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EFFECTIVE FUNCTIONING OF HUMAN RIGHTS MECHANISMS;
NATIONAL INSTITUTIONS AND REGIONAL ARRANGEMENTS

Written statement* submitted by Asian Legal Resource Centre (ALRC), a non-governmental
organization in general consultative status

The Secretary-General has received the following written statement which is circulated
in accordance with Economic and Social Council resolution 1996/31.

[30 January 2003]

* This written statement is issued, unedited, in the language(s) received from the
submitting non-governmental organization(s).

The need for effective national human rights institutions in Asia

1. The Asian Legal Resource Centre has raised concerns about the effective functioning of national human rights institutions (NHRIs) in Asia with the Commission on Human Rights through several oral and written statements in recent years. In a written statement to the fifty-eighth session (E/CN.4/2002/NGO/87), it noted that when a national juridical system is fundamentally flawed, the NHRIs are unable to do their work effectively. It also observed that some national human rights institutions inquire into grave crimes such as torture but eventually resolve these cases through piecemeal financial settlements. When the role of an NHRI is trivialized to this extent, the victims of human rights violations are hurt more than the perpetrators.
2. NHRIs based on the Paris Principles offer avenues for the effective address of human rights violations. They are expected to be watchdogs, monitors, advocates and promoters of rights. For these purposes, NHRIs need powers and resources. National laws are supposed to provide the necessary legal mandate, and the national budget is supposed to provide the resources. Yet even under these circumstances, NHRIs may not perform as would otherwise be expected. NHRIs frequently fail to grow to their full potential, instead demonstrating unwillingness to actively and positively pursue serious and sensitive human rights issues. To illustrate, the Asian Legal Resource Centre draws the Commission's attention to the Human Rights Commission of Sri Lanka, and the National Human Rights Commission of the Republic of Korea.
3. The Human Rights Commission of Sri Lanka was recently created via a statute that gave it wide powers. It has not lacked power or resources, however its performance has been dismal and left the human rights community bitterly disappointed.
4. The Human Rights Commission of Sri Lanka is well protected by law. For example, it cannot be called as a witness in any court of law or be sued for matters relating to its official duties. This is a good provision intended to protect it from perpetrators, who are often powerful persons holding positions in law enforcement agencies. However, when this protection is abused to deprive victims their rights and discourage them from pursuing complaints, victims feel powerless and become confused about where they should turn for justice. Consequently, victims' criticisms of this NHRI are bitter and widespread. Some characteristic complaints follow.
 - a. The Human Rights Commission of Sri Lanka often violates principles of international and national law in dealing with torture cases, by allowing perpetrators to escape criminal punishment through the payment of small sums in compensation. Under national law (Act No. 22 of 1994), torture is a crime punishable with a mandatory prison sentence of seven years and a fine, but the Human Rights Commission settles cases after the payment of as little as 1,000

rupees (about US\$12). Victims are then prevented from pursuing criminal cases. (See further the Asian Legal Resource Centre's written statement to the fifty-ninth session of the Commission on torture committed by the police in Sri Lanka.)

- b. Victims are often pressured to accept settlements. According to one person thrown into a river by a police officer with the intent to kill, officials of the Human Rights Commission told him that he really did not have a case and that it would be better to accept a small payment and end the matter. Because most victims are poor, not educated in legal matters and not represented by lawyers, they are easily confused and misled into accepting a financial settlement against their will.
 - c. The Human Rights Commission takes a soft attitude towards police officers violating human rights, creating the impression of close links and collusion between it and the offending officers. Many people express doubts about the integrity with which some complaints are handled.
 - d. The Human Rights Commission of Sri Lanka adopts a tribunal-like approach to investigations, declining to undertake preliminary inquiries in the manner of a criminal investigator. Whereas it is empowered and obliged to collect evidence relating to complaints and forward it to bodies that can take appropriate legal action, its investigating officers often tell the victims to find their own evidence. Victims, however, cannot undertake these investigations, as they lack the power of access to police stations, official documents and other sources entitled to the Human Rights Commission.
 - e. Officers of the Human Rights Commission try to impose standards relating to violations that are below those of human rights norms, thereby trivializing complaints. For example, any act of torture or inhuman treatment that does not cause a serious physical injury is rejected outright.
 - f. The Human Rights Commission is slow to respond to illegal arrests and detention. Whereas prompt intervention can prevent the abuse of power during arrest and detention, it has failed to adopt principles for action in these circumstances, such as those set out in the Indian case of *Basu vs. West Bengal Government*.
 - g. The Human Rights Commission has not used its powers to study patterns of human rights abuse in Sri Lanka and make recommendations to the state to correct them.
 - h. The Human Rights Commission does not issue an annual report about human rights abuses in Sri Lanka. It is one of the duties of an NHRI to produce an annual report and make it available to the public.
5. Another NHRI in Asia that has been a source of disappointment after its inception little more than one year ago is the National Human Rights Commission of the Republic of Korea. Although it enjoys a wide mandate and broad range of functions, like its Sri Lankan counterpart it has shown reluctance to grasp

opportunities. Unlike the Sri Lankan commission, however, its powers are not binding—it makes strong recommendations to persons and agencies responsible for human rights violations—so in principle it has the opportunity to be more progressive in its decision making than a judicial body.

6. Regrettably, the National Human Rights Commission in Korea has failed to take the initiative on many occasions, and has instead tended to follow the judgements of courts, rather than attempt to set important precedents. This is because it has mistakenly seen itself as a judicial rather than advocacy body. Instead of realizing its opportunity to act as a strong proponent of universal human rights principles, it has acted as if an adjudicator of individual human rights cases. This is unfortunate, as it means that the National Human Rights Commission has been prepared to take a back-seat role, in keeping with a 'neutral' adjudicators stance, rather than be proactive and visible, as befits an advocate. Some instances where the National Human Rights Commission has failed to fully realize its mandate follow.
 - a. The National Human Rights Commission of Korea has invited outside agencies and experts to conduct surveys of human rights in Korea on its behalf, including one on prisons and one on the army, rather than undertake research itself. However, prison and army conditions are unsuitable for surveys conducted entirely by outside contractors, because other agencies do not have the legal access that is available to the National Human Rights Commission. Furthermore, the results of these surveys are subject to the caveat that the opinions they contain are "not necessarily those of the Commission". This is unfortunate, as the findings of such research are significant and should be backed with the greatest amount of authority available.
 - b. The National Human Rights Commission has proved unwilling to criticize or question the Constitutional Court, deciding that it cannot officially express opinions or comment on Court decisions on the grounds that all state agencies are legally bound by them. This argument ignores the fact that the National Human Rights Commission has the power to submit expert opinions to the Constitutional Court, which should sometimes differ from the Court. It also gives supremacy to domestic law, whereas the National Human Rights Commission is also expected to speak for international human rights law, which means that it may sometimes be obliged to publicly criticize the Court if its decision were to contradict that body of law.
 - c. The National Human Rights Commission is authorized to submit written opinions to courts trying human rights cases without its permission, however to date it has not obtained the full list of human rights cases pending in courts, and as a result it failed to intervene on important occasions.
 - d. The National Human Rights Commission has the power to hold public hearings and receive testimony from a wide variety of persons and agencies, but to date it has arranged just one such hearing, which lasted only a few hours. Again it has showed reluctance to employ a useful tool for the promotion of human rights, and one that should always precede strategic policy interventions. In

fact, such hearings should in the future form part of a series of public consultations that would by law precede the appointment of members to the Commission, to ensure that it obtain a more proactive membership than it has at the present.

- g. Rather than taking on controversial human rights cases as a part of its mandate, the National Human Rights Commission has avoided responsibility or handed down weak decisions on a number of important issues, including conscientious objection, repatriations to North Korea, and indefinite solitary confinement of prisoners (see the Asian Legal Resource Centre's written statement to the fifty-ninth session of the Commission on indefinite solitary confinement in the Republic of Korea).
7. Apart from working within their own territories, NHRIs can take initiative to raise concern on human rights issues related to other countries in the Asia-Pacific region. Although NHRIs are nationally focused, raising concern about the promotion and protection of human rights in other countries upholds the universality of human rights. On 4 December 2002, for instance, the Secretary General of the National Human Rights Commission of the Republic of Korea wrote to the Minister of Interior in Sri Lanka with regards to the brutal torture of a 25-year-old man, Mr. Nalinda Senaratne, by the police. The Secretary General urged the Minister prevent such torture from happening in future and called for immediate and impartial investigations into all alleged cases of torture in Sri Lanka. This is a good example of where the National Human Rights Commission of the Republic of Korea did in fact use its wide mandate effectively to intervene in a human rights case in another country. The Asian Legal Resource Centre welcomes such initiatives. The Asian Legal Resource Centre also welcomes the activities initiated by the Asia-Pacific Forum on National Human Rights Institutions and urges the Forum to address matters relating to effective functioning of NHRIs in the region.
8. The Asian Legal Resource Centre accordingly calls upon the Commission to
 - a. Pressure NHRIs in Asia to perform in keeping with the Paris Principles, such that the interests of the victims of human rights violations and international human rights law may be upheld above all others and so that NHRIs don't themselves become human rights problems. Most importantly, NHRIs must be understood as tools for human rights advocacy and not passive interpreters of legalistic principles.
 - b. Advise and assist in the improvement of NHRIs in Asia, particularly through working more closely with the Asia-Pacific Forum on National Human Rights Institutions, to expand dialogue on developing effective remedies for human rights violations and make Asian NHRIs more outspoken proponents of human rights principles than at present.