 in possession of copies of a VCD showing footage of the extraordinarily opulent wedding of the daughter of Senior General Than Shwe. On April 25 Than Htun was sentenced to four and a half years' imprisonment.

o. ***Tuition Law, 1984, section 23*** (unofficial translation): Whoever is held to have violated any of the provisions in sections 14(a)(b)(c), 15, 19, 20 [Opening of **unregistered tuition is prohibited**; engagement of an unlicensed tuition teacher is prohibited] or 21 shall be sentenced to three years' imprisonment and shall be fined thirty thousand kyat.

Case: Police and local officials arrested Ko Min Min (a.k.a. La Min Htun) on 10 July 2007 and charged him under the Tuition Law after he organised a talk on human rights at his house on Bogyoke Road, Thayetdaw Ward, Pyay, Bago Division, which was attended by about 20 persons. Min Min had earlier been licenced to hold tuition classes there but had stopped some time before and gone to work as a tutor elsewhere. He had removed the signboard advertising the premises and was clearly no longer engaged in teaching students there. He and defence witnesses testified to this effect in court, but on 30 July 2007 Judge U Khin Maung Win sentenced him to three years and fined 30,000 Kyat.

p. ***Unlawful Associations Act, 1908, section 17(1):*** **Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association or in any way assists the operations of any such**

association, shall be punished with imprisonment for a term [which shall not be less than two years and more than three years and shall also be liable to fine]

"Thurein Aung and five others were convicted for having organized a seminar on workers' rights"

Case: Ko Thurein Aung, 32, and five others were convicted under the Unlawful Associations Act, Penal Code section 124A, and Immigration (Emergency Provisions) Act, 1947, section 13(1), for having organized a seminar on workers' rights on 1 May 2007. They were detained at the Kyaikkasan interrogation camp and cases opened against them in the Yangon Western District Court (Criminal Case Nos. 82-84/2007, conducted within Insein Prison, from 16 July 2007, Judge Aye Lwin presiding). Their lawyers withdrew in protest at the handling of the case on 4 August 2007 and on 7 September 2007 the accused were sentenced to 28 years' imprisonment.

7. Extracts, Constitution of the Republic of the Union of Myanmar, 2008 [Note: The Asian Legal Resource Centre has in a couple of places added its interpretation of the meaning in the original Burmese-language text in brackets after the official text.]

11. (a) The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, **to the extent possible**, and exert reciprocal control, check and balance among themselves.

...

20. (b) The Defence Services has the right to **independently administer and adjudicate all affairs of the armed forces**.... (f) **The Defence Services is mainly responsible for safeguarding the Constitution**. [The Armed Forces has the primary responsibility to safeguard the Constitution.]

21. (a) Every citizen shall enjoy the right of equality, the right of liberty and the right of justice, as prescribed in this Constitution. (b) No citizen shall be placed in custody for more than 24 hours without the permission of a Court. (c) Every citizen is responsible for public peace and tranquility and prevalence of law and order. (d) Necessary law shall be enacted to make citizens' freedoms, rights, benefits, responsibilities and restrictions effective, steadfast and complete.

...

96. The Pyidaungsu Hluttaw [parliament] shall have the right to enact laws for the entire or any part of the Union related to matters prescribed in Schedule One of the Union Legislative List.

...

353. Nothing shall, **except in accord with existing laws**, be detrimental to the life and personal freedom of any person.

354. Every citizen shall be at liberty in the exercise of the following rights, **if not contrary to the laws, enacted for**

> "No person shall, except in matters on precautionary measures taken for the security of the Union or prevalence of law and order, peace and tranquility in accord with the law in the interest of the public, or the matters permitted according to an existing law, be held in custody for more than 24 hours without the remand of a competent magistrate"
>
> *—2008 Constitution of Myanmar*

Union security, prevalence of law and order [rule of law], community peace and tranquility or public order and morality: (a) to express and publish freely their convictions and opinions; (b) to assemble peacefully without arms and holding procession; (c) to form associations and organizations; (d) to develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relations between one national race and another or among national races and to other faiths.

355. Every citizen shall have the right to settle and reside in any place within the Republic of the Union of Myanmar **according to law**.

356. The Union shall protect **according to law** movable and immovable properties of every citizen that are lawfully acquired.

357. The Union shall protect the privacy and security of home, property, correspondence and other communications of citizens **under the law subject to the provisions of this Constitution**.

358. The Union prohibits the enslaving and trafficking in persons.

359. The Union prohibits forced labor **except hard labor as a punishment for crime duly convicted and duties assigned by the Union in accord with the law in the interest of the public**.

...

365. Every citizen shall, **in accord with the law**, have the right to freely develop literature, culture, arts, customs and traditions they cherish. In the process, **they shall avoid any act detrimental to national solidarity**. Moreover, any particular action which might adversely affect the interests of one or several other national races shall be taken only after coordinating with and obtaining the settlement of those affected.

...

376. No person shall, **except [in] matters on precautionary measures taken for the security of the Union or prevalence of law and order [rule of law], peace and tranquility in accord with the law in the interest of the public, or the matters permitted according to an existing law**, be held in custody for more than 24 hours without the remand of a competent magistrate.

...

382. In order to carry out their duties fully and to maintain the discipline by the Defence Forces personnel or members of the armed forces responsible to carry out peace and security, **the rights given in this Chapter shall be restricted or revoked through enactment to law**.

…

417. If there arises or if there is sufficient reason for a state of emergency to arise that may disintegrate the Union or disintegrate national solidarity or that may cause the loss of sovereignty, due to acts **or attempts** to take over the sovereignty of the Union by insurgency, violence and wrongful forcible means, the President may, after co-ordinating with the National Defence and Security Council, promulgate an ordinance and declare a state of emergency. In the said ordinance, it shall be stated that the area where the state of emergency in operation is the entire Nation and the specified duration is one year from the day of promulgation.

418. (a) In the matter concerning the declaration of the state of emergency according to Section 417, the President shall declare **the transferring of legislative, executive and judicial powers of the Union to the Commander-in-Chief of the Defence Services** to enable him to carry out necessary measures to speedily restore its original situation in the Union…

419. The Commander-in-Chief of the Defence Services to whom the sovereign power has been transferred **shall have the right to exercise the powers of legislature, executive and judiciary**. The Commander-in-Chief of the Defence Services may exercise the legislative power either by himself or by a body including him. The executive power and the judicial power may be transferred to and exercised by an appropriate body that has been formed or a suitable person.

420. The Commander-in-Chief of the Defence Services may, during the duration of the declaration of a state of emergency, **restrict or suspend as required, one or more fundamental rights of the citizens in the required area**.

…

SCHEDULE ONE: Union Legislative List (Refer to Section 96)

1. **Union Defence and Security Sector**

…

(f) Stability, peace and tranquility of the Union and **prevalence of law and order [rule of law**]; and (g) Police force.

"In the matter concerning the declaration of the state of emergency according to Section 417, the President shall declare the transferring of legislative, executive and judicial powers of the Union to the Commander-in-Chief of the Defence Services"

—2008 Constitution of Myanmar

B. The Institutional Framework

8. Policing and prosecution

a. Arbitrary detention:

i. See United Nations Working Group on Arbitrary Detention Opinion No. 7/2008 on the case of Ko Than Htun and Ko Tin Htay; Opinion No. 26/2008 on the case of Hkun Htun Oo, Sai Nyunt Lwin, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, Nyi Nyi Moe and Hso Ten; and, Opinion No. 44/2008 on the case of U Ohn Than, all in A/HRC/13/30/Add.1.

“Nyi Nyi Aung and four others were taken into custody on different days in January 2009 for allegedly setting up an illegal organization but the police did not bring cases to court until April 24”

ii. Khin Moe Aye (a.k.a. Moe Moe) and Kyaw Soe were detained on 16 December 2007 and brought to the Insein Central Prison where US dollars were found in their possession. The police charged them under section 24(1) of the Foreign Exchange Regulation Act, 1947 having received the case from military intelligence, with prison officers as witnesses and the persons responsible for the search and seizure of the dollars. The alleged offence was not uncovered until the accused were already in custody and inside the prison premises. The items of evidence were recovered by the prisons officers, not by the police, and were illegally kept in the prison rather than at a police station. There were no independent civilian witnesses to the search and seizure as required by law. The two accused were held illegally and without remand from date of arrest until 26 March 2008 when they were finally brought before a judge inside the prison, a fact that the investigating officer admitted under cross-examination before the court.

iii. Nyi Nyi Aung, 25; resident of Lepugan Village, Pale Township, Sagaing Division, and four others were taken into custody on different days in January 2009 for allegedly setting up an illegal organization but the police did not bring cases against them to court until April 24 (section 6, Organisation Law 1988, Hlaing Township Court, Yangon, Criminal Case No. 356/2009; Judge Win Swe presiding; hearings began in May 2009) during which time the defendants were kept in illegal custody at the Aungthapyay Interrogation Camp. The police records did not give details of the exact day on which the inquiries against them commenced, and also falsely recorded the date of arrest of all accused as April 10; however, this contradicted the search warrants, which were dated January 26, 28 and 29.

iv. Sein Hlaing (53, male; trader, residing at Kyaiklat Road, Linlundaung Ward, Sanchaung Township, Yangon) and two other persons were also arbitrarily detained at the Aungthapyay camp after their arrest on 6 March 2009, before their eventual charge under the Unlawful Associations Act (Criminal Case No. 432/2009, Sanchaung Township Court, Judge Tin Swe Win [Special] presiding) for allegedly receiving money illegally from abroad. The accused alleged that from 13 March to 12 May the police held them illegally at the interrogation facility in Mayangone Township. When asked about this in court the police first refused to reveal where interrogations had been held on the ground that it is a secret, and then said that he didn’t know where the accused were held. They were transferred to Insein Central Prison on 13 May 2009. The case against them opened on 26 August 2009. The charge was finally lodged only on 10 September 2009. At no time in the period from 6 March to 26 August was there a judicial order to allow for their detention: a fact that the police in court did not deny but could not explain. The accused also testified in court that during their six months in arbitrary detention they were tortured; however the allegations went unanswered by the police, other than that they submitted evidence from the interrogations of the accused as proof of the alleged crime in violation of the Evidence Act.

b. Torture:

i. Dr. Wint Thu and eight others were arrested and accused over their involvement in a prayer campaign for the release of political prisoners, and of having had contact with groups abroad that the state has designated unlawful. They were allegedly held incommunicado until their trials in December 2009 (Mandalay District Court, Criminal Case Nos. 192, 196, 197, 211, 212 & 213/09 and others, Judge Moe Myint presiding, trial conducted inside Ohboe Prison) and tortured. Officers allegedly forced Than Htaik Aung to stand with toothpicks inserted into his heels, to drink putrid drain water, and allegedly also came into his cell and urinated; and, allegedly forced U Nandawuntha, a monk, to stand throughout two days of interrogation and then forced him to kneel on sharp gravel while an officer jumped up and down on his calves—if he didn't give the answers that they wanted then they hit him on the head with a wooden rod. Dr. Wint Thu and Ko Myo Han were also both allegedly forced to stand throughout interrogations of two and four nights respectively. Four officers at the Aungthapyay interrogation facility in Yangon Division allegedly dripped candle wax onto the genitalia of co-accused Wei Hypoe, splashed him with boiling water and tied him to metal bars, then assaulted him with bamboo rods. They also applied a stinging substance to his open wounds. In a related case, Special Branch officers allegedly injected a detainee from Nyaung-U by the name of Ko Zaw Zaw with an unknown substance during interrogation. All of the victims were sentenced to long jail terms at a closed court inside a prison. Their convictions were based upon confessions that the police obtained through the use of torture.

"They hit me on the cheeks and punched me in the face. They hit me with batons over a hundred times on my ankles, finger and elbow joints, shoulder blades and head. They made me stand on my tip-toes then put something with sharp points under my feet and made me hold a pose like I was riding a motorcycle, for about two hours"

—Torture victim

ii. The Asian Legal Resource Centre at the end of September 2009 received details of a case concerning two young male victims who were tortured at an urban police station over an alleged robbery. Neither of them was taken before a judge. According to the first:

> I was interrogated by eight police for three days. They said to give back what I had robbed. They covered my face with a sarong and then four or five of them assaulted me. They hit me on the cheeks and punched me in the face. They hit me with batons over a hundred times on my ankles, finger and elbow joints, shoulder blades and head. They made me stand on my tip-toes then put something with sharp points under my feet and made me hold a pose like I was riding a motorcycle, for about two hours. They prodded my back with a baton. During this time they were drunk.

He added that his wife paid the police the equivalent of around USD100 so that they would not torture him. His companion also said that, "I was detained and interrogated for two days. While interrogating me they hit my cheeks and pressed a piece of bamboo on my shins and ran it up and down. They kept my wristwatch." The techniques described in this case are advanced methods of routine torturers. The motorcycle and rolling bamboo are particularly familiar methods in the documentation of military intelligence and Special Branch. However, the torturers in this case were police in an ordinary suburban station.

c. Deaths in custody:

> **“Ko Naing Oo was allegedly beaten to death by personnel of the local council after a dispute with his in-laws”**

i. Ko Naing Oo (a.k.a. Ko Ye Naing Oo), 36, labourer, married with two children, residing in Ward 2, North Okkalapa Township, Yangon was allegedly beaten to death by personnel of the Ward 2 Peace & Development Council in the township on 18 March 2007 after a dispute with his in-laws. His younger brother alleged that he saw Naing Oo lying dead with cuts on the left side of his head, at the base of the skull and above the temple; bruises on his left leg and blood coming from his mouth, among other injuries. It was also obvious that the body had been moved after he died. The body was sent to hospital for a post mortem. The doctor handling the case promised to give a true post mortem report; however, the family did not later receive any information about it. Meanwhile, the family obtained the necessary documents from the hospital and police to collect Naing Oo's body for cremation and went to take it at 2:30pm on March 21. It was then that they found out that three accused in the case had already brought a car at 10am that morning and already taken the body to the crematorium. The family lodged a complaint over the death and the matter went into the local court. But the family was not informed when a hearing into the case was held on April 11, or that another would be on April 26. This is despite the fact that Naing Oo's younger brother should have been called as a witness. Meanwhile, local police reportedly warned Naing Oo's father that if he tried to sue over his son's death then he would lose his job as an import-export officer on the Yangon docks. On March 29 a local news journal also reported on the case and apparently on instructions of the authorities said that the autopsy had found that Naing Oo had died from natural causes while “sleeping soundly” at the council office where he had been brought for being drunk and disorderly.

ii. Maung Chan Kun (a.k.a. Maung Myint Thein), 20, of Dawnachan Ward, Pantanaw Township, Ayeyarwady Division, married to Ma Chan Nyein Khaing, of Ma-Ubin Township, Ayeyarwady Division, was detained in Pantanaw police lockup on 11 January 2007 after he had registered with the local council as a guest staying in the locality. The next morning a police officer came to the house and told Chan Nyein Khaing that her husband was in the Pantanaw Township Hospital. When she went to the hospital she found her husband lying dead upon a wooden bed frame in the cleaning room. There were injuries all over his body, including an approximately one-inch-long hole at the back of the head from which blood emerged when his relatives moved his body to take it for autopsy, as no orderlies were available. There was also bruising from his neck to the backs of his ears, and on his face, sides and forearms. There was swelling on his right side. Radio journalists who contacted the Pantanaw police station from abroad were told that Chan Kun was arrested because he had escaped from an army prison labour camp run by Light Infantry Battalion 304 in Thaton. The police said that after he was brought to the station they had intended to send him to the Ma-Ubin Prison, but before that he had started to

show symptoms of malaria so he was sent to the hospital. They denied that he was tortured or that he was chained while in hospital. On January 14, Chan Nyein Khaing lodged complaints with the national and division council chairmen, home affairs minister and police chief. However, she was denied an attempt to lodge a complaint in court. On February 5 a post-mortem inquest was held at the Pantanaw Township Court. In the findings of the court, Chan Kun had been brought to the lockup at 2am and transferred to the hospital at 8:30am after looking unwell, and died from malaria at 11:45am. The judge closed the inquiry.

"Ko Aung Khaing Htun was allegedly beaten to death by members of his local council after they held him and another fisherman in exchange for money for their release"

iii. Maung Lin Lin Naing, 18, a small trader, resident of Oatphoe village, Waingkyi tract, Phadoe, Kyauktaga Township, Bago Division was allegedly killed in the custody of police stationed at Phadoe, Kyauktaga on 4-5 January 2007 after a local storekeeper accused him of theft. According to the police record, at 4pm the next day, February 9, Lin Lin Naing was found hanged in the Phadoe police lock up; the police also showed concerned persons a photograph of the young man hanging from some discarded clothing. At 7pm on February 10, without having informed the family, the police hired four persons to dispose of the body. The family of Lin Lin Naing together with their local council official went to ask the police how the young man had died and where they could find the remains, but they did not get any answers. On February 17 they were forced to hold the religious ceremony for his death without a body. A human rights defender helping the family has said that they had been warned by the police and Phadoe local officials that they would be "shut up" if they tried to complain about the death. Nonetheless, the family lodged a complaint with the Minister of Home Affairs, who oversees the police force. It is not known if he took any action on the case or not.

iv. Ko Aung Khaing Htun (a.k.a. Balashin), 31, a fisherman residing in Ward 9, Seingone, Pathein Town, Ayeyarwady, was allegedly beaten to death by members of the Ward 1 Peace and Development Council (PDC), Kunchan, Pathein on 19 June 2009 after they held him and another fisherman in exchange for money for their release. They had released the other man so that he could collect the money, but by the time that he came back on June 20 they said that Aung Khaing Htun had already left. On June 21, his family received news that his bruised and bloodied body had been recovered from a roadside. The police detained a number of persons, including local officials, over the killing, but at last report that the Asian Legal Resource Centre received, only a couple of petty officials had been charged with murder.

d. Coerced signing of documents with no basis in law: Following the September 2007 protests, many persons were released from custody after signing "pledges" not to recommit undefined offences that had no legal basis whatsoever. For example, Khin Sanda Win, 23, was detained by unidentified men in plain clothes on 29 September 2007 outside the Pansodan Department Store in Kyauktada Township, Yangon. They tied her hands behind

her back and took her to the town hall where she was put together with ten men who were unknown to her and then they were each photographed with various weapons, including knives, slingshots and pellets. Then they were allegedly forced to sign confessions that the weapons had been found in their bags. Khin Sanda Win was sent to the special interrogation centre at Kyaikkasan and she was kept there without charge, warrant or otherwise until October 7, when she was transferred to the central prison and held there, again without charge, warrant or any other legal order until October 25, when she was sent to the Hlaing Township Peace and Development Council office where in the presence of the council chairman and her parents she was told to sign a pledge that she would not take part in any anti-state activities, after which she was released; however, as the pledge had no legal validity, on 1 November 2007 two police officers came to Khin Sanda Win's house and informed her that she would be charged with having illegal arms. When Khin Sanda Win went to court the next day, the charge that the court put against her was not as the police had indicated but instead acting "to endanger human life or the personal safety of others" under sections 336/511 of the Penal Code. When her lawyer applied for bail, the amount set was vastly in excess of the legal maximum, and thereafter Assistant Judge U Thaung Lwin (First Class) (Kyauktada Township Court) unilaterally revoked bail without giving a reason. Appeals to higher-level courts were unsuccessful and she served a term for the offence before being released.

"U Kyaw Min had his appeals to the Supreme Court against his 47 years' imprisonment and 17 years' imprisonment for every member of his immediate family for allegedly violating the 1982 Citizenship Law dismissed without a hearing"

e. Duplicated and multiplied charges:

i. U Kyaw Min, a.k.a. Md. Shamsul Anwarul Haque, 58, a graduate of the Rangoon Institute of Economics and Rangoon Institute of Education, former Lettauk Township Education Officer and headmaster of Basic Education Middle School, elected member of parliament for Buthidaung Township (National Democratic Party for Human Rights), constituency no. 1, had his appeals to the Supreme Court against his 47 years' imprisonment and 17 years' imprisonment for every member of his immediate family (his wife, son and two daughters) for allegedly violating the 1982 Citizenship Law dismissed without a hearing (3 May 2006, Judge U Khin Maung Aye presiding; 23 August 2006, Special Appeal Nos. 177-181/2006, heard by Judges Dr. Tin Aung Aye and U Chit Lwin presiding). The entirely political case was a consequence of Kyaw Min joining with other elected members of parliament to call for the elected legislature to be allowed to sit, and also because he met with representatives of the International Labour Organisation visiting Yangon. In order to penalize U Kyaw Min far beyond the maximum set down in the Citizenship Law, the police lodged four identical separate cases for each of four members of the family, even though the offence was the same and under law they should have been lodged as a single case. All four were brought against Kyaw Min, even though there is nothing in the section of law under which they were charged to penalize someone giving false information

concerning someone else, i.e. for his family members. The police also lodged a separate case against each under the 1950 Emergency Provisions Act that in lying about their identities the family had "spread false news", even though the section was completely irrelevant to the case, but for which they each received a seven-year penalty.

"U Tin Min Htut and U Nyi Pu were sentenced on 9 February 2009 in a closed trial to 27 years in prison each for writing a letter to the United Nations in which they criticised the government's programme for political change"

ii. Kyaw Htun Lin (a.k.a. Ko Latt); resident of Kyaukpadaung Township, Mandalay Division and two other persons were sentenced to 19 to 55 years in prison on 23 December 2009 likewise through the duplication and multiplication of charges after they were accused of attending training programmes on children's rights in Thailand and receiving money from abroad for work in Myanmar (Immigration [Emergency Provisions] Act and Unlawful Associations Act, Criminal Case Nos. 201–207, 209 & 214/09, Mandalay District Court, Deputy District Judge Ohn Myint presiding, trial conducted inside Ohboe Prison, Mandalay). The alleged offences were tried in as many separate cases as possible so as to multiply the number of years' imprisonment, rather than compounded in accordance with the Criminal Procedure Code. The defendants were also allegedly tortured during interrogation, the cases were held outside the jurisdictions where the charges were first laid, and the accused did not have opportunities to hire lawyers, except when they were giving their own testimonies; therefore, the prosecution witnesses were not cross-examined. Requests for leave to appeal were rejected in the divisional court on 16 February 2010.

9. Court processes and trial

a. Closed trial:

i. U Tin Min Htut (a.k.a.) Tin Htut, residing at Yuzana Building, Yetashei New Road, Yetashei Ward, Bahan Township, Yangon and U Nyi Pu, residing in Yahaingkwin Village, Gwa Township, Rakhine State, both elected members of parliament, were sentenced on 9 February 2009 in a closed trial to 27 years in prison each for writing a letter to the United Nations on 21 July 2008 that was signed by 92 MPs, in which they criticised the government's programme for political change and also critiqued the UN's approach to the situation in Myanmar. Both of the accused was detained arbitrarily: police arrested U Nyi Pu around 2am on 11 August 2008 and U Tin Min Htut in the afternoon of 12 August 2008 whereupon they were both sent to the Aungthapyay Interrogation Camp until the end of September when they were transferred to Insein Central Prison. They were not brought to court until February 2009, in violation of the Criminal Procedure Code, section 61, making them subject to arbitrary and illegal detention for around six months each. They were charged under section 4 of what is popularly known as the Anti-Subversion Law (The Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Opposition), 1996; as well as section 33(a) of the Electronic Transactions Law and section 505(b) of the Penal

Code (Criminal Case Nos. 138 & 140/09, Yangon West District Court [Special Court]). Neither of the accused was represented by a lawyer, even though they signed a Power of Attorney for a Supreme Court advocate to represent them and he came to the location of the trial to conduct the defence, but he also was not allowed inside.

"Ma Eint Khaing Oo and Kyaw Kyaw Thant were imprisoned after they took a group of cyclone victims to the ICRC and UNDP buildings in Yangon on 10 June 2008 to request relief"

ii. Ma Eint Khaing Oo, 24, resident of Ward 46, North Dagon Township and Kyaw Kyaw Thant, 29, resident of Pauktawwa Ward, Insein Township, both reporters, were imprisoned after they took a group of cyclone victims to the ICRC and UNDP buildings in Yangon on 10 June 2008 to request relief. They were both charged under section 505(b), Penal Code, and Kyaw Kyaw Thant was also charged with an immigration offence. They were tried in a closed court (Criminal Case Nos. 760 and 949/08, Tamwe Township Court, Judge Daw Than Than [Special] presiding). In the court the two journalists denied the charges and said that they had only been trying to help people left homeless after the disaster. Even the prosecution witnesses gave evidence that supported the defendants' account. Notwithstanding, the judge in a verdict that contained no reasoning convicted them both on 14 November 2008; however, after intensive international pressure, including from the Special Procedures, the two were among prisoners released in September 2009.

b. Procedurally-incorrect cases:

i. The case against democracy party leader Daw Aung San Suu Kyi to keep her under house arrest throughout 2009 and 2010—Yangon Northern District Court, Judges U Thaung Nyunt (Northern District Judge) and U Nyi Nyi Soe (Western District Judge) presiding; Criminal Case No. 47/2009, charged under section 22 of the Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts (No. 3/1975; known as the State Protection Law) with violating an order set down under that law—was indicative of the procedural incoherence in so many cases in Myanmar courts. The case was heard unlawfully outside of the district where the alleged offence occurred, and with judges from two different districts hearing it, for which there is no provision in law.

ii. At the other end of the spectrum of cases in Myanmar, the owner of a fabric shop in 2007 accused two teenage girls in his employment of stealing money. He lodged the case with the township police but they failed to take it up. He then went to the district police and allegedly paid them to lodge a case against the girls under section 380 of the Penal Code (theft in a building). When the case was brought to the township court the judge failed to correctly ascertain the ages of the girls as required by law. In fact, at the time of being produced one of the accused was under 16 and should have been tried in a juvenile court [Child Law 1993, sections 2(a), 37(f)]. At the end of 2009, the girls were still being held in adult remand, apparently under the influence of the complainant, and the case has remained pending. While

under investigation, the girls also were allegedly tortured, the police squeezing their fingers and bending them back until they reached stress points in order to extract confessions.

"Ma Thanda was sentenced to 28 years in prison after she went to visit her husband in Thailand"

iii. In a similar case, two children were among six persons sentenced to a year in prison on 31 August 2009 for illegal gambling because the judge did not make proper inquiries (Criminal Case No. 133/2009, Daik-U Township Court, Judge Aye Myint [Special] presiding). The judge was reportedly informed that the girls were aged less than 16 but he failed to verify this fact because the police gave falsified documentary evidence and paid the prosecutor who handled the case 30,000 Kyat to try all the accused as adults.

iv. Ma Thanda, married with three children, resident of Einme Township, Ayeyarwady Division, was charged with a range of offences and sentenced on 25 October 2007 to 28 years in prison after she went to visit her husband in Thailand during April 2007 (Penal Code section 124A; participating in an illegal organisation, Unlawful Association Act, Immigration [Emergency Provisions] Act, in Yangon Western District Court, Criminal Case Nos. 93, 94 & 95/07, Deputy District Judge Myint Soe presiding). The case consisted of multiple violations of criminal procedure, including that: the section 124A charge could only be laid with written approval of the Ministry of Home Affairs but none was obtained; the Yangon court did not have jurisdiction as there was no order to transfer the case there from the area where the offences allegedly occurred; Ma Thanda was not able to hire a lawyer or call witnesses, and the case was in a closed court.

c. Evidence-less and groundless cases:

i. Ma Honey Oo, 21, was accused of having had contact with overseas radio stations to give out information at the time of the September 2007 protests, and having been involved in making a student union. She was taken into custody on 9 October 2007 but was not brought before the Yangon Eastern District Court until 20 December 2007. The police accused Honey Oo of having been involved in a student union, having talked to foreign media by telephone and of having participated in protests at the Yuzana Plaza and on the road from Mingalar Market to Natmauk on 25-6 September 2007. However, when pressed in court they could not produce any evidence to support any of their claims and on the contrary showed ignorance and confusion about the laws under which she had been brought. The investigating detective said that the information they had that Honey Oo was part of the group accused of having contact with overseas media was from a reliable source, but he could not divulge the source to the court and the source was not included among the list of witnesses in the case. He had no evidence to present to the court other than the supposed confession of the accused. Nor could he produce any photographs or other evidence that Honey Oo was in the protests as he had claimed in the charges against her, saying only that eyewitnesses had seen her.

"Maung Nyo and Ma Thanda Htun were convicted of having travelled illegally to Thailand"

ii. Win Maw, a.k.a. Maw Gyi, 46, was also arrested over the September 2007 protests, on 27 November 2007, and charged under various offences, starting with section 505(b) of the Penal Code (Mingalar-taungnyunt Township Court, Criminal Case No. 313/2008, Judge U Tin Latt [Special], presiding) because he had allegedly sent news by phone and email and took photographs for a media group abroad. The case opened against Win Maw on 28 March 2008 in a closed court, like other cases from the protests. The police "evidence" of the crime included legally-published books owned by Win Maw's father and bearing his signature, some photos of democracy leader Daw Aung San Suu Kyi, and a computer hard disk, which itself—not its contents—was submitted as evidence. Also on the evidence list were 18 "political" texts the police admitted under cross-examination were actually just English learners.

iii. Phoe Htoke (a.k.a. Khin Maung Cho), a dried fish merchant, 47, residing in Yankin Township, Yangon, and two other men were convicted under the Television and Video Law and section 505(b), Penal Code (Criminal Case Nos. 1089, 1091/2008, Judge U Thein Swe [Special] and Assistant Judge San Mya Kyu [Special] presiding respectively, Kyimyindaing Township Court) and were sentenced to a total of five years each in two separate verdicts given on 8 December 2008. The police accused Phoe Htoke and Kan Myint of both travelling to Thailand where they met with members of unlawful associations, that after they came back they were involved in protests on 22 February 2007 at Theindawgyi Market in Papedan Township of Yangon and on 24 April 2007 at the Thingankyun Model Market, that they distributed unlawful fliers in the lead-up to the protests in September to encourage people to join in demonstrating, including on 8 and 15 September 2007 at Mingalar Market and Tamwe Market, and distributed VCDs of, among other things, a comedy troupe satirising the government and uncensored videos of lectures by monks. Despite the many allegations, they had no firm evidence. For instance, they could not show proof of the two men's involvement in the protest in February, despite having taken photographs of it. They could not give dates that the two accused had gone to Thailand. The lawyer handling the case for the defence on the video-related charge was himself forced to flee the country during the trial after being charged with obstructing the work of the court for making a submission that the Minister for Information, who had named his clients in a press conference, appear as a witness.

iv. Maung Nyo, 34, an English tuition teacher residing in East Thirihema Ward, Chan-aye-tharzan Township, Mandalay and Ma Thanda Htun, 27, a tour guide, residing in Mingalar-yenyunt Ward, Aungmyay-tharzan Township, Mandalay, were convicted of having travelled illegally to Thailand where they met with members of a group of Buddhist monks opposed to the government of Myanmar (Yangon Western District Court [Special Court], Deputy District Judge U Tin Htun presiding) and sentenced on 24 March 2010 to three years each under the Immigration (Emergency Provisions) Act and two years each under the

Organisations Law. The police took the two accused into custody on 3 August 2009. But a case was not opened against them until 11 September 2009. During this time they were illegally detained at an interrogation centre where they were allegedly tortured to extract confessions. There was no evidence against either of the accused. The 11 prosecution witnesses in the closed trial consisted only of the police, a couple of low-ranking council officials and two witnesses to the search and seizure of property at time of arrest. There were no independent or credible witnesses to any crime. Also, witnesses that should have been called, namely, officials from the immigration office in Myawaddy, were not: instead they just sent documentary information, which is not acceptable as primary evidence because it denies the defence of the right to make a cross-examination. Also, as the two accused are residents of Mandalay and they allegedly committed the crimes at the border of Thailand, they were incorrectly brought to the central prison in Yangon for the trial without correct authorization (Criminal Procedure Code, sections 177, 178).

"Ma Hla Hla Win was in 2009 sentenced in the Pakokku Township Court to a total of 27 years in jail for allegedly taking illegal video footage and sending it abroad"

v. Ma Hla Hla Win, 25, a resident of Shukhinthar Road, Thaketa Township, Yangon, was in 2009 sentenced in the Pakokku Township Court to a total of 27 years in jail for six charges connected to her allegedly taking illegal video footage and sending it abroad; a co-defendant, Maung Myint Naing, 32, resident of Daung-okyi village, Myaing town, was sentenced to 32 years. One of the charges brought against the two was under section 5(1) of the Control of Imports and Exports (Temporary) Act 1947 (Criminal Case No. 1763/09, Pakokku Township Court, Judge Aye Aye Mu [Special] presiding) for which they both received seven years on 6 October 2009. This offence arose because the two of them had ridden on an illegally-imported motorcycle—an offence for which the pillion on the motorcycle, Hla Hla Win, had no liability but was nonetheless charged and convicted. On 29 April 2010 the Magwe District Court refused to entertain her appeal.

d. Denial of defendants' rights and targeting of defence lawyers:

i. Ko Phoe Phyu (a.k.a. U Yan Naing Aung), 30, resident of Thingangyun Township, Yangon, had his licence to practice law revoked under Legal Practitioners Act 1880, sections 12 and 13(f), because of conviction under section 6, Association Formation Law 6/1988 (Criminal Case No. 587/2009, Magwe Township Court); revocation order given in letter of 11 March 2010 from Judge Myint Aung, Yangon Divisional Court, on order of Supreme Court. The revocation was motivated by the lawyer's defence of persons accused in political cases and his attempt to form a new lawyers' association. He was not given an opportunity to mount a defence against disbarment.

ii. Two experienced Supreme Court advocates, U Aung Thein and U Khin Maung Shein, were in October 2008 representing three men and one woman in five cases lodged against them over the September 2007 protests (Criminal Case Nos. 307-311/

"Thant Zin Oo and Ma Hla Hla Maw were imprisoned because they made a legitimate complaint about health of detainees after they went to visit Thant Zin Oo's younger brother"

2008 before Judge Daw Aye Myaing of the Hlaing Township Court, Yangon). The hearings were proceeding, like others from September 2007, in a special courtroom within the Insein Central Prison, apparently under an order from the Supreme Court. At the hearing on October 6 one of the four defendants informed the court that the defendants "no longer had faith in the judicial process" and that they would withdraw the power of attorney from the two lawyers at the next hearing. The judge instructed that the same be put to the court through the lawyers. U Aung Thein asked that the court record the same in its record and U Khin Maung Shein did likewise. It was clear from this procedure that the withdrawal of power of attorney was made through consultation of the clients with their advocates, in accordance with the clients' wishes. On October 20 U Khin Maung Shein gave the submissions to withdraw power of attorney in the five cases to the four defendants. They read the documents thoroughly and each signed them. The two attorneys also had their signatures affixed. Then the documents were submitted to the court. At that time the judge said that the remark in paragraph 2 of the submissions to withdraw power of attorney that the defendants "no longer had faith in the judicial process" had not been made orally at the earlier hearing. Two of the defendants, Ko Htun Htun Oo and Ko Aung Kyaw Moe, both objected that they had said these words and they would again make a submission to the court to this effect. But Judge Daw Aye Myaing said that, "It is too late. Don't speak." The Hlaing Township Court then made an application to the Supreme Court under section 3 of the Contempt of Courts Act, 1926, that, contempt of court may be punished with imprisonment for a term that may extend to six months (Miscellaneous Criminal Application No. 99/2008, Daw Naw Than Than Aye applicant). On 6 November 2008 the Supreme Court found the two advocates guilty of contempt of court and sentenced them to four months' imprisonment each without giving them any opportunity to defend themselves. After they were released in 2009, both of the lawyers were disbarred from practice, again without being given any opportunity to present their cases against disbarment.

e. Lack of means for redress and counter-complaints against complainants:

i. Thant Zin Oo, 37 and Ma Hla Hla Maw (a.k.a. Maw Kyi), 22 were imprisoned at Insein Central Prison in a case initiated by a corrections officer (Criminal Case No. 555/2008, Insein Township Court, Assistant Township Judge Daw Baby [Special], presiding) because they made a legitimate complaint about health and welfare of detainees after they went on 21 January 2008 to visit Thant Zin Oo's younger brother. In his letter to the police opening the case, the corrections officer gave the reason for legal action as that the prison officials had not authorised their visit for the purposes of writing such a letter and that they had recorded on the register their intent to come as simple visitors.

ii. U Than Lwin, 70, elected member of parliament (National League for Democracy), resident of Mattaya Township, Mandalay Division, was assaulted by an unidentified man who fled into an office of the government mass organization, the Union Solidarity and Development Association, in Mattaya Township on 15 June 2007. A complaint was lodged with the police, but thereafter the secretary of the township USDA filed a counter-complaint against nine persons, including the victim's son, two daughters and son-in-law on 26 June 2007 under Penal Code section 506 (criminal intimidation) and section 114 (abetment), because they had pursued the assailant to the outside of the office. The case against the nine was heard in the Mattaya Township Court from 24 July 2007 to 5 October 2007. Despite the fact that the entire prosecution case was based on hearsay, the judge found all of the accused guilty and on October 5 sentenced them from five to seven years in jail. U Than Lwin was himself taken from his house by police and officials at around midnight on 1 October 2007, without charge, in connection with the protests of September 2007. While incarcerated, he lost his eyesight due to the injuries he sustained because of the earlier assault and lack of medical treatment.

"Ko Myint Naing and a colleague who had travelled to Hinthada to conduct a human rights training session were assaulted by a group of men in plain clothes who were allegedly supervised by local police and council officials"

iii. On 17 April 2007 Ko Myint Naing and a colleague who had travelled to Hinthada Township, Ayeyarwady Division to conduct a human rights training session were assaulted by a group of men in plain clothes who were allegedly supervised by local police and council officials. Myint Naing had to be transferred to the Yangon General Hospital for cranial treatment. On April 23, the state-run newspapers ran articles against Myint Naing and his colleagues, whom they accused of going to stir up trouble and that villagers had insisted that "there were no incidents of human rights abuse" in their area, and that when the group had gone to Oatpone village, the villagers had tried to have them leave a confrontation had followed. On April 24 the authorities sent notices to Myint Naing and five others indicating that they would be charged under section 505(b)(c) of the Penal Code. On May 2, Myint Naing lodged a criminal complaint in the Hinthada court against 12 officials for endangering life, criminal force, robbery, and aiding and abetting. The same day that he lodged his complaint the preliminary hearings in the two cases against him and the five others were heard in the same court. Judge Daw Myint Myint San ordered all six men to be kept in custody, including Myint Naing, who was still receiving treatment for the head injuries he suffered during the April assault. On June 8 the township court reviewed the police report about the April 18 incident and accepted Myint Naing's own complaint on just one relatively-minor charge of voluntarily causing hurt (a one-year jail term if found guilty), against six minor accused, only three of whom were petty officials. The judge did not call the accused police or others to court to conduct his own inquiries as he is empowered to do, but just followed the police findings. Unlike the six human rights defenders, the six accused in this case were all given bail. A request by Myint Naing's lawyer to have the local

council chairman and police appear as witnesses in this trial was refused. Finally, the three civilians received minor penalties while the officials were acquitted. Meanwhile, on July 24 the court found the six accused rights defenders guilty: Myint Naing was sentenced to eight years, as he was a respondent to both criminal cases; the other five to four years each—they were released in September 2009; Myint Naing is still serving his sentence.

"Judges are responsible for guarding against all kinds of dangers to national unity and development and public interests and passing appropriate sentences to those who do such harmful acts"
—Prime Minister General Thein Sein

V. Two major constraints

10. Role of the judiciary as enforcer of executive policy:

a. Official statements:

i. *New Light of Myanmar*, 15 September 2009: Prime Minister General Thein Sein… said administrative bodies at various levels need to constantly know about the State policies and objectives. It is necessary to strive for the emergence of a peaceful, modern and developed nation by upholding Our Three Main National Causes as it is a national policy forever so long as the State exists. To do so, the rule of law is important. At a time when the State is in its important state, **constant measures are to be taken to ensure the rule of law in order to thwart any disturbances. In this regard, high civil administrative capability is the main factor and that will contribute much towards community peace and stability**. So, to ensure high administrative capability and the rule of law, the strength of ward and village peace and development councils is needed, said the Prime Minister.

ii. *New Light of Myanmar*, 12 May 2009: Prime Minister General Thein Sein said that… [the] legislative, executive and judicial pillars are of paramount importance for a nation, and nation-building endeavours have to be carried out through the practice of the three main pillars… Out of the three branches, **the judicial pillar is indispensable like the legislative and executive pillars, and the law is a rule or discipline of a nation. It is incumbent upon the administrative body to supervise the rule or discipline for each citizen to abide by, he noted… Therefore, the law staff and judicial staff play a pivotal role in the process of building a nation… In adopting, assessing and translating laws, bylaws, procedures and orders, law officers are required to do so in accordance with the basic principles upholding Our Three Main National Causes** – non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty.

iii. *New Light of Myanmar*, 13 May 2009: The Prime Minster spoke of the need for the judges to ensure prevalence of law and order [rule of law] and contribute their shares in the building of a new and modern nation **realizing the policy and tasks of the State… The judges are responsible for guarding against all kinds of dangers to national unity and development and public interests and passing appropriate sentences to those who do such harmful acts**. They will be able to contribute to "prevalence of law and order [rule of law], community peace and public

interests" only if they decide in accordance with the law... The courts are required to use their judicial powers only in the interests of the people. For this objective to be achieved, the courts will have to cooperate with administrative personnel. The administrative and judicial systems cannot operate separately but need to be in harmony to be able to protect public interests.

iv. *New Light of Myanmar*, 6 February 2007: [Prime Minister General Soe Win said that] the people must respect the law, and the law must protect the people as well. Moreover, **the conducting of judicial affairs must be in consistency with the State policies and existing laws. It is necessary to have political as well as judicial views**. An extensive use of law terms may confuse the people and ignoring the nature of law is a kind of extreme act. **If needs arise to solve the issues of community peace and tranquillity, and to end misconduct, the courts and local administrative bodies are to cooperate and coordinate [with] each other. Peace and development councils at various levels are regional administrative bodies under the leadership of the State Peace and Development Council. Therefore, it is necessary to know the role of those administrative bodies**.

> **"If needs arise to solve the issues of community peace and tranquillity, and to end misconduct, the courts and local administrative bodies are to cooperate and coordinate [with] each other"**
>
> *—Prime Minister General Thein Sein*

b. The administrative role of the judiciary was also acknowledged by the Supreme Court in a recent application brought to it by the National League for Democracy on 23 March 2010. The party submitted a miscellaneous civil application to the court under the Judiciary Law and the Specific Relief Act 1887. It asked the court to examine provisions of the new Political Parties Registration Law 2010 that prohibit convicted serving prisoners from establishing or participating in political parties. The NLD's approach to the court was premised on the notion that the Supreme Court would at very least be able to entertain its plaint. But according to the NLD, the application did not even go before a judge. Instead it was returned by lunchtime on the same day with an official giving the reason that, "We do not have jurisdiction." Subsequently, an attempt to approach the chief justice directly was also rebuffed.

11. Examples of corruption (the Asian Legal Resource Centre has records of these cases on file but here has removed identifying details):

a. In 2007 a police special drug squad arrested a notorious dealer in possession of a small amount of amphetamines. The local police nominated a defence lawyer for him: a common practice in which there is a 30 per cent kickback to the police station chief. After being hired, the lawyer went to meet with the judge and prosecutor handling the case. The judge explained to the lawyer that the problem was because of the notoriety of his client, there was local and official interest in the case and the judge could not just let the client off without risking accusations of corruption and loosing face. So they arranged the case in a way that would get the client off, give the judge credibility and make everyone money. Payments were made both to the judge and the prosecutor. During the hearings, they deliberately botched the case. The judge admitted evidence that

cast doubt on the allegations, and the prosecutor asked questions that supported the defence. Some prosecution witnesses were made hostile and their evidence recorded fully in the judgement. The judge convicted the accused, and public interest in the case ceased. The case was appealed to the district court. Here there were no public hearings and no knowledge of what was going on. The judge in the court of first instance had already contacted the judge in the higher court, and had given money to him. The higher court acquitted the accused, who moved to another locality after his release.

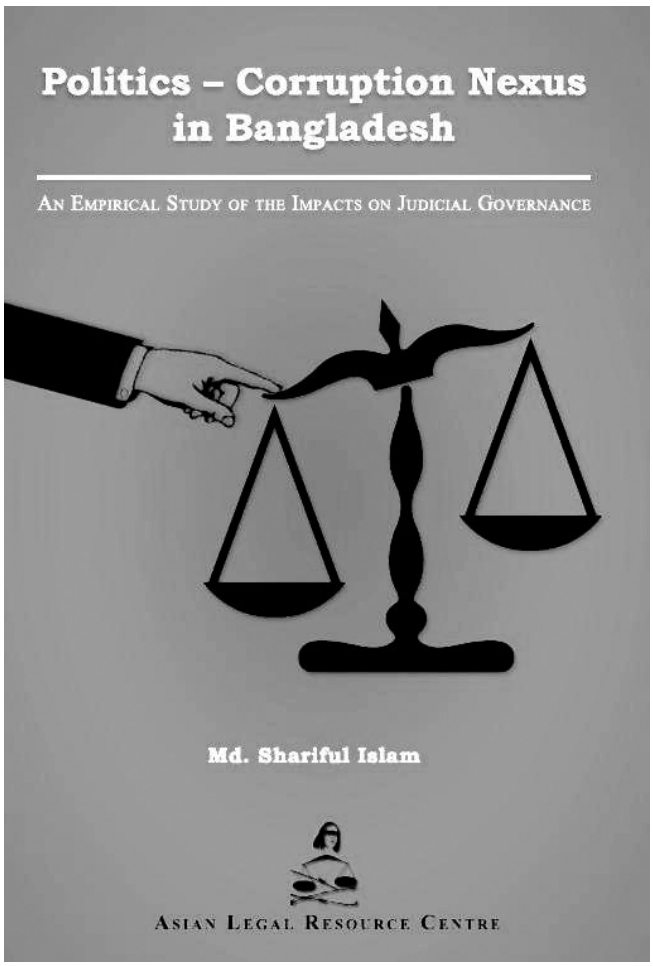
b. A government car driver a few years from retirement was in 2007 approached by a group of men, who asked to rent his house. The amount they offered was far above the market value. The occupant consulted with local government administrators whom he knew as friends. They advised him that the group apparently wanted the house for gambling, but that there was nothing to worry about and that he should do it. He rented the house and received a year's payment in advance. After two months a group of special vice squad police arrested the gang. The manager of the gambling operation used his contacts with the police to have the house owner pose as the key accused, securing bail for himself and his men. He told the owner that if he went along with the scheme then he wouldn't have to repay the year's rent, and that he would also get him released after a short time. He also threatened him that if he didn't cooperate then the gang would implicate his son. In the end, the house owner and two junior members of the gang faced court, with the owner in jail and the others on remand. In 2008 the court convicted the owner and freed the other two for lack of evidence. On appeal the elderly man was conditionally released, taking into account time served, but without his knowing the prosecutor appealed to a higher court and the original sentence was re-imposed; the police again arrested him and he is serving the remaining time. The gang has moved elsewhere.

c. The son of an army officer posted to a regional command in 2008 allegedly attempted to rape a classmate together with a companion. The family of the victim took the unusual step of strongly supporting her complaint against the two accused. The case attracted local interest because of the status of the alleged perpetrator as a family member of the ruling military class. At first the charge against the two was attempted rape. They were held as VIP detainees in a room next to the police station chief's own office that the police normally use for playing cards and drinking. The army officer's son received bail on the basis of a supposed health problem that required medical treatment; his companion was held in remand, but in the same room as before. After preliminary hearings and payment of money, the judge ordered that the charge be altered to assault on a woman, which is a much lower offence for which bail is habitually given, and the second accused also was released. Finally both accused were acquitted of that charge on the benefit of the doubt, the judge implying that the victim had misled the two accused and at first had consented to sex.

NEW PUBLICATION:
Politics-corruption nexus in Bangladesh

The Asian Legal Resource Centre (ALRC) has published a new book by Md. Shariful Islam, Assistant Professor of Political Science at the University of Dhaka, which presents an overview of the linkages between politics, corruption and the criminal justice system in Bangladesh, especially in its subordinate judiciary.

The book observes, "No matter what form of corruption takes place in the judiciary of Bangladesh, political factors play a huge part in terms of the origin, development and practices of corruption. Government must take a holistic approach to the problems and undertake a thorough reformation of the existing systems without any further delay. The Subordinate Judiciary of Bangladesh has yet to develop as an effective institution under the status quo. This is so even after its separation from the executive branch. It is one of the most neglected institutions of the State having only minimum facilities. In upholding the rule of law, in maintaining law and order, in protecting fundamental human rights and in building up a strong check and balance system in the State organs, the judiciary should be rescued directly and with all due speed, from its status of vulnerability."



The author urges judges to ensure timely and early disposal of orders and not to entertain telephone calls from, or meet political leaders. Lawyers are urged to provide clients with receipts for payments from clients. Police are called upon to register only genuine cases and end practices of torture and extrajudicial killing.

There is also a variety of recommendations for litigants and the international community, among others.

The book is the product of an ALRC-funded empirical research project. It is published by and available from the ALRC, 19/F, Go-Up Commercial Building, Mongkok, Kowloon, Hong Kong, tel. +852 2698 6339, fax +852 2698 6367, email: books@ahrchk.net, and can be obtained in PDF format from the AHRC website: http://www.ahrchk.net/pub/mainfile.php/books.

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ALRC invites submissions to ***article 2*** by interested persons and organisations concerned with implementation of human rights standards in the region.

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