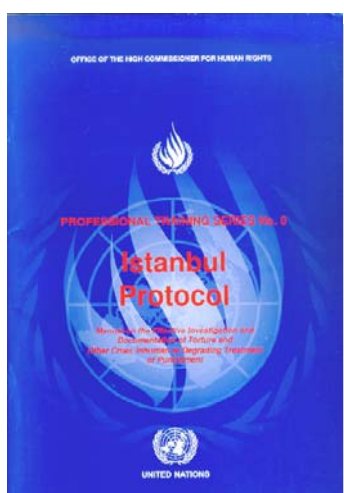


## Reference Materials

The Istanbul Protocol: International Guidelines for the Investigation and Documentation of Torture

# ACTION AGAINST TORTURE A PRACTICAL GUIDE TO THE ISTANBUL PROTOCOL FOR LAWYERS IN SRI LANKA

2004



This guide has been written by the REDRESS TRUST as part of the Istanbul Protocol Implementation Project, an initiative of Physicians for Human Rights USA (PHR USA), the Human Rights Foundation of Turkey (HRFT), the World Medical Association (WMA), and the International Rehabilitation Council for Torture Victims (IRCT)

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The Istanbul Protocol: International Guidelines for the Investigation  
and Documentation of Torture

## ACTION AGAINST TORTURE

### A PRACTICAL GUIDE TO THE ISTANBUL PROTOCOL FOR LAWYERS IN SRI LANKA

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## **ACTION AGAINST TORTURE: A PRACTICAL GUIDE TO THE ISTANBUL PROTOCOL FOR LAWYERS**

### *ACKNOWLEDGMENTS*

This report was written by Caroline Rowlands and Lutz Oette, on the basis of information provided by Desmond Fernando, Legal Consultant of the Istanbul Protocol Implementation Project, and edited by Gabriela Echeverria and Carla Ferstman.

## **REFERENCE MATERIALS REGARDING THE USE OF THE ISTANBUL PROTOCOL: INTERNATIONAL GUIDELINES FOR THE INVESTIGATION AND DOCUMENTATION OF TORTURE**

The Istanbul Protocol is the first set of international guidelines for the investigation and documentation of torture. The Protocol provides comprehensive, practical guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture, and for reporting the findings to the relevant authorities. Initiated and co-ordinated by Physicians for Human Rights USA (PHR USA), Action for Torture Survivors and the Human Rights Foundation of Turkey (HRFT), the Protocol was developed over three years with the involvement of more than 40 organisations, including the International Rehabilitation Council for Torture Victims (IRCT) and the World Medical Association (WMA).

With the generous support of the EU, the 'Istanbul Protocol Implementation Project' was carried out between March 2003 and March 2005 to increase awareness, national endorsement and tangible implementation of the Protocol in five target countries; Georgia, Mexico, Morocco, Sri Lanka and Uganda.

The resource materials presented here were developed as a source of practical reference for health and legal professionals during the trainings conducted as part of the project. The materials were widely disseminated to the 250 individual health professionals and 125 lawyers who participated in the trainings and were also distributed to relevant national institutions and government agencies in the five countries. It is hoped that these materials offer insights and create synergy between the two professions in the joint efforts to combat torture.

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# PART 1: OVERVIEW OF THE ISTANBUL PROTOCOL

## A. Introduction

Recognising the prevalence of torture in the world and the need to take active steps to combat it, medical, legal and human rights experts from a range of countries drafted the “*Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)*.” The Manual was finalised in August 1999 and has since been endorsed by the United Nations, regional organisations and other bodies.<sup>1</sup>

The Istanbul Protocol is intended to serve as a set of international guidelines for the assessment of torture or cruel, inhuman or degrading treatment or punishment, and for investigating such allegations, and reporting findings to the judiciary or other investigative bodies. The set of “*Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*” (*The Istanbul Principles*) annexed to the Istanbul Protocol was included in the Resolution on Torture unanimously adopted by the UN General Assembly in December 2000.<sup>2</sup> Subsequently, the United Nations Commission on Human Rights drew the attention of governments to these Principles and strongly encouraged them to reflect upon them as a useful tool in combating torture.<sup>3</sup>

Torture is defined in the Istanbul Protocol in the words of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

“Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.<sup>4</sup>

Accordingly, torture is the intentional infliction of severe pain or suffering, whether physical or mental, by or on behalf of a public official (such as the police or security forces) or with their consent. The calculated abuse of an individual’s physical and psychological integrity, in a way that is designed specifically to undermine their dignity, is horrible in any circumstance. But when this act is perpetrated by or on behalf of a public official (someone with the very responsibility to protect an individual’s rights) the crime becomes all the more reprehensible. Indeed torture is typically perpetrated/condoned by the State officials who are responsible for upholding and enforcing the law.

Torture may cause physical injury such as broken bones and wounds that heal slowly, or can leave no physical scars. Often torture will lead to psychological scars such as an inability to trust, and a difficulty to relax in case the torture happens

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<sup>1</sup> Available at <http://www.unhchr.ch/pdf/8istprot.pdf>.

<sup>2</sup> UN General Assembly Resolution 55/89 Annex, 4 December 2000.

<sup>3</sup> Commission on Human Rights Resolution 2003/33, 57th meeting, 23 April 2003 [E/CN.4/2003/L.11/Add.4].

<sup>4</sup> Article 1, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UNGA resolution 39/46 of 10 December 1984, *entry into force* 26 June 1987.

again, even in a safe environment. Torture survivors may experience difficulty in getting to sleep or may wake early, sometimes shouting or with nightmares. They may have difficulties with memory and concentration, experience irritability, persistent feelings of fear and anxiety, depression, and/or an inability to enjoy any aspect of life. Sometimes these symptoms meet the diagnostic criteria for post-traumatic stress disorder (PTSD) and/or major depression. Physical and psychological scars can last a lifetime. To someone who has no experience of torture, these symptoms might appear excessive or illogical, but they can be a normal response to trauma.

The word 'torture' will, to most people, invoke images of some of the most horrific forms of physical and psychological suffering - the pulling out of fingernails, electric shocks, mock executions, being forced to watch the torture of parents or children, rape. The variety and severity of the methods of torture and cruel, inhuman or degrading treatment or punishment may simply defy belief. But there is no exhaustive list of acts that constitute torture;<sup>5</sup> torturers continue to invent new ways to brutalise individuals. And there is no limit on who can be victimised – survivors of torture come from all walks of life, and from most countries around the world. Even children may be victims.<sup>6</sup> But most frequently, torture survivors are criminal suspects, or victims of discrimination on the grounds of race, ethnicity, religion, gender or sexual identity.<sup>7</sup>

As noted in the Istanbul Protocol, "torture is a profound concern for the world community. Its purpose is to deliberately destroy not only the physical and emotional well-being of individuals, but the dignity and will of entire communities. It concerns all members of the human family because it impugns the very meaning of our existence and our hopes for a brighter future."

In other words, torture is abhorrent not only for what it does to the tortured but for what it makes of the torturer and the system that condones it. The Istanbul Protocol explains: "Perpetrators often attempt to justify their acts of torture and ill-treatment by the need to gather information. Such conceptualizations obscure the purpose of torture and its intended consequences...By dehumanizing and breaking the will of their victims, torturers set horrific examples for those who later come in contact with the victim. In this way, torture can break or damage the will and coherence of entire communities...."

For this reason, torture is absolutely prohibited by every relevant human rights instrument since the Universal Declaration of Human Rights of 1948. The violation of this prohibition is considered so serious that no legal justification may ever be found, even in times of emergency or armed conflict.

Despite the absolute prohibition of torture under international law, a glance at any of the reports of the United Nations Special Rapporteur on Torture, or of recent reports of the International Committee of the Red Cross (ICRC), or indeed many newspapers, makes it quite clear that torture is still commonplace in many countries around the world. This imbalance between the absolute prohibition on the one hand and the frequent practice of torture underscores the need to improve domestic implementation of international standards against torture and to improve the effectiveness of domestic remedies for torture survivors.

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<sup>5</sup> In its General Comment on Article 7 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee considered that it is not desirable to draw up a list of prohibited acts or a precise distinction between them. Furthermore, Sir Nigel Rodley, former UN Special Rapporteur on Torture, considered that it is extremely difficult and indeed dangerous to establish a threshold to distinguish acts of torture from cruel, inhuman or degrading treatment.

<sup>6</sup> See *Hidden Scandal, Secret Shame* (AI Index ACT 40/38/00) for reports of torture perpetrated against children.

<sup>7</sup> See *Crimes of Hate, Conspiracy of Silence* (AI Index ACT 40/016/2001) for reports of torture perpetrated against sexual minorities; *Broken Bodies, Shattered Minds* (AI Index: ACT 40/001/2001) for reports of the torture of women; *Racism and the Administration of Justice* (AI Index: ACT 40/020/2001) for reports of torture and racial discrimination.



The Istanbul Protocol is an important instrument in the fight against torture - the effective investigation and documentation of torture helps to expose the problem of torture and to bring those responsible to account. The Principles contained in the Protocol reflect important international standards on the rights of torture survivors and States obligations to refrain from and prevent torture.

International law requires States to investigate allegations of torture and to punish those responsible. It also requires that victims of acts of torture obtain reparation and have an enforceable remedy to fair and adequate compensation, restitution of their rights and as full rehabilitation as possible. The Istanbul Protocol is a manual on **how** to make investigations and documentations of torture **effective** in order to punish those responsible, to afford adequate reparation to the victims and more generally, to prevent future acts of torture.

This Guide is aimed at lawyers in Sri Lanka working with torture survivors. For each key international standard recognised in the Istanbul Protocol, relevant domestic laws and practices are outlined, and discrepancies between domestic laws and international standards are highlighted, as reviewed by international human rights bodies. This Guide suggests practical ways that lawyers might counter domestic laws and practices that do not comply with international standards and thereby improve the recognition and implementation of these standards in national context.

Lawyers are key interlocutors for survivors of torture seeking justice and other forms of reparation. Equally, they may play a vital role in persuading governments to comply with their international obligations to refrain from acts of torture and to implement preventative measures. If lawyers are familiar with the applicable international standards, they may seek to interpret and apply domestic law in light of these standards, and may cite such standards in their legal argument, pleadings and complaints.

This Guide does not purport to be a comprehensive survey of domestic law and practice of torture in Sri Lanka. It aims only to provide an outline of relevant legal provisions, case law and practice, in order to identify steps to ameliorate domestic implementation of applicable international standards.

Chapter I of the Istanbul Protocol outlines the ethical responsibilities of lawyers and medical professionals under international law, as well as relevant international human rights mechanisms. Chapter II outlines the relevant professional ethical codes for lawyers and doctors, as well as judges and prosecutors. Whilst Chapter III sets out international standards on the purposes and procedures of a legal investigation into torture, Chapters IV - VI cover how to obtain different sources of evidence in torture cases - physical and psychological medical evidence, as well as evidence from other sources, such as interviews.

## **B. The importance of medical professionals in the documentation of torture and the need for lawyers to understand the medical symptoms of torture**

The Istanbul Protocol highlights the important role of medical professionals in the documentation of torture and sets out detailed guidelines on methodology for obtaining medical evidence, including the recommended content of medical reports.

It is important for lawyers working with torture survivors to know how torture can be medically documented and what are the physical and psychological symptoms of torture. This will not only help them to better understand their clients and assist them but equally, such insight is extremely important when lawyers lodge complaints of torture or other forms of ill-treatment on the survivors' behalf. As recognised in the Istanbul Protocol lawyers and doctors need to work closely together to effectively investigate and document acts of torture. Medical evidence will help prove that torture has occurred. It will also assist lawyers to determine victims' claims for reparations (e.g., restitution, compensation and rehabilitation). Similarly, lawyers will need to assess whether the official investigation of the police or other competent body took into account proper medical evidence or whether they need to arrange for independent medical examinations to attest to the victim's version of the events.

The Istanbul Protocol states that lawyers have a duty, in carrying out their professional functions, to promote and protect human rights standards and to act diligently in accordance with law and recognised standards and ethics of the legal profession. Other human rights instruments, such as the "*UN Basic Principles on the Role of Lawyers*",<sup>8</sup> set out the duty of lawyers to assist clients "in every appropriate way" and to take legal action to protect their interests. The Istanbul Protocol also states that there is a duty on medical professionals to always act in the best interests of the patient, regardless of other pressures or contractual obligations. Similarly, under the "*UN Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*"<sup>9</sup> it is a "gross contravention of medical ethics" for doctors to engage in acts which constitute participation in, complicity in, incitement to, or attempts to commit torture.

## **C. Key International Standards in the Istanbul Protocol**

The Istanbul Protocol outlines international legal standards on protection against torture and sets out specific guidelines on how effective investigations into allegations of torture should be conducted. These guidelines (the Istanbul Principles) have been recognised by human rights bodies as a point of reference for measuring the effectiveness of investigations. The Istanbul Protocol identifies the following obligations on governments to ensure protection against torture:

1) To take effective legislative, administrative, judicial or other measures to prevent acts of torture, for example, by:

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<sup>8</sup> See UN Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 27 August-7 September 1990.

<sup>9</sup> The UN Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were adopted by the UN General Assembly on 18 December 1982.

- Not expelling, returning or extraditing a person to a country when there are substantial grounds for believing that the person would be tortured (non-*refoulement*);
- Ensuring that any statement that is established to have been made as a result of torture is not invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made;
- Ensuring that the prohibition of torture is included in training of law enforcement and medical personnel, public and other relevant officials;

2) To ensure that general safeguards against torture exist in places of detention such as:

- Granting detainees prompt and unrestricted access to a lawyer and a doctor of their choice;
- Granting detainees access to family members;
- Ceasing the use of incommunicado detention;

3) To effectively investigate allegations of torture, by:

- Ensuring that the relevant authorities undertake a prompt and impartial investigation whenever there are reasonable grounds to believe that torture has been committed;
- Guaranteeing that all allegations of torture are effectively investigated.

4) To ensure that alleged perpetrators are subject to criminal proceedings by:

- Criminalising acts of torture, including complicity or participation;
- Making torture an extraditable offence and providing assistance to other national governments seeking to investigate and/or prosecute persons accused of torture;
- Ensuring that the alleged perpetrators are subject to criminal proceedings if an investigation establishes that an act of torture appears to have been committed;

5) To ensure that victims of torture have the right to an effective remedy and adequate reparation by:

- Ensuring that victims of torture have effective procedural remedies to protect their right to be free from torture in law and practice;
- Guaranteeing that domestic law reflects the different forms of reparation recognised under international law and that the reparations afforded reflect the gravity of the violation(s).

## **PART 2: GENERAL LEGAL FRAMEWORK AND PRACTICE OF TORTURE IN SRI LANKA**

This Part outlines the legal framework and the practice of torture in Sri Lanka, including how international human rights mechanisms have classified this practice. It gives the context in which lawyers in Sri Lanka are currently working to assist torture survivors and to improve implementation of relevant international standards.

### **A. The practice of torture in Sri Lanka**

According to the UN Committee against Torture, “torture is frequently resorted to in the following cases: (a) By the police, especially during the first days following arrest and detention of suspects; (b) By the army in respect of captured terrorists, in order to “facilitate” follow up operations and before handing them over to the civilian authorities; and (c) By paramilitaries, who apparently are not a regular force fully responsible to the military command.”<sup>10</sup>

There have been several violent conflicts in Sri Lanka over the last decades. The most severe of these has been the armed confrontation in the Northeast of the country between government forces and paramilitary groups on one side and the LTTE (Liberation Tigers of Tamil Eelam) on the other. This armed conflict, which broke out in 1977, has continued almost unabated until late 2001 when the then Sri Lankan Government under the leadership of Ranil Wickremasinghe, UNP, and the LTTE agreed upon a ceasefire.<sup>11</sup> In the course of the conflict, both sides carried out serious violations of international humanitarian and human rights law. Government forces have reportedly carried out extra-judicial killings, “disappearances” and torture on a wide scale.<sup>12</sup> As it has come to light in numerous habeas corpus and fundamental rights applications, torture has frequently been used against Tamil detainees. Most of the cases filed against them depended solely on confessions extracted under torture.

Torture has been facilitated by a number of emergency laws, which suspended safeguards and curtailed the rights of the people affected, i.e. mainly the Tamils living in the Northeast of Sri Lanka. All of these emergency laws have now been lifted. While the number of allegations of torture in the Northeast has decreased since the ceasefire came into effect in 2001, torture appears to continue unabated in the rest of the country, judging by the cases reported in the press as well as by human rights organisations.<sup>13</sup> In particular, there has apparently been a significant rise of cases of rape in custody.<sup>14</sup>

Torture has also been systematically applied during the JVP (Janatha Vimukthi Peranmuna, People’s Liberation Front) uprisings. In the suppression of the 1971 JVP uprising, several thousand youth were reportedly extra-judicially killed and over 15,000 were apparently held in long-term detention without trial. During the 2<sup>nd</sup> JVP uprising from 1987 to 1991, reports indicate that over 30,000 persons were disappeared or extra-judicially killed and over 18,000 persons were held in long-term detention without trial. In respect of both JVP uprisings, the

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<sup>10</sup> Activities of the Committee under Article 20 of the Convention: Sri Lanka, UN Doc. A/57/44, 17 May 2002, paras.117-195, para.176. In 1998, the UN Committee against Torture concluded that information provided by five NGOs based in the United Kingdom on the alleged systematic practice of torture in Sri Lanka was reliable and contained well-founded indications that torture is being systematically practised in Sri Lanka.

<sup>11</sup> The negotiations for a political settlement of the conflict were ongoing at the time of writing.

<sup>12</sup> See, also on the historical background, Elisabeth Nissan, *Sri Lanka: A Bitter Harvest*, Minority Rights Group, London, 1996.

<sup>13</sup> *Second Special Report: Endemic torture and the collapse of policing in Sri Lanka*, in Asian Human Rights Commission, Article 2, Vol.3, No.1, 2004 and Concluding Observations of the UN Human Rights Committee on Sri Lanka’s State party report, UN Doc. CCPR/CO/79/LKA, 1 December 2003, para.9.

<sup>14</sup> See Amnesty International, *Sri Lanka: Rape in Custody*, January 2002, AI Index: ASA 37/001/2002 (available online at <http://web.amnesty.org/library>).

majority of those in custody were apparently subjected to torture. Army camps were set up throughout the country where detainees were held for years without trial. Several army camps and police stations earned notoriety as torture chambers. During this period the Government sanctioned torture and the state agencies carried out torture with its connivance.<sup>15</sup>

The perpetrators have employed a wide range of torture methods, the use of which has resulted in several deaths in the custody of the army, the police and prisons. Typical perpetrators of torture have been members of the Police and the security forces.<sup>16</sup> In the Northeast, allegations of torture have been made mainly against the army, the navy and the Special Task Force (STF) of the Police. In this context, torture has been routinely committed following arrests under the Emergency Regulations (ER) or the Prevention of Terrorism Act (PTA), often in unauthorised places of detention. Reportedly, Tamil groups fighting alongside Government forces also committed serious human rights violations, including torture.<sup>17</sup> Allegations of torture are rarely made against the Prison Administration though the prison officers reportedly use force to keep the prisoners under control.

During the periods of conflict specified above, victims of torture were mostly political prisoners who were arrested and detained under Emergency Regulations and the Prevention of Terrorism Act. Despite the fact that all the persons arrested in connection with the conflict are persons belonging to the Tamil community, torture has not been exclusively directed against members of ethnic communities or political opponents of the regime.

As is evident from the records of the fundamental rights applications filed in the Supreme Court during the period 1990 – 2001, the vast majority of victims of torture are civilians. Women have in some instances become victims of various forms of sexual harassment and abuse, including rape, in custody. Children have also been subjected to torture in several cases.<sup>18</sup>

## **B. Prohibition and definition of torture**

### **□ The Constitution**

Under Article 11 of the Constitution, freedom from torture is a fundamental right: 'No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. According to Article 15, there shall be no derogation from the rights declared and recognised in Article 11 in times of public emergency.

### **□ Criminal law**

Torture is a criminal offence under the Torture Act No.22 of 1994. Section 12 of this Act defines torture as follows:

“Torture, with its grammatical variations and cognate expressions, means any act which causes severe pain, whether physical or mental, to any other person, being an act which is-

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<sup>15</sup> Amnesty International, Sri Lanka, Extra-judicial Executions, “Disappearances” & Torture, 1987-1990, London 1990.

<sup>16</sup> See Newman, Dwight, *Patterns of Torture, Circumstances Facilitating Torture in Sri Lanka and Malaysia*, in Human Rights Solidarity, Vol.12, No.4, July 2002, at 16.

<sup>17</sup> See Amnesty International, *Sri Lanka: Torture in Custody*, June 1999, AI Index: ASA 37/10/99 and the issue of the journal Article 2, Vol.1, No.4, August 2002 of the Asian Human Rights Commission which contains several articles on the practice of torture in Sri Lanka.

<sup>18</sup> For more information on the specific issue of children being subjected to torture whilst in detention, see World Organisation Against Torture (OMCT), *State Violence in Sri Lanka: An Alternative Report to the United Nations Human Rights Committee*, January 2004 (available online at <http://www.reliefweb.int/library/documents/2004/omct-sri-30jan.pdf>).

- (a) done for any of the following purposes:
- (i) obtaining from such person or a third person any information or confession;
  - (ii) punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or
  - (iii) intimidating or coercing such other person or a third person; or
- (b) done for any reason based on discrimination, and being in every case, an act, which is, done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.”

This definition of torture is not fully consistent with the one found in Article 1 of the Convention against Torture. The Act defines torture as “any act which causes severe pain” whereas the Convention reads “severe pain and suffering.” Moreover, whereas the Convention against Torture gives examples of the various purposes for which torture is inflicted by way of illustration, the Sri Lankan Act is phrased so that the examples are treated as exhaustive. The UN Committee against Torture and Human Rights Committee have both recommended that the Torture Act be brought in line with the Convention against Torture and the International Covenant on Civil and Political Rights (ICCPR) respectively.<sup>19</sup>

#### ❑ **International treaties:**

The Constitution of Sri Lanka is silent on the incorporation and status of international human rights treaties in the domestic legal order.<sup>20</sup> Human rights treaties ratified by Sri Lanka cannot be directly invoked or enforced through the courts or by the administration in Sri Lanka but must be incorporated into domestic law before the courts or competent authorities can apply them. Even so, the courts of Sri Lanka have referred to them in their judgments.

Sri Lanka enacted the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994 to give effect to the Torture Convention. The Act has the same status as other statutory legislation.

Sri Lanka has ratified the following treaties prohibiting torture:

- ❑ Geneva Conventions of 1949 (1959)
- ❑ International Covenant on Civil and Political Rights [ICCPR] (1980)
- ❑ UN Convention against Torture and Inhuman and Degrading Treatment (1994)<sup>21</sup>
- ❑ First Optional Protocol to the International Covenant on Civil and Political Rights [ICCPR] (1997)

## **C.Domestic remedies/mechanisms available to torture survivors**

#### ❑ **Constitutional remedies**

<sup>19</sup> Concluding Observations of the UN Committee against Torture: Sri Lanka, UN Doc. A/53/44, 19 May 1998, paras.243-257, para.254 and UN Doc. CCPR/CO/79/LKA, supra, para.9.

<sup>20</sup> Article 157 of the Constitution, the only provision providing for the direct application and force of law of treaties concerns investment treaties only.

<sup>21</sup> Sri Lanka has not ratified the Optional Protocol to the UN Convention against Torture. The Optional Protocol envisages visits to places of detention to prevent torture and ill treatment. It was adopted in December 2002 and had, as of August 2004, been ratified by four States. See, for more information, <http://www.apr.ch/un/opcat/opcat.shtml>.

Article 17 of the Constitution stipulates that every person is entitled to a remedy for the infringement of fundamental rights by state action.<sup>22</sup> The Supreme Court has pursuant to Article 126 of the Constitution sole and exclusive jurisdiction to hear and determine cases relating to the infringement of fundamental rights by State action.

Any person can bring an application to the Supreme Court by letter addressed to the Chief Justice alleging violation of a fundamental right (Article 11 of the Constitution) or by way of a formal application (petition & affidavit supported by medical reports) by the victim or an attorney-at-law on his behalf, within 30 days of such infringement.<sup>23</sup> These applications are private prosecutions brought by victims or by lawyers on their behalf.

A torture survivor may take legal action against the State and individual perpetrators before the Supreme Court. In recent practice, the reparations awarded by the Supreme Court are limited to (a) obtaining compensation from an individual perpetrator and the State and (b) a declaration of infringement of fundamental rights, including torture.<sup>24</sup> Relatives of a torture victim have no express standing, to invoke the fundamental rights provisions according to the wording of Articles 17 and 126 of the Constitution and earlier jurisprudence. However, the Supreme Court held in a recent judgment that persons other than the victim can have standing under Article 126 (2) of the Constitution, at least in cases where the infringement resulted in the death of the victim:

“It could never be contended that the Fundamental Rights ceased and would become ineffective due to the intervention of a death of a person, especially in circumstances where death in itself is the consequence of injuries that constitutes the infringement. [...] Hence, when there is a causal link between the death of a person and the process which constitutes the infringement of such person’s fundamental rights any one having a legitimate interest could prosecute that right in a proceeding instituted in terms of Article 126 (2) of the Constitution.”<sup>25</sup>

A case has to be proved by balance of probability or by preponderance of the evidence.<sup>26</sup> At the time of filing a fundamental rights application the victim can request the Court to call for the medical reports from the hospital or for an order directing a JMO to examine the person and furnish a report. This is the practice that is generally followed.

The Supreme Court has a wide discretionary power to grant relief in fundamental rights cases<sup>27</sup> and has construed the relevant constitutional provisions as containing a right to compensation (especially in regards to rights to freedom from arbitrary arrest and detention, and torture).<sup>28</sup> In recent rulings the Supreme Court has held that:

- a) pecuniary and non-pecuniary aspects may be taken into consideration<sup>29</sup> and other forms of reparation may also be awarded;
- b) the State is liable for the infringement of fundamental rights by its officials;<sup>30</sup>

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<sup>22</sup> Article 17 of the Constitution.

<sup>23</sup> Article 126 (2) of the Constitution. Article 171 (2) of the 2000 Draft Constitution proposed extending this time limit to three months. However, Parliament rejected the bill to repeal the current Constitution, when it was presented in Parliament on 3 August 2000.

<sup>24</sup> A declaration issued by the Supreme Court in fundamental human rights applications does not constitute a punitive measure.

<sup>25</sup> S.C. (F.R.) Application No. 471/2000- *Case of Kotabadu Durage Sriyani Silva, Pettawatta, Gomarankada, Payagala v Chanaka Iddamalgoa*, Officer-in Charge, Police Station, Payagala, Inspector & others, decided on 10 November 2002.

<sup>26</sup> *Channa Pieris and Others v. Attorney-General and Others (Ratawesi Peramuna Case)*, (1994) SLR 1.

<sup>27</sup> Article 126 (4).

<sup>28</sup> *Saman v. Leeladasa and Another*, S.C. Application No.4/88, October 6 and 7, 1988.

<sup>29</sup> See *ibid.*

<sup>30</sup> *A.K. Velmurugu v. The Attorney-General and Another*, S.C. Application No.74/81, October 19, 20, 21, 30, 1981, Per Wanasundera.

c) officials can also be held individually responsible. In recent years, the Supreme Court has increasingly held perpetrators of torture personally liable to pay compensation to the victim.<sup>31</sup> The State may also take disciplinary or legal action against the official whose conduct led to state liability.

If the Court awards compensation against an individual defendant who refuses to pay damages or has no means to do so, the damages awarded against the individual defendant cannot be recovered from the State. The torture survivor may apply for a writ of execution against the individual in order to seize his movable and immovable property.

#### ❑ Criminal procedures

A torture survivor or his/her lawyer may complain to the police with the aim of seeking disciplinary action or criminal prosecution. If the torture has been inflicted by the local police, the complaint can be made orally or in writing to a higher police authority in charge of the local police in question. This can be done in the following order:

Assistant Superintendent of Police (ASP) → Superintendent of Police (SP) → Deputy Inspector General of Police (DIG) → the Police Headquarters.<sup>32</sup>

Alternatively, he or she may complain in writing to the Attorney General's Department.<sup>33</sup>

The National Police Commission (NPC) was established through an amendment to the Constitution, to internally investigate allegations against police officers, including torture.<sup>34</sup> Under Article 155G (1) of the 17<sup>th</sup> Amendment "the appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the Inspector General of Police." Article 155G (2) provides that " the Commission shall establish procedures to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purpose".<sup>35</sup> According to the Chairman of the NPC, a Public Complaints Unit was established at NPC's Head Office on 1 October 2004.<sup>36</sup>

A torture victim, a relative or an attorney-at-law on their behalf can also file a criminal action against an alleged torturer for "voluntarily causing hurt" under the Penal Code, provided the police have not filed an action themselves. Such proceedings can be instituted in a Magistrate's Court, by lodging an oral or written complaint to a Magistrate stating that an offence has been committed over which the court has jurisdiction. Written complaints must be signed by the complainant and furthermore, the victim must append a certified copy of the

<sup>31</sup> See e.g. SCA 623/2000; SCA 290/98; SCA 66/97; SCA 98/97; SCA 477/96; SCA 615/95.

<sup>32</sup> See Criminal Procedure Code, Chapter XI, Sections 109 (1), (2), (5) (a) and 125.

<sup>33</sup> There are no laws applicable as such. For the implementation of the Torture Act, a Perpetrators of Torture Prosecution Unit has specially been set up in the Attorney General's Department on the basis of an internal arrangement.

<sup>34</sup> The NPC was established in late 2002, pursuant to the enactment of the Seventeenth Amendment to the Constitution. The Seventeenth Amendment to the Constitution was certified on 3 October 2001.

<sup>35</sup> In its Concluding Observations on Sri Lanka's State Party report, the UN Human Rights Committee stated that "the National Police Commission complaints procedure should be implemented as soon as possible". See, UN Doc. CCPR/CO/79/LKA, 1 December 2003, para.9. Subsequently, at the 60<sup>th</sup> session of the UN Human Rights Commission, the Hong-Kong based NGO, Asian Legal Resource Centre, distributed a written statement entitled *The role of the National Police Commission of Sri Lanka in establishing an effective complaint procedure against police*. See, UN Doc. E/CN.4/2004/NGO/47, 16 February 2004.

<sup>36</sup> In a letter addressed to the Executive Director of the NGO, Asian Human Rights Commission, dated 7 October 2004, the Chairman of the NPC stated that the Public Complaints Unit was established on 1 October 2004. See, Asian Human Rights Commission, Update on Urgent Appeal, 12 October 2004 available online at <http://www.ahrchk.net/ua/mainfile.php>. Annex 2 of this Guide reproduces the text of the 7 October 2004 correspondence from the Chairman of the NPC.



initial complaint made to the police as well as a medical report from a government hospital that is normally not made available without a court order.<sup>37</sup>

Compensation cannot be claimed as part of criminal proceedings. However, compensation may be awarded by the Court pursuant to s.17 (4) of the Criminal Procedural Code. This provision stipulates that a court can award compensation to be paid by the offender in cases where it refrains from imposing a prison sentence or from proceeding to conviction. The maximum amount of compensation that a Magistrate's Court can award to an aggrieved party is Rs.500 (Section 17 (7) Civil Procedure Code). This provision is only applicable in cases of action filed under the Penal Code for voluntarily causing hurt which are being dealt with by the Magistrate's Court, and not in torture cases. A rape victim may obtain compensation from the offender according to the provisions stipulated in the Penal Code Amendment Act No.22 of 1995 (Section 364 (1) Penal Code).

#### □ **Civil procedures**

Victims may claim compensation through a civil action for damages in the District Court under the common law. A damages claim may be for pecuniary and non-pecuniary losses. The victim and his or her relatives can also claim compensation against the State pursuant to the Crown (Liability in Delict) Act 1969 for unlawful injury caused by law enforcement personnel.<sup>38</sup>

Civil suits must be brought within two years from the time when the cause of action has arisen (Prescription Ordinance, Section 9). In cases against the State, which are brought against the Attorney General, there is a notice period of one month before a suit can be instituted (Sections 456 and 461 Civil Procedure Code). The burden of proof lies on the plaintiff who has to prove the case by a balance of probability or preponderance of the evidence.<sup>39</sup> The Court will consider such factors as the cost of rehabilitation and measures of satisfaction when awarding damages. Costs are calculated according to the rules of court.<sup>40</sup>

In civil actions, enforcement procedures are governed by the Civil Procedure Code.<sup>41</sup> The creditor can apply to the District Court to obtain a writ of execution for the attachment of assets and seizure of goods belonging to the debtor. All assets of the debtor, with the exception of his salary, are liable to be seized for enforcement.

#### □ **National Human Rights Commission**

The Human Rights Commission of Sri Lanka (HRC), which was established in March 1997, is mandated to monitor, investigate and advise in relation to the promotion and protection of human rights. It was set up as a permanent national institution to investigate any infringement or imminent infringement of a fundamental right declared and recognised by the Constitution.<sup>42</sup>

A victim of torture or any interested party, or a lawyer on their behalf, may complain to the HRC in writing alleging a violation of Article 11 of the Constitution within a reasonable time.<sup>43</sup>

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<sup>37</sup> See Section 136(1) (a) and Sections 122 (1), (2), 124 and 137 of the Criminal Procedure Code, respectively. These provisions are meant to assist the police in conducting investigations. There are no similar provisions supporting private complaints in the Magistrate's Courts.

<sup>38</sup> The procedures are governed by the Civil Procedure Law.

<sup>39</sup> Sections 101 and 102 of the Evidence Act No.3 of 1961.

<sup>40</sup> Chapter XXI, specially Section 214 of the Civil Procedure Code. The plaintiff is obliged to pay lawyers' fees as well as stamp duty for every document tendered to the Court according to the value of the claim.

<sup>41</sup> Section 218 of the Civil Procedure Code.

<sup>42</sup> Initial reports of States parties due in 1995: Sri Lanka, UN Doc. CAT/C/28/Add.3, 21 November 1997, para. 28.

<sup>43</sup> See Section 14 of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996.

Under Section 14 of the Human Rights Commission Act, the Commission has the power to conduct investigations into complaints of violations of fundamental rights. Torture victims can also obtain reparation through the HRC. It has no power to make orders, but may recommend compensation.<sup>44</sup> The Commission has no power to enforce its recommendations.

Seeking redress through the HRC does not exclude recourse to the courts. It is supplementary and complementary. Those who cannot come before the Supreme Court within one month can make a complaint to the HRC or to any of its provincial offices. The period in which the matter is pending before the HRC is excluded in calculating the one month period for making an application to the Supreme Court.<sup>45</sup> The Supreme Court also refers complaints to the HRC for inquiry and report.

#### □ **Administrative procedures**

The Government has not established any reparation scheme for torture committed in the context of the armed conflict and thereafter. There is also no general compensation scheme for victims of crime.

The Government has, however, provided some limited relief in disappearance cases.<sup>46</sup>

## **D. International remedies/mechanisms available to torture survivors**

When domestic remedies fail to provide prompt and adequate redress, torture survivors and their families directly, or through their lawyers, can bring claims before international human rights bodies.

Since international law considers that States should have an opportunity to repair any human rights violation for which they are responsible before the international bodies intervene<sup>47</sup>-- international procedures for individual complaints generally require domestic remedies to have been "exhausted" before accepting to examine the complaint. However, there is no need to exhaust domestic remedies when they are ineffective or cannot provide fair and adequate reparation. In such cases torture victims, their families or/and their lawyers can seek recourse through the most appropriate *individual complaints procedure* at the international level.<sup>48</sup>

In Sri Lanka, victims of torture can bring individual claims against the State for the failure to provide effective remedies and adequate reparation (*complaints procedures*) before the UN Human Rights Committee.

It is also possible to send information on the general failure of the Sri Lankan State to prevent and punish torture and to afford effective remedies and adequate reparation for victims (*reporting procedures*) to the UN Committee against Torture and the UN Special Rapporteur on Torture. The UN Special Rapporteur also admits information on individual cases but can only refer them to the government in question.

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<sup>44</sup> Ibid., Section 15 (3)(c).

<sup>45</sup> Ibid., Section 13 (1).

<sup>46</sup> UN Doc. CCPR/C/SR.2156, *supra*, para.23.

<sup>47</sup> This principle does not apply for systematic or gross violations of human rights. For more information see *Reparation - A Sourcebook For Victims Of Torture And Other Violations Of Human Rights And International Humanitarian Law*, REDRESS, March 2003, available at <http://www.redress.org/publications/SourceBook.pdf> (REDRESS' Sourcebook on Reparation).

<sup>48</sup> *Idem*.

For more information on universal and regional human rights mechanisms, see Part II, section E and Annex I of *Action Against Torture: A Practical Guide to the Istanbul Protocol for Lawyers*, as well as Part II, section B, for a full description of “preventative mechanisms” (international bodies in charge of visiting places of detention).

## 1. International Human Rights Complaints Procedures

### □ UN Human Rights Committee

The UN Human Rights Committee was established pursuant to Article 28 of the International Covenant on Civil and Political Rights (ICCPR) to monitor State Parties’ implementation of the ICCPR.

Torture is prohibited under Article 7 of the ICCPR and under Article 2, States are obliged to provide effective remedies for the rights protected by the ICCPR and if breached, to provide adequate reparations to the victims.

As Sri Lanka has ratified the first Optional Protocol to the ICCPR, torture victims directly, or through their lawyers, can submit individual communications to the Committee complaining that their rights under the ICCPR have been violated (i.e. Articles 2, 7 and 10). If the petition is found admissible, the Committee issues a decision on the merits and, if appropriate, on the forms of reparation due to the petitioner(s). The Committee’s views are not binding but are sent as recommendations to the State Party and are made public in its annual report.<sup>49</sup>

A number of communications alleging violations of ICCPR provisions by the Sri Lankan authorities have been submitted to the UN Human Rights Committee under its complaints procedures.<sup>50</sup> Recently, the UN Human Rights Committee considered a communication from a Tamil detainee who alleged violations of their rights under Articles 2, 7 and 14 of the ICCPR.<sup>51</sup> The UN Human Rights Committee found violations in respect of Article 14, read together with Articles 2 and 7, concluding that, *inter alia*, the Sri Lankan authorities were under an obligation to provide an effective remedy, including release or retrial and compensation.<sup>52</sup>

### □ UN Committee against Torture

The Committee against Torture also has an individual complaints procedure in accordance with Article 22 of the UN Convention against Torture; however, Sri Lanka has not yet accepted the Committee’s jurisdiction.<sup>53</sup>

## 2. International Human Rights Reporting Procedures

### □ UN Committee against Torture

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<sup>49</sup> Under Article 40 of the ICCPR, States Parties to the ICCPR are required to submit an initial report on the measures they have adopted which give effect to the rights recognized within the Covenant within one year of its entry into force and thereafter every five years.

<sup>50</sup> Communications submitted to the UN Human Rights Committee alleging violations of ICCPR provisions by the Sri Lankan authorities are available online at <http://www.unhchr.ch/tbs/doc.nsf>.

<sup>51</sup> UN Human Rights Committee, Communication No. 1033/2001, UN Doc CCPR/C/81/D/1033/2001, 23 August 2004.

<sup>52</sup> The UN Human Rights Committee also concluded that the Sri Lankan State is under an obligation to avoid similar violations in the future and should ensure that the “impugned sections” of the Prevention of Terrorism Act No.48 of 1979 (as amended by Act No. 10 of 1982 and No.22 of 1988) are made compatible with the provisions of the ICCPR. See *idem*, paragraph 7.6.

<sup>53</sup> See Rule 96 of the UN Committee against Torture’s Rules of Procedure on declarations by State Parties under Article 22 of the Convention.

Under Article 19 of the UN Convention against Torture, States Parties are obliged to submit periodic reports on the measures they have taken to give effect to their undertakings under the Convention.<sup>54</sup> Sri Lanka has submitted its second periodic report to the UN Committee against Torture and the Committee is scheduled to review it in May 2005.<sup>55</sup>

Under Article 20, if the Committee receives reliable information that appears to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee must invite that State party to cooperate in the examination of the information and submit observations with regard to the information concerned. In agreement with the State Party, the inquiry may include a visit to its territory. The Committee may, after consultation with the State party concerned, decide to include a summary account of the results of the inquiry in its annual report to the other States parties and to the UN General Assembly.

In 1998, following the submission of information on the alleged systematic practice of torture in Sri Lanka by NGOs to the UN Committee against Torture, and in accordance with Article 20 of the Convention, the Committee requested to visit Sri Lanka. The Government accepted this request and the visit took place in August- September 2000.<sup>56</sup>

#### □ **UN Special Rapporteur on Torture**

The Special Rapporteur's remit to provide the UN Commission on Human Rights with information on governments' legislative and administrative actions in relation to torture extends to all UN Member States. Torture victims or their lawyers may submit a communication to the Special Rapporteur, who may transmit an urgent appeal (to prevent possible incidents of torture) or raise the allegation in a communication with the Sri Lankan Government.

A recent report by the Special Rapporteur gives details on the communications and urgent appeals transmitted to the Sri Lankan Government.<sup>57</sup>

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<sup>54</sup> Article 19(1) of the UN Convention against Torture states: "[T]he States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request".

<sup>55</sup> Second periodic report of Sri Lanka to the UN Committee against Torture, UN Doc. CAT/C/48/Add.2., 6 August 2004.

<sup>56</sup> For security reasons, members of the UN Committee against Torture were unable to visit the northern and eastern parts of Sri Lanka, where many allegations of torture had been reported. For the Committee's findings from the visit, see Activities of the Committee under Article 20 of the Convention: Sri Lanka, UN Doc. A/57/44, 17 May 2002.

<sup>57</sup> See Addendum, Report of the Special Rapporteur on Torture to the UN Commission on Human Rights, E/CN.4/2004/56/Add.1, 23 March 2004. According to a representative of the Sri Lankan Government before the UN Human Rights Committee, as of October 2003, 110 cases had been referred to the Sri Lankan government by the UN Special Rapporteur on Torture. In 25 of those cases, investigations had been completed but criminal proceedings had not been instituted, on the advice of the Attorney-General; in 4 cases, disciplinary action had been instituted; and in 9 cases, proceedings had been instituted in the High Court. Seventeen cases were currently under investigation and five cases were pending, awaiting instructions from the Attorney-General's Department. In 33 cases, the complaint had been withdrawn, the victim was living abroad or unable to be traced, or there was insufficient information to proceed with an investigation. See, UN Doc. CCPR/C/SR.2156, para.30.

## **PART 3: INTERNATIONAL STANDARDS CONTAINED IN THE ISTANBUL PROTOCOL**

This Part describes Sri Lanka's obligations in accordance with the international standards reflected in the Istanbul Protocol. It examines how lawyers can advocate for implementation of these international standards, through general advocacy work and by invoking domestic and international remedies on behalf of torture victims in specific cases. This Part will address the following international standards:

- A General preventative measures;
- B Specific safeguards in places of detention;
- C Investigating allegations of torture effectively;
- D Prosecution of alleged perpetrators and punishment of those responsible; and
- E Guaranteeing effective remedies and adequate forms of reparation for victims

### **A. General preventative measures in Sri Lanka**

The Istanbul Protocol recognises the obligations on States to take legislative, administrative and judicial measures to prevent torture. Through their general advocacy work and litigation, lawyers can advocate for the implementation of specific, positive measures to be implemented by their Government. Examples of recent preventative measures taken by the Sri Lankan Government are as follows:

Over the last ten years, the Government has taken a number of steps in response to human rights violations and torture: ratification of the UN Torture Convention and subsequent enactment of a Torture Act; appointment of four Commissions of Inquiry into Involuntary and Enforced Disappearances; establishment of a Human Rights Commission empowered to investigate cases of human rights violations; institution of special units responsible for prosecuting torture and involuntary or enforced disappearances in the Police and Attorney General's department and introduction of a human rights component to all of its training programmes for the Police and the Armed Forces. In 2001, the Inspector General of the Police issued an official circular to all officers in charge of Police Divisions and Specialised Divisions that stated that under no circumstances should torture be perpetrated or permitted. Under the Ceasefire Agreement entered into between the Government and the LTTE in February 2002, the Government made a permanent, political commitment that arrests of individuals would no longer continue to be made under the Prevention of Terrorism Act (PTA). Under this Act, a person can be kept in custody for 72 hours prior to being produced before a Magistrate. It was in particular during this period of police custody that torture was inflicted for the purpose of obtaining confessions. Since February 2002, persons can be arrested only under non-emergency law and kept in custody for 24 hours.

The Government has not made public statements expressing its commitment to implementing the Istanbul Protocol. However, at a Joint Meeting of the Human Rights Commission and the Police Commission, on 22 May 2004, both the Chairperson of the Human Rights Commission and the Chairman of the Police Commission condemned torture and stated that they would work to drastically reduce the number of torture cases. According to the Government "the Inter-Ministerial Working Group on Human Rights worked closely with all investigative mechanisms such as the Disappearance Investigations Unit (DIU), the Criminal Investigations Department (CID) and the Special Investigation Unit (SIU) in order to bring cases to a speedy conclusion. Torture cases would be a high priority under the National Human Rights Commission's strategic plan for 2003-2006, which also envisaged consultation with government authorities and NGOs."<sup>58</sup>

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<sup>58</sup> UN Doc. CCPR/C/SR.2156, *supra*, para.27.

While the Supreme Court has strongly condemned torture and the continuing impunity of torturers on several occasions,<sup>59</sup> the lower courts have apparently shown less willingness to take a strong stance against torture.<sup>60</sup> However, recently the first conviction under the Torture Act was determined in the Case of Jayalath. He was sentenced to 7 years imprisonment and a fine of Rs. 10,000/-.<sup>61</sup>

#### **Advocacy by lawyers for policy initiatives**

In the course of their work, lawyers may gain the opportunity to influence future policy initiatives, such as the following:

- Encouraging the Government to accept the competence of the UN Committee against Torture under Article 22 of the Convention to receive individual complaints;<sup>62</sup>
- Strengthening existing national preventative mechanisms, such as the Board of Prison Visitors and lobbying for ratification of the Optional Protocol to the UN Convention against Torture;
- Ratifying the Additional Protocols to the Geneva Conventions of 1949 and the Rome Statute of the International Criminal Court;
- Bringing the Torture Act No.22 into line with the UN Convention against Torture in respect of the definition of torture, acts that amount to torture and provisions relating to extradition, return and expulsion;
- Amending the Prevention of Terrorism Act in order to bring it into line with international standards on the prevention of torture;
- Addressing institutional reforms required within the police and Attorney General's Department to counter political interference in law enforcement activities, such as making the Police Commission (NPC) responsible for appointing the Inspector-General of Police;
- Providing specific training for law-enforcement personnel, lawyers and judges on international and domestic standards relating to the prevention of torture;
- Supporting initiatives to improve access to justice, especially in more remote regions of Sri Lanka, through awareness-raising, increasing financial assistance available to individuals and other measures;
- Disseminating information on the UN Convention against Torture and the rights and obligations stemming from it;
- Enacting a Freedom of Information Act, with provisions permitting torture victims and their lawyers to access documentation relating to criminal investigations and prosecutions, at any stage in proceedings.

<sup>59</sup> *Kulatunge J, Weragama vs. Indran and Others*, SC Appns. 396-397/93, SC Minutes, 24/02/1995.

<sup>60</sup> See *infra*.

<sup>61</sup> The Torture Act provides for a minimum penalty of seven years imprisonment.

<sup>62</sup> Sri Lanka has not recognised the competence of the UN Committee against Torture to hear individual complaints under Article 22 of the UN Convention against Torture nor has Sri Lanka ratified its Optional Protocol. The Optional Protocol to the UN Convention against Torture envisages visits to places of detention to prevent torture and ill treatment. It was adopted in December 2002 and had, as of August 2004, been ratified by four States. See for more information <http://www.ap.t.ch/un/opcat/opcat.shtml>.

## B. Specific safeguards in places of detention and rights of persons deprived of their liberty

In light of the obligation on States to take measures to prevent torture, international human rights mechanisms have developed standards on specific measures that can be taken to minimise the risk of torture, such as implementing "custodial safeguards" in places of detention.<sup>63</sup>

This section highlights some of the key safeguards to protect detainees from the risk of torture (a full description of these safeguards can be found in: Section B, *Action Against Torture: A Practical Guide to the Istanbul Protocol for Lawyers*):

- ❑ National preventative mechanisms: independent bodies, consisting of legal and medical professionals making periodic visits to any place of detention and with access to all detainees.
- ❑ Right to communicate with and notify a third person of detention: granting detainees the possibility to immediately notify relatives or a third person of their detention.
- ❑ Right to access a doctor: this includes a prompt and independent medical examination upon a person's admission to a place of detention, health of detainees should be ensured during the whole period of detention and detainees should have the right to an independent medical examination by a doctor of their own choice.
- ❑ Right to access a lawyer of their own choice: granting detainees prompt access to a lawyer of their own choice.
- ❑ Right to challenge the lawfulness of detention: a person who has been detained is entitled to have the lawfulness of their detention subject to prompt review by a judicial authority.

### Legal framework and practice in Sri Lanka

#### ❑ National preventative mechanisms

In Sri Lanka several preventative mechanisms are in operation, in particular the Board of Prison Visitors, the Human Rights Commission of Sri Lanka and visits by magistrates.

The Board of Prison visitors has been described as follows: "The Board of Prison visitors appointed by the Minister of Justice under the Prison Ordinance are empowered to visit any prison in the island to examine conditions, hear complaints of inmates and make appropriate recommendations to the authorities. There are also local prison visitors committees for each prison entrusted with the task of overseeing the welfare of prisoners."<sup>64</sup> According to certain lawyers, the Board of Prison visitors constitutes a potentially effective preventative mechanism, if the scope of its authority could be strengthened.

The HRC has the right to enter any place of detention without notifying the authorities beforehand. While the HRC can play a crucial role in preventing torture, it is under-staffed and the follow-up measures tend to be slow. Visiting human rights officers do send reports to

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<sup>63</sup> International standards containing detailed safeguards for detainees include the UN Code of Conduct for Law Enforcement Officials, the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

<sup>64</sup> UN Doc. CAT/C/28/Add.3, *supra*, para.75.

headquarters of the detention centres and/or police but often no further measures appear to be taken to remedy the situation.

Under the provisions of the Judicature Act, magistrates have the authority, exercised by certain but not all magistrates in practice, to make monitoring visits to detention facilities.

#### **What legal and practical measures can lawyers take?**

- ◆ Support measures to strengthen the Board of Prison Visitors, as a national preventative mechanism, in line with the requirements for national preventative mechanisms under the Optional Protocol to the UN Convention against Torture and relevant international standards;
- ◆ Petition magistrates to exercise their authority under the Judicature Act to make visits to detention facilities without giving prior notification to the relevant authorities;
- ◆ Visit detention facilities in person when seeking information about a detainee, rather than relying on information given by public officials over the telephone, to minimise delays in establishing contact with detainees at risk of torture;
- ◆ Where information on an individual has been submitted to an international human rights body or mechanism, such as the UN Special Rapporteur on Torture, continue to send updated information on the status of that individual, to facilitate interventions by the UN Special Rapporteur on Torture with the Sri Lankan authorities.

#### **□ Right to communicate with and notify a third person of detention**

The right of detainees to communicate with and notify a third person of their detention is not explicitly provided for in Sri Lankan law. However, such a right is envisaged in the 2000 draft Constitution.<sup>65</sup>

The Human Rights Commission Act provides that the Commission should be informed within 24 hours of a person being taken into custody. According to Sri Lankan lawyers, this is sometimes not followed in practice.

According to the Sri Lankan Government, a 24-hour telephone hotline has been established in detention facilities, permitting third persons and relatives to ascertain whether an individual has been arrested and if so, the exact place of detention. To increase the effectiveness of this hotline, a computerised Central Police Registry has also been established at Police Headquarters. This registry contains information on the arrest and detention of suspects under the PTA.<sup>66</sup>

#### **What legal and practical measures can lawyers take?**

- ◆ When lawyers become aware that a law enforcement official has failed to inform the Human Rights Commission, within the prescribed 24 hours, that an individual has been detained, request the detaining authorities to specify reasons, in writing, for failing to comply with national law and international standards on the right of detainees to communicate with and notify a third person of their detention; take statements from

<sup>65</sup> Article 10 (4).

<sup>66</sup> See CCPR/C/LKA/2002/4, *supra*, paras. 184-185.



anyone present when a detainee is obstructed in exercising their rights, as evidence against implicated law enforcement officials;

- ◆ Seek sanctions against law enforcement officials who deny detainees their right to communicate with and notify a third person of their detention, citing relevant international standards on the duties of these officials, such as the UN Code of Conduct for Law Enforcement Officials;
- ◆ Consider legislative advocacy measures to ensure that Sri Lankan law complies with international standards on detainees' rights to communicate with and notify a third person of their detention;
- ◆ In communications to the UN Human Rights Committee and relevant international human rights mechanisms, include information and documentation on how detainees were denied the right to communicate with and notify a third person of their detention.

#### □ **Right to access a doctor**

Neither the Constitution nor statutory legislation, contain an express right of access to a doctor.

In practice, persons deprived of their liberty, do not receive prompt and independent medical examination on entry into a detention facility. However, if they complain to the prison authorities, depending on the officer to whom the complaint is made, they may be examined medically. Even where an examination is conducted, medical professionals rarely document psychological torture.

Under domestic law, a torture victim does not have the right to be examined by an independent doctor of his/her choice. However, he/she could ask the prison authorities to take him before a Magistrate and ask for a Court order, permitting him/her to request a doctor of his/her choice to investigate. The results of the examination are conveyed to the Judge who ordered the investigation. The victim's lawyer is also generally given a copy.

When a suspect is produced in Court from police custody, the person or his lawyer can request the Court to have him examined by a government medical practitioner and call for a medical report on the injuries and their causes (See section 122, Criminal Procedure Code). An injured person can be treated in the prison hospital. The history given by the injured person is recorded by the medical practitioner. At the time of filing a fundamental rights application the victim can request the Court for an order directing a Judicial Medical Officer or a District Medical Officer (DMO) to examine the person and furnish a report. In case of suspicious deaths, an autopsy has to be carried out. The courts and police generally follow the procedures concerning the examination of torture survivors and the drawing up of medical reports.

There have been reported instances in which doctors issued false or insufficient reports, sometimes simply stating that there are no injuries, usually in cases where police officers are present during the investigation.<sup>67</sup> Examinations have also been delayed which, in rape cases, has resulted in the allegation no longer being proven.<sup>68</sup>

The Supreme Court held in *Vijitha v Wijesekara & Ors* in 2002 that "No reliance can be placed on the report of the Assistant Junior Medical Officer for Colombo [who had found that there was no evidence of the alleged injuries] given that V was in police custody at the

<sup>67</sup> See on the role of the medical profession, Second Special Report: *Endemic torture and the collapse of policing in Sri Lanka*, Article 2, supra.

<sup>68</sup> See Amnesty International, *Rape in custody*, supra, p.7, specifying the reasons why criminal investigations into rape in custody cases are often unsuccessful.

time.<sup>69</sup> However, even where lawyers appearing for suspects inform the Magistrate of the fact that the suspect has been tortured resulting in injuries, some Magistrates have directed that treatment is to be provided to the suspect without getting him examined by a JMO and calling for a medical report on injuries.<sup>70</sup>

#### **What practical and legal steps can lawyers take?**

- ◆ As a non-litigation measure, support the issuance of administrative regulations or directives by the Ministry of Health to all JMOs giving guidelines on how to identify signs of physical and psychological torture when conducting medical examinations and the rights of detainees/obligations on law enforcement officials in relation to medical examinations; these guidelines could refer to the Istanbul Protocol expressly, including the anatomical drawings contained in Annex III;
- ◆ In fundamental human rights applications to the Sri Lankan Supreme Court, include a request to the Court to order an independent medical examination of the torture victim, citing relevant international standards on the procedural safeguards that should be ensured during medical examinations;
- ◆ Where doctors falsify medical reports, pursuant to the medical examination of a torture victim, or where medical reports do not accurately document psychological and physical indications of torture, seek disciplinary sanctions and/or criminal prosecution of implicated individuals.

#### **□ Right to access a lawyer of their own choice**

Section 41 of the Judicature Act entitles every person to be represented by a lawyer of his/her choice before any Court or Tribunal, however, at present, there is no constitutional right of access to a lawyer, though such a right was included in the draft Constitution of 3 August 2000.<sup>71</sup> A person detained in a police station has no access as of right in Sri Lankan law. There is a binding agreement between the Bar Association and the Head of the Police Department that a lawyer may meet with detainees (their clients) whilst in police custody. Despite this agreement, in practice, accessing a lawyer from police custody remains problematic. The UN Committee against Torture, following its inquiry into systematic torture in Sri Lanka, recommended to the Government of Sri Lanka to “guarantee the access of counsel to detainees in police custody.”<sup>72</sup>

In its State Party report to the UN Committee against Torture, the Sri Lankan Government states: “The Police Department does not object to counsel/attorney-at-law representing the rights of suspects detained at police stations, interviewing/advising such suspects prior to their being produced before a magistrate. However, owing to the need to ensure that police investigators are able to conduct the initial investigation and interview suspects in an

<sup>69</sup> *Vijitha v Wijesekera & Ors*, (2003) 4 CHRLD 142.

<sup>70</sup> The Supreme Court has commented on this attitude of some Magistrates: “In my opinion it is indeed a matter of concern and trepidation that Magistrates in spite of repeated reminders by this Court do not exercise what is their duty namely to question and probe from a person produced before them from Police custody and to so record his observations. It has been my experience that Magistrates did act so and it was a deterrent to breaches of fundamental rights even when they were not enshrined by a constitution. It is a further tragedy that some members of the legal profession do not act with courage and fearlessness in what is their duty. I say so with responsibility inasmuch as an allegation of assault and of torture has been made to the Superintendent of Police on the 17<sup>th</sup> of February 1998 after this release of the petitioner by the Magistrate in consequence of which the petitioner was produced before the JMO, but the Attorneys-at-Law did not bring this to the notice of the Magistrate. May be the medical report in the first instance would have been quite different if the petitioner was so produced on the instructions of the Magistrate.” - L. H. G. Wijesekera J, *Pradeep Kumar Dharmaratne vs. Inspector of Police Dharmaratne and Others*, S. C. Appn. No. 163/98, SCM 17. 12. 1998.

<sup>71</sup> Article 10 (5) of the 2000 Draft Constitution: “Any person arrested shall have the right to consult and retain an attorney-at-law and such attorney-at-law shall be afforded all reasonable facilities by the State.”

<sup>72</sup> UN Doc. A/57/44, paras.117-195, para.136 (g).

unhindered manner, such interview (by counsel representing suspects) shall not take place prior to the recording of the statement of the suspect.”<sup>73</sup>

Even when individuals detained in prisons are able to meet with a lawyer of their choice, it is not always possible to finish a consultation within the time period given by the authorities, since prison rules permit visits from lawyers only between certain hours. There is no legal aid for detainees to hire a private lawyer but accused persons have access to a defence lawyer appointed by the State.

Where the authorities fail to grant access, the period of one month within which a fundamental rights case before the Supreme Court has to be filed is increased if it can be established that the person had been deprived of his access to a lawyer.

#### **What legal and practical steps can lawyers take?**

- ◆ As a legislative advocacy measure, support calls for legislative reform to provide for judicial review, or a non-judicial oversight procedure, that permits lawyers to challenge detaining authorities, such as the police, where lawyers are denied access to individuals held in detention;
- ◆ As a non-litigation measure, support calls for revisions of instructions circulated to police by the Inspector General of Police on the international prohibition of torture, or issuance of new instructions, to include information on detainee’s rights, such as the right to access a lawyer of their own choice.

#### **□ Challenging the lawfulness of detention**

Article 13 (2) of the Constitution stipulates that no person shall be arrested except in accordance with procedures established by law and that every person held in custody, detained or otherwise deprived of personal liberty shall be brought before a judge and shall not be further held in custody except upon terms of the order of such judge made in accordance with the procedure established by law.<sup>74</sup> Article 141 of the Constitution enshrines the right to *habeas corpus*.<sup>75</sup> Pursuant to section 37 of the Criminal Procedure Code (and section 65 of the Police Ordinance), a person arrested has to be produced within 24 hours before a Magistrate who will either release him/her on bail or remand into prison custody. A Magistrate can release individuals arrested on suspicion of committing torture on bail, as well as individuals accused of lesser offences. Under the Prevention of Terrorism Act

<sup>73</sup> See second periodic report of Sri Lanka to the UN Committee against Torture, UN Doc. CAT/C/48/Add.2., 6 August 2004. para. 36.

<sup>74</sup> Article 13 (1).

<sup>75</sup> Article 151 of the Constitution states: “The Court of Appeal may grant and issue orders in the nature of writs of habeas corpus to bring up before such Court -

(a) the body of any person to be dealt with according to law ; or

(b) the body of any person illegally or improperly detained in public or private custody,

and to discharge or remand any person so brought up or otherwise deal with such person according to law : Provided that it shall be lawful for the Court of Appeal to require the body of such person to be brought up before the most convenient Court of First Instance and to direct the judge of such court to inquire into and report upon the acts of the alleged imprisonment or detention and to make such provision for the interim custody of the body produced as to such court shall seem right; and the Court of Appeal shall upon the receipt of such report, make order to discharge or remand the person so alleged to be imprisoned or detained or otherwise deal with such person according to law, and the Court of First Instance shall conform to, and carry into immediate effect, the order so pronounced or made by the Court of Appeal:

Provided further that if provision be made by law for the exercise by any court, of jurisdiction in respect of the custody and control of minor children, then the Court of Appeal, if satisfied that any dispute regarding the custody of any such minor child may more properly be dealt with by such court, direct the parties to make application in that court in respect of the custody of such minor child.”

(PTA), a person could be detained by the police for up to 3 days before being produced before a Magistrate. There is no authority to extend the period of pre-trial detention.

Under the provisions of the Ceasefire Agreement signed by the former Prime Minister, Ranil Wickremasinghe and the LTTE in 2002, it was agreed that no arrests should continue to be made under the PTA.

In practice, the 24 hours period before being brought before a Magistrate is sometimes illegally exceeded and the family of the person will be unaware that the person is in custody. During the consideration of Sri Lanka's State party report, members of the UN Human Rights Committee raised concerns about reports that "basic safeguards against arbitrary detention, such as bringing suspects before a magistrate within 24 hours, were not being respected...While the delegation would not be expected to explain the circumstances of that particular case [of having allegedly spent seven days instead of 24 hours in detention], the fact that such illegal confinement could occur indicated that the necessary procedures to bring those responsible to justice were not in place. He [Member of the UN Human Rights Committee] wondered whether the problem lay with the Attorney-General or the courts, or whether there was just no system in place to deal with it."<sup>76</sup>

The *habeas corpus* remedy has at times been ineffective because of the difficulty of accessing courts and delays in hearing the petitions.

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<sup>76</sup> UN Doc. CCPR/C/SR.2156, *supra*, para.62.

### What legal and practical steps can lawyers take?

- ◆ Make a *habeas corpus* application to the Court of Appeal, pursuant to Article 141 of the Constitution, to seek the release from detention of a detainee at risk of torture; where there are indications that the detainee has been subjected to torture, request the Court to order an immediate medical examination of the detainee;
- ◆ Systematically document incidents in which law enforcement officials in a detention facility fail to bring detainees before a Magistrate within 24 hours; when submitting information on these cases to national preventative mechanisms and relevant international human rights mechanisms, include documentation that exposes patterns of violations in specific detention facilities.

## C. Obligation to effectively investigate torture allegations

The obligation on governments to carry out effective investigations is firmly established in international law. Whenever there are indications that torture might have been committed, governments are obliged to automatically undertake an effective investigation, even without a formal complaint triggering it. Accordingly, the Istanbul Protocol provides that, "even in the absence of an express complaint, an investigation should be undertaken if there are other indications that torture or ill-treatment might have occurred". For an investigation to be "effective" under international human rights law, it must be:

1. **Prompt:** investigations should be commenced and conducted expeditiously;
2. **Impartial:** investigations should be free from undue bias and the investigations should be in the hands of an authority without links to the alleged perpetrators;
3. **Thorough:** the nature and scope of the investigation must ensure that all relevant facts and the identity of the perpetrators is ascertained.

Amongst the key principles highlighted in the Istanbul Protocol for investigations to be effective:

- ◆ Investigators must be competent, impartial and independent of suspected perpetrators and the national authority for which the investigators work;
- ◆ Methods used to carry out investigations should meet the highest professional standards and findings shall be made *public*;
- ◆ Investigators should be obliged to obtain all information necessary to the inquiry and should effectively question witnesses;
- ◆ The investigative body should have access to independent legal advice to ensure that the investigation produces admissible evidence for criminal proceedings;
- ◆ Torture victims, their lawyer and other interested parties should have access to hearings and any information relevant to the investigation and must be entitled to present evidence and allowed to submit written questions;
- ◆ Detainees should have the right to obtain an alternate medical evaluation by a qualified health professional and this alternate evaluation should be accepted as admissible evidence by national courts.

### □ Legal framework and practice in Sri Lanka

The Criminal Investigations Department (CID) of the police conducts all investigations into complaints of torture on the directions of the Attorney General's Department. The Attorney

General's Department is also responsible for the prosecution of alleged perpetrators in accordance with the Torture Act.<sup>77</sup>

There is a Prosecution of Torture Perpetrators Unit in the Attorney General's Department which was set up in November 2000. It has taken steps to investigate and prosecute acts of torture committed since Sri Lanka's ratification of the Torture Convention. However, many torture survivors have apparently refrained from making complaints, particularly against members of the army in the Northeast, because of a lack of access to the available mechanisms, out of fear of reprisals or because of the stigma attached to rape in custody cases. The Human Rights Committee noted "with concern reports that victims of human rights violations feel intimidated from bringing complaints or have been subjected to intimidation and/or threats, thereby discouraging them from pursuing appropriate avenues to obtain an effective remedy (art. 2 of the Covenant)."<sup>78</sup>

Where there are allegations of torture against the officers of the CID, the investigation will be entrusted to a Special Investigation Unit at the Police Headquarters under a Senior Deputy Inspector General of Police.<sup>79</sup> Additionally, as noted in Part 2C above, a complaint can now be filed with the Public Complaints Unit at Police Headquarters.

The opening of an investigation is obligatory in cases where there is credible evidence of the commission of a serious offence, i.e. a prima facie case.<sup>80</sup> The police may decide to discontinue an investigation on the basis of a lack of evidence to prove a case beyond all reasonable doubt.<sup>81</sup> The Attorney General has the power to review such a decision and give necessary directions to continue the investigations.<sup>82</sup> The Courts may also review such a decision but there are no precedents to date. The HRC may also inquire into a complaint of not proceeding with investigations but it has no power to give directions to reopen the investigations. Additionally, lawyers have reported that in practice, it can be difficult to keep track of the progress in an investigation due to bureaucracy in transferring information between HRC regional offices and its headquarters in Colombo.

The Human Rights Commission has power to conduct investigations into complaints of violations of fundamental rights. Where an investigation discloses the infringement of a fundamental right, the Commission has the power to refer the matter for reconciliation or mediation.<sup>83</sup> Where the attempt at reconciliation or mediation is not successful, the Commission may recommend to the appropriate authorities that a prosecution or other proceedings be instituted against the alleged violator; or make such recommendation to the appropriate authority with a view to preventing or remedying the violation.<sup>84</sup> A copy of the recommendation will be sent to the aggrieved person, the head of the institution concerned and the Minister to whom the institution concerned has been assigned.<sup>85</sup> The Commission will require any authority or persons to whom a recommendation is addressed to report to the Commission the action taken to give effect to the recommendation.<sup>86</sup> Where any authority fails to report to the Commission, the Commission shall make a full report of the

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<sup>77</sup> Whether under the Torture Act or under the Penal Code for voluntarily causing hurt, the Police will not take steps to prosecute a torturer without a direction by the Attorney General. The Police have the power to institute action under the Penal Code for voluntarily causing hurt in the Magistrate's Court. Under the Torture Act only the Attorney General can indict a person in the High Court.

<sup>78</sup> UN Doc. CCPR/CO/79/LKA, supra, para.9.

<sup>79</sup> In 1997, a Disappearance Investigations Unit was also established.

<sup>80</sup> Section 109(5)(a) Criminal Procedure Code; Sections 109(5)(b), 114, 115(1), and 116(1) Criminal Procedure Code.

<sup>81</sup> Section 109 (5) (b) Criminal Procedure Code.

<sup>82</sup> Sections 393 and 397 Criminal Procedure Code.

<sup>83</sup> Ibid., Sections 15 (2) and 16.

<sup>84</sup> Ibid., Section 15 (3).

<sup>85</sup> Ibid., Section 15 (6).

<sup>86</sup> Ibid., Section 15 (7).

facts to the President who shall cause a copy of the report to be placed before Parliament.<sup>87</sup> The Commission can only make recommendations and has no power to make orders.<sup>88</sup>

Investigations generally take from a few months to several years. After the recent institutional changes, investigations conducted by the CID on the directive of the Attorney General's Department may be conducted more expeditiously and to a higher standard. The HRC has so far not played a major role in the investigation and subsequent prosecution of alleged torturers, mainly due to a lack of powers, effectiveness and resources.

The UN Committee against Torture has "welcomed the significant efforts undertaken by the Government of Sri Lanka to fight and prevent acts of torture" while noting that "investigation by the Sri Lankan police of alleged instances of torture is not satisfactory, as it has been often inordinately delayed. Prosecution or disciplinary proceedings have until recently been rare."<sup>89</sup>

## **1. Investigating torture allegations "promptly"**

Under Sri Lankan law, there are no provisions explicitly obliging the prosecution service or other competent investigative bodies to promptly open an investigation into torture allegations.

While the opening of an investigation is obligatory in cases where there is credible evidence of the commission of the offence, i.e. a prima facie case,<sup>90</sup> the police and, to some degree, the Attorney-General have reportedly not reacted promptly to allegations of torture by ordering an immediate investigation. As noted by the Committee against Torture, investigations are "often inordinately delayed."<sup>91</sup> While Magistrates may order an investigation, they often seem to confine themselves, when a detainee alleges torture before them, to deciding whether or not an investigation was extracted under torture without ordering an investigation.

The Human Rights Commission has been criticised for its practice of seeking settlements of torture cases instead of undertaking serious preliminary investigations.<sup>92</sup> The Supreme Court, in deciding upon fundamental rights applications, has repeatedly ordered the police and the Attorney-General to take the required steps to investigate and prosecute alleged perpetrators of torture but the implementation has been wanting, undermining the power and role of the Supreme Court in ensuring protection of human rights and combating impunity.<sup>93</sup>

The UN Committee against Torture has recommended to the Government of Sri Lanka to "ensure that all allegations of torture – past, present and future – are promptly, independently and effectively investigated and the recommendations implemented without any delay."<sup>94</sup>

## **2. Investigating torture allegations "impartially" and the independence of investigating bodies**

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<sup>87</sup> Ibid., Section 15 (8).

<sup>88</sup> See for the powers of the Commission, *ibid.*, Section 11.

<sup>89</sup> UN Doc. A/57/44, paras.117-195, *supra*, paras. 195 and 179.

<sup>90</sup> Section 109(5)(a) Criminal Procedure Code; Sections 109(5)(b), 114, 115(1), and 116(1) Criminal Procedure Code.

<sup>91</sup> UN Doc. A/57/44, paras.117-195, *supra*.

<sup>92</sup> *Special Report: Torture committed by the Police in Sri Lanka*, Asian Human Rights Commission, Article 2, Vol.1, No.4, August 2002.

<sup>93</sup> See UN Doc. A/53/44, *supra*, para.250: "The Committee regrets that there were few, if any, prosecutions or disciplinary proceedings despite continuous Supreme Court warnings and awards of damages to torture victims."

<sup>94</sup> UN Doc. A/53/44, paras.243-257, *supra*, para.255 (b).

There is no genuinely independent body tasked with fully investigating torture allegations, as the HRC has only limited powers in this regard. As mentioned earlier, torture allegations are investigated by the CID on the directions of the Attorney-General. While the CID and the Attorney-General are generally independent of those officials that are being investigated for alleged acts of torture, doubts about their institutional independence remain due to a conflict of interests in combating crime on the one hand and prosecuting those who are charged with this task, i.e. police officers, on the other. The UN Committee against Torture recommended that Sri Lanka “initiate prompt and independent investigations of every instance of alleged torture.”<sup>95</sup> Furthermore, it recommended to “strengthen the Human Rights Commission and other mechanisms dealing with torture prevention and investigation and provide them with all the means that are necessary to ensure their impartiality and effectiveness.”<sup>96</sup>

### **3. Investigating torture allegations “thoroughly”**

Complainants and their lawyers are often not fully informed about the status of investigations, making it difficult to assess which steps, if any, have been taken to secure evidence. The right of individuals to access information relating to criminal proceedings is not currently entrenched in Sri Lankan law. Several reports have pointed to the lack of investigative skills and resources as one of the reasons for the lack of effective investigations.<sup>97</sup>

The practice of medical examinations and the production of medical reports are not consistent as there is no clear legislative basis and guidance. While in some cases independent medical reports are produced and applied by the courts, in others the police have reportedly obstructed medical examinations.<sup>98</sup> A further practical problem is the lack of trained judicial medical officers and a severe shortage of psychiatrists.

A serious shortcoming in Sri Lankan law and practice is the absence of an effective victim and witness protection programme. In the light of prevailing harassment and intimidation by the police, many torture survivors have either refrained from bringing torture complaints or they and witnesses have been pressurised into not making any incriminating statements. For example, lawyers have reported that where detainees are raped in custody, they are instructed by the prison authorities not to report the incident to the JMO and face reprisals for not following instructions. This practice has been facilitated by the fact that alleged perpetrators of torture are only rarely kept on remand and that no effective measures, such as strictly enforced disciplinary codes, have been taken that break up the widely acknowledged protective police culture.<sup>99</sup> Currently, there are no steps being taken to introduce a victim and witness protection programme.

The present system of investigating torture cases only came into operation in late 2000 and constitutes a significant improvement over the previous one where the police investigated police torture and there was almost complete impunity.<sup>100</sup> By November 2003, the Attorney-General had filed 40 indictments under the Torture Act. 27 police and military officers had been charged with murder in relation to disappearances.<sup>101</sup> However, in many of the cases investigated, the Unit has found that there was insufficient evidence for prosecution.<sup>102</sup>

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<sup>95</sup> UN Doc. A/57/44, paras.117-195, supra, para.136 (k).

<sup>96</sup> Ibid., para.255 (e).

<sup>97</sup> Special Report: Torture committed by the Police in Sri Lanka, Article 2, supra.

<sup>98</sup> See case of *Vijitha v Wijesekara & Ors*, supra.

<sup>99</sup> Special Report: Torture committed by the Police in Sri Lanka, Article 2, supra.

<sup>100</sup> See UN Doc. A/53/44, paras.243-257, paras.250 and 251.

<sup>101</sup> UN Doc. CCPR/C/SR.2156, supra, paras.22 and 68.

<sup>102</sup> As explained by a member of Sri Lanka’s delegation to the Human Rights Committee “A total of 110 cases had been referred to the Government by the United Nations Special Rapporteur on the question of torture. In 25 of those cases, investigations had been completed but criminal proceedings had not been instituted, on the advice of the Attorney-General; in 4 cases, disciplinary action had been instituted; and in 9 cases, proceedings had been instituted in the High Court.



### **What legal and practical measures can lawyers take?**

- ◆ Request the Attorney General to review the decision of the police/Attorney General's Department to close an investigation into torture allegations, requesting a copy of the formal decision containing the grounds for closing the investigation;
- ◆ Where a decision by the police/Attorney General's Department to close an investigation on the grounds that the torture victim's allegations lack credibility, challenge the reasoning of this decision, referring to the findings of international human rights bodies and mechanisms<sup>103</sup>;
- ◆ Request the police/Attorney General's Department for access to all documentation, including medical reports, relating to the investigation in accordance with international standards on freedom of information;
- ◆ Consider bringing a private prosecution against perpetrators of torture in a Magistrates Court;
- ◆ As a legislative advocacy measure, support calls for amendments to the Criminal Procedure Code to make decisions taken by the police and the Attorney General's Department subject to judicial review;
- ◆ In fundamental human rights applications to the Supreme Court, challenge the scope of discretion permitted by the Attorney General in criminal proceedings;
- ◆ Interview the client who alleges torture as quickly as possible and establish which sources of evidence are available;
- ◆ Try to obtain any type of evidence of the injuries sustained, such as prison medical records, photographs, testimonies of witnesses including relatives that visited the detainee to prove that the detainee was in good health before entering the detention facility in contrast to their physical and psychological condition after their release or whilst still in detention (using as a guide the human diagrams contained in the Istanbul Protocol). To this end, it might be necessary to request a court order for a medical examination or other measures, as required. Where possible, a lawyer should attempt to obtain an independent medical examination and diagnosis, both of physical injuries and mental suffering caused by torture. The necessary steps should be taken as quickly as possible to secure evidence unless such move would put the victim or others at risk;
- ◆ Ensure that there is evidence to substantiate all supporting facts, for example, to identify the alleged perpetrator and to prove their presence in the interrogation or at the time the torture was committed and the objective of subjecting the detainee to torture (such as eliciting a confession);
- ◆ Petition the Attorney General to make the findings of investigations public.

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Seventeen cases were currently under investigation and five cases were pending, awaiting instructions from the Attorney-General's Department. In 33 cases, the complaint had been withdrawn, the victim was living abroad or unable to be traced, or there was insufficient information to proceed with an investigation". Ibid., para.31.

<sup>103</sup> For example, the UN Human Rights Committee recently concluded that "insofar as the [Sri Lankan] courts were prepared to infer that the author's [torture victim's] allegations lacked credibility by virtue of his failing to complain of ill-treatment before its Magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention. Nor did this treatment of the complaint by its courts satisfactorily discharge the State party's obligation to investigate effectively complaints of violations of article 7". See UN Human Rights Committee, Communication No. 1033/2001, UN Doc CCPR/C/81/D/1033/2001, 23 August 2004, paragraph 7.4.

## D. Prosecution of alleged perpetrators of torture and punishment of those responsible

International law clearly establishes the obligation on governments to prosecute those accused of torture. This obligation exists regardless of where the crime was committed or of the nationality of the victim or alleged perpetrator. As established in the Istanbul Protocol, “States are required under international law to investigate reported incidents of torture promptly and impartially. Where evidence warrants it, a State in whose territory a person alleged to have committed or participated in torture is present, must either extradite the alleged perpetrator to another State that has competent jurisdiction or submit the case to its own competent authorities for the purpose of prosecution under national or local criminal laws.” Article 7(2) of the UN Convention against Torture determines that a prosecuting authority must take a decision to prosecute an offence of torture in the same way as any other crime of a serious nature.

### Legal framework and practice in Sri Lanka

#### □ Prosecution

The Attorney General is responsible for indicting the suspected perpetrator(s). Under the Torture Act, only the High Court has jurisdiction to try all persons indicted for torture.<sup>104</sup> A Magistrate’s Court has power to try a person charged with voluntarily causing hurt under the Penal Code.<sup>105</sup> A Court Martial may have the power to try military personnel charged with torture.<sup>106</sup>

All trials relating to torture are conducted under the normal criminal procedure code of the country.<sup>107</sup> In torture cases on indictment, the State Counsel of the Attorney General’s Department conducts the trial. This is based on the adversarial system. As torture is a criminal offence, a high degree of proof is required to prove the case beyond a reasonable doubt. If relevant and admissible, no evidence will be excluded or withheld on grounds of public security.

The law allows for the participation of the victim or (in the case of death of the victim his or her relatives) in a criminal trial as an aggrieved party.<sup>108</sup> A lawyer may appear to look after the interests of the aggrieved party. The aggrieved party cannot lead evidence or cross-examine witnesses at High Court trials, but can make submissions, with leave of the Court, on matters affecting them specifically.<sup>109</sup>

Confessions elicited through torture are not admissible in court.<sup>110</sup> Before leading the confession in evidence the prosecution has to prove that the confession has been made voluntarily. Generally Sri Lankan Courts have demonstrated caution before accepting a confession as evidence and, if an allegation of torture is made, normally will order a *voir dire* inquiry before declaring admissible such a confession.

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<sup>104</sup> Section 2 of the Torture Act.

<sup>105</sup> Sections 313 – 322 Penal Code; First Schedule; Sections 10 and 11 Criminal Procedure Code.

<sup>106</sup> There are no such precedents.

<sup>107</sup> For summary trials before the Magistrate’s Court for offences under the Penal Code : Chapter XVII, Sections 182 – 192 Criminal Procedure Code; For High Court trials for offences under the Torture Act : Chapter XVIII, Sections 193 – 203 Criminal Procedure Code.

<sup>108</sup> Sections 41, 1 Judicature Act, Section 260 and Criminal Procedure Code. NGOs are not allowed to participate.

<sup>109</sup> *Bandaranayake vs. Jagathsena (1984) 2 SLR 397*.

<sup>110</sup> Sections 24 – 27 of the Evidence Ordinance shut out confessions in criminal trials. However under the Prevention of Terrorism Act and the Emergency Regulations voluntary confessions made to a police officer not below the rank of an Assistant Superintendent of Police is admissible in evidence.

The evidentiary value of medical reports is high. The report is treated as objective and both the victim and the alleged perpetrator have access to the report.

#### □ **Punishment/Penalties**

According to the Torture Act, “a person guilty of an offence under this Act shall on conviction after trial by the High Court be punishable with imprisonment of either description for a term not less than ten thousand rupees and not exceeding fifty thousand rupees.”<sup>111</sup> The minimum sentence for a person found guilty of torture is seven years and the courts have no discretion to vary this penalty.

In practice, there have recently been forty indictments under the Torture Act but only one conviction to date. While this constitutes a welcome change to the almost complete impunity for torture committed in the past, which are yet to be investigated and prosecuted, several observers have voiced their dissatisfaction with the number of investigations closed and the slow progress in trials.

Accordingly, the UN Committee against Torture has recommended to the Government of Sri Lanka to “take the necessary measures to ensure that justice is not delayed, especially in the cases of trials of people accused of torture.”<sup>112</sup> The UN Human Rights Committee, in echoing and expanding on the points of concern stated that “It regrets that the majority of prosecutions initiated against police officers or members of the armed forces on charges of abduction and unlawful confinement, as well as on charges of torture, have been inconclusive due to lack of satisfactory evidence and unavailability of witnesses, despite a number of acknowledged instances of abduction and/or unlawful confinement and/or torture, and only very few police or army officers have been found guilty and punished... It should ensure in particular that allegations of crimes committed by State security forces, especially allegations of torture, abduction and illegal confinement, are investigated promptly and effectively with a view to prosecuting perpetrators. The National Police Commission complaints procedure should be implemented as soon as possible. The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases. The capacity of the National Human Rights Commission to investigate and prosecute alleged human rights violations should be strengthened.”<sup>113</sup>

#### **What legal and practical steps can lawyers take?**

- ◆ Following the detailed guidelines contained in the Istanbul Protocol, seek to obtain the necessary evidence, including witnesses statements and medical reports, that may lead to an indictment of implicated officials;
- ◆ Present medical evidence during court proceedings and request an independent medical examination, where the accuracy and adequacy of medical evidence produced in court is brought into question.

<sup>111</sup> Section 2 (4) of the Torture Act.

<sup>112</sup> Ibid., para.255 (d).

<sup>113</sup> UN Doc. CCPR/CO/79/LKA, supra, para.9.

## E. Right to an effective remedy and reparations

The right to an effective (procedural) remedy to guarantee the substantive right to adequate reparations for torture survivors is clearly established under international law (see Section E, *Action Against Torture: A Practical Guide to the Istanbul Protocol for Lawyers*). According to the UN Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law,<sup>114</sup> the forms that reparation may take include: restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition.

### Legal framework and practice in Sri Lanka

#### □ Effectiveness of remedies

**Constitutional Remedies:** Article 17 of the Constitution stipulates that every person is entitled to a remedy for the infringement of fundamental rights by State action. The Supreme Court has a wide discretionary power to grant relief in fundamental rights cases.<sup>115</sup>

In practice, since 1978 there have been several hundred fundamental rights applications filed in the Supreme Court by torture survivors seeking relief and redress. While the record of the Supreme Court in awarding compensation is impressive, a considerable number of torture survivors have not been able to invoke this remedy. The main reasons are lack of access, especially concerning violations committed by the Army in the North-East.

One of the key limitations to the effectiveness of this remedy is the short time limit of one month within which a fundamental rights application has to be filed with the Supreme Court. One of the consequences of this short time limit is the fact that medical reports are usually not available to the victims at the time of filing the application. This means that they are not in a position to make a proper assessment of the amount of compensation to be claimed supported by available evidence. However, the Supreme Court has shown some flexibility in admitting cases where the applicants could not adhere to the time limit.

Even if an application to the Supreme Court is made in time, falsified medical reports, missing entries in Police Information logs as well as the absence of sufficient evidence have proved to be further major obstacles for torture survivors in pursuing claims before the Supreme Court.

Furthermore, until recently only the victims of torture themselves were recognised as being entitled to file a fundamental rights application. This has left relatives of torture victims without an effective constitutional remedy. It remains to be seen whether the recent judgment by the Supreme Court in the case of *Kotabadu Durage Sriyani Silva et al.*, mentioned in Part 2 above heralds a fundamental change in the jurisprudence of the Supreme Court in this regard.

The Committee against Torture has welcomed “the unequivocal position taken by the Supreme Court as well as other courts on the question of torture and the awards of compensation to victims of torture under the fundamental rights jurisdiction of the Supreme Court.”<sup>116</sup> It recommended that “while continuing to remedy, through compensation, the consequences of torture, give due importance to prompt criminal prosecutions and disciplinary proceedings against culprits.”<sup>117</sup>

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<sup>114</sup> Annex, E/CN.4/2000/62. The revised version of 15 August 2003 can be found at <http://www.unhchr.ch/html/menu2/revisedrestitution.doc>.

<sup>115</sup> Article 126 (4).

<sup>116</sup> UN Doc. A/53/44, paras.243-257, supra, para.247 (d).

<sup>117</sup> Ibid., para.255.

**Criminal remedies:** A torture survivor or his/her lawyer may complain to the police with the aim of seeking disciplinary action or criminal prosecution. Compensation cannot be claimed as part of criminal proceedings. However, courts may award compensation pursuant to s.17 (4) of the Criminal Procedural Code. This provision stipulates that a court can award compensation to be paid by the offender in cases where it refrains from imposing a prison sentence or from proceeding to conviction.

The procedures enabling victims to obtain compensation as part of the criminal trial are not applicable to torture under the Torture Act.

**Civil remedies:** There is hardly any practice of claims relating to reparation for torture before the Civil Courts.<sup>118</sup> This is mainly due to the fact that civil litigation is very costly and usually takes between three to four years before a final judgment is rendered. Most torture survivors can therefore not afford to take legal action before civil courts. It is moreover doubtful whether acts of torture would qualify as delicts under the State (Liability in Delict) Act. While there are doubts about the effectiveness of this remedy, its utility has yet to be fully tested.

**National Human Rights Commission:** A victim of torture or any interested party, or a lawyer on their behalf, may complain to the HRC in writing alleging a violation of Article 11 of the Constitution within a reasonable time.<sup>119</sup> Under Section 14 of the Human Rights Commission Act, the Commission has the power to conduct investigations into complaints of violations of fundamental rights. Torture victims can also obtain reparation through the HRC. It has no power to make orders, but may recommend compensation.<sup>120</sup> The Commission has no power to enforce its recommendations.

The same kind of reparation as awarded by the Supreme Court can be and has been recommended by the National Human Rights Commission. However, the Commission has not recommend to the State to pay compensation, but sometimes it has recommended that the police or army officers pay compensation to the victims. In so doing, it has in a limited way functioned as a supplementary mechanism for torture victims who could not apply to the Supreme Court due to the time bar or lack of supporting medical evidence.

#### □ Adequate reparations

In earlier cases, the Supreme Court has ordered only the State to pay compensation. More recently, both the State and the individual perpetrators were ordered to pay compensation. In awarding and calculating compensation, the Supreme Court has taken the gravity of the injuries, the methods of torture employed and the harm caused into consideration. The amounts of compensation awarded vary from Rs. 5,000 to Rs. 250,000 (ca. \$ 50 – 2,600).

Compensation has been awarded for pecuniary and non-pecuniary damages. The Supreme Court has also noted that compensation has the function of acknowledging regret and providing relief for the hurt caused to the victim.<sup>121</sup> In so doing, it expressly rejected awarding

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<sup>118</sup> According to Amnesty International, *Torture in custody*, supra, pp.34, 35: "In one rare case filed against the state in 1985, relatives of 30 of 53 Tamil political prisoners killed in July 1983 by Sinhalese prisoners at Welikada prison, Colombo, filed for compensation claiming failure by the state to provide adequate protection to the prisoners. In April 1994, the cases were settled by agreement between both sides, the state undertaking to make certain *ex gratia* payments to the relatives without admitting liability." In another case, Abeyratne, alias Taxi Abey, filed a suit for damages for torture against officers of the DID, IGP and AG before the District Court Colombo in 2000, the first of its kind. According to the last information received, the parties were intending to settle the case.

<sup>119</sup> See Section 14 of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996.

<sup>120</sup> *Ibid.*, Section 15 (3)(c).

<sup>121</sup> *Saman v. Leeladasa and Another* (op. Cit.), Per Amerasinghe, J. (Ranasinghe C.J. agreeing): "When in an appropriate case compensation is awarded for the violation of a Fundamental Right, it is, I think, by way of an acknowledgement of regret and a *solatium* for the hurt caused by the violation of a Fundamental Right and not as a punishment for duty disregarded or authority abused."

punitive damages as compensation.<sup>122</sup> It may take into consideration the gravity or the serious nature of the injuries caused requiring long term medical treatment and rehabilitation in the assessment of the amount of compensation although there are no such precedents.

In ordering compensation personally to be paid by the perpetrator<sup>123</sup> and directing the higher authorities to take disciplinary and other action, the Court has taken into account the punitive aspect as well as the need of guaranteeing non-repetition of the violation.<sup>124</sup> It has also emphasised that holding perpetrators personally accountable involves an element of satisfaction.<sup>125</sup> Moreover, the Supreme Court judges have highlighted that “a meaningful course of action to minimize violations of Article 11 should include other measures (than enacting legislation) making torture an offence.” Thus, it drew attention to the need for education and certain procedural steps that the State should adopt, citing Articles 10 to 13 of the Convention against Torture.<sup>126</sup> In so doing, the Court has shown its willingness to contemplate ordering measures aimed at guaranteeing the non-repetition of torture.

However, the decisions of the Supreme Court have not been consistent in terms of quantum and the victims of ‘higher social standing’ have apparently been awarded higher amounts of compensation than other victims for similar violations.<sup>127</sup> Furthermore, according to NGOs, at the end of trials representatives of the Attorney General's Department have reportedly urged the court to reduce the amount of compensation to be awarded by the Court.<sup>128</sup>

#### **What legal and practical steps can lawyers take?**

- ◆ Consider filing fundamental rights applications to the Supreme Court seeking compensation and other forms of reparation for violation of fundamental rights;
- ◆ Use civil proceedings to claim compensation based on tort law both from the individual perpetrators and the State, pursuant to the Crown (Liability in Delict) Act 1969;
- ◆ Seek redress through the Human Rights Commission by filing a complaint against violations of a fundamental right;
- ◆ As a non-litigation measure, support calls for amendment of the Torture Act to enable courts to award adequate compensation in the course of criminal proceedings; support calls for legislative reform to reflect the recent Supreme Court ruling on standing and to amend the time limits for filing fundamental human rights applications;
- ◆ Consider strategic litigation before the Supreme Court to develop jurisprudence following the recent Supreme Court ruling on standing.

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<sup>122</sup> Ibid.

<sup>123</sup> See e.g. SCA 623/2000; SCA 290/98; SCA 66/97; SCA 98/97; SCA 477/96; SCA 615/95.

<sup>124</sup> See e.g. SC No.4/91.

<sup>125</sup> *Abasin Banda v. S.I. Gunaratne and Others*, S.C. Application No. 109/95, October 6, 1995, Amerasinghe, J.: "The award of compensation is useful because it provides an opportunity to demonstrate society's abhorrence of such conduct... The fact that a transgressor is personally required to pay a part of the compensation assessed by the court as being just and equitable is useful to the extent that it will to some extent assuage the wounded feelings of the victim."

<sup>126</sup> Per Amerasinghe, J. in: *Abasin Banda v. S.I. Gunaratne & Others*, S.C. Application No.109/95 [1995] 1 Sri L.R., p.256.

<sup>127</sup> See REDRESS, *Reparation for Torture in India, Nepal and Sri Lanka*, report issued in February 2003 in collaboration with Commonwealth Human Rights Initiative, p.91 (available online at [www.redress.org/publications/IndianSeminarReport.pdf](http://www.redress.org/publications/IndianSeminarReport.pdf)).

<sup>128</sup> See World Organisation Against Torture, *State Violence in Sri Lanka: An Alternative Report to the United Nations Human Rights Committee*, January 2004.

# **ANNEX 1: CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT ACT, NO. 22 OF 1994**

Supplement to Part II of the Gazette of the Democratic Socialist Republic of Sri Lanka of December 23, 1994 (L.D. - O 8/94)

AN ACT TO GIVE EFFECT TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

WHEREAS a Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, was signed in New York on December 10, 1984:

AND WHEREAS by an instrument of accession dated December 14, 1993, and deposited with the Secretary-General of the United Nations Organization, on January 3, 1994, Sri Lanka has acceded to the aforesaid Convention:

AND WHEREAS the aforesaid Convention has entered into force for Sri Lanka with effect from February 2, 1994:

AND WHEREAS it has become necessary to make legislative provision to give effect to Sri Lanka's obligations under the aforesaid Convention:

NOW therefore be it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows: -

1. This Act may be cited as the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994.

2. (1) Any person who tortures any other person shall be guilty of an offence under this Act.

(2) Any person who -

- (a) attempts to commit;
- (b) aids and abets in committing;
- (c) conspires to commit,

an offence under subsection (1), shall be guilty of an offence under this Act.

(3) The subjection of any person on the order of a competent court to any form of punishment recognized by written law shall be deemed not to constitute an offence under subsection (1).

(4) A person guilty of an offence under this Act shall on conviction after trial by the High Court be punishable with imprisonment of either description for a term not less than seven years and not exceeding ten years and a fine not less than ten thousand rupees and not exceeding fifty thousand rupees.

(5) An offence under this Act shall be a cognizable offence and a non-bailable offence, within the meaning, and for the purposes, of the Code of Criminal Procedure Act, No.15 of 1979.

3. For the avoidance of doubts it is hereby declared that the fact that any act

constituting an offence under this Act was committed -

(a) at a time when there was a state of war, threat of war, internal political instability or any public emergency;

(b) on an order of a superior officer or a public authority, shall not be a defence to such offence.

4. (1) The High Court of Sri Lanka shall have the jurisdiction to hear and try an offence under this Act committed in any place outside the territory of Sri Lanka by any person, in any case where-

(a) the offender whether he is a citizen of Sri Lanka or not, is in Sri Lanka, or on board a ship or aircraft registered in Sri Lanka;

(b) the person alleged to have committed the offence is a citizen of Sri Lanka; or

(b) the person in relation to whom the offence is alleged to have been committed is a citizen of Sri Lanka.

(2) The jurisdiction of the High Court of Sri Lanka in respect of an offence under this Act committed by a person who is not a citizen of Sri Lanka, outside the territory of Sri Lanka, shall be exercised by the High Court holden in the Judicial Zone nominated by the Chief Justice, by a direction in writing under his hand.

5. A confession otherwise inadmissible in any criminal proceedings shall be admissible in any proceedings instituted under this Act, for the purpose only of proving the fact that such confession was made.

6. Where a person who is not a citizen of Sri Lanka is arrested for an offence under this Act, then he shall be entitled to communicate without delay with the nearest appropriate representative of the State of which he is a national or if he is a stateless person, the nearest appropriate representative of the State where he usually resides.

7. (1) Where a person is arrested for an offence under this Act, the Minister in charge of the subject of Foreign Affairs shall inform the relevant authorities in any other State having jurisdiction over that offence, of the measures which the Government of Sri Lanka has taken, or proposes to take, for the prosecution or extradition that person, for that offence.

(2) Where a request is made to the Government of Sri Lanka, by or on behalf of the Government of any State for the extradition of any person. accused or convicted of the offence of torture, the Minister in charge of the subject of Foreign Affairs shall, on behalf of the Government of Sri Lanka, forthwith inform the Government of the requesting State, of the measures which the Government of Sri Lanka has taken, or proposes to take, for the prosecution or extradition of that person, for that offence.

(3) Where it is decided that no order should be made under the Extradition Law, No. 8 of 1977, for the extradition of any person accused or convicted of the offence of torture pursuant to a request for his extradition made under that Law, by the Government of any State, the case shall be submitted to the relevant authorities, so that prosecution for the offence which such person is accused of, or other appropriate action may be considered.

8. The Extradition Law, No. 8 of 1977, is hereby amended in the manner set out in the Schedule to this Act.

9. (1) Where there is an extradition arrangement in force between the Government of



Sri Lanka and the Government of any other State, such arrangement shall be deemed, for the purposes of the Extradition Law, No.8 of 1977, to include provision for extradition in respect of the offence of torture as defined in the Convention, and of attempting to commit, aiding and abetting the commission of, or conspiring to commit, the offence of torture as defined in the Convention.

(2) Where there is no extradition arrangement made by the Government of Sri Lanka with any State, in force on the date of the commencement of this Act, the Minister may, by Order published in the Gazette, treat the Convention, for the purposes of the Extradition Law, No.8 of 1977, as an extradition arrangement made by the Government of Sri Lanka with the Government of that State, providing for extradition in respect of the offence of torture as defined in the Convention and of attempting to commit, aiding and abetting the commission of, or conspiring to commit, the offence of torture as defined in the Convention.

10. The Government shall afford such assistance (including the supply of any relevant evidence at its disposal) to the relevant authorities of any State as may be necessary in connection with criminal proceeding instituted in that State against any person, in respect of the offence of torture.

11. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

12. In this Act, unless the context otherwise requires -

"Convention" means the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment signed in New York on December 10, 1984;

"public officer" means a person who holds any paid office under the Republic;

"torture" with its grammatical variations and cognate expressions. means any act which causes severe pain, whether physical or mental, to any other person, being an act which is - (a) done for any of the following purposes that is to say -(i) obtaining from such other person or a third person, any information or confession; or (ii) punishing such other person for any act which he or a third person has committed, or is suspected of having committed ; or (iii) intimidating or coercing such other person or a third person; or done for any reason based on discrimination, and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

#### SCHEDULE [Section 8]

Amendment to the Extradition Law, No. 8 of 1977

The schedule to the Extradition Law, No. 8 of 1977, is hereby amended by the insertion immediately before Part B thereof, of the following: - "(39) torture".

## **ANNEX 2: LETTER TO THE NATIONAL POLICE COMMISSION**

NATIONAL POLICE COMMISSION  
No. 69/1,  
Ward Place, Colombo  
07.

7 October 2004

Mr. Basil Fernando  
Executive Director  
Asian Human Rights Commission

### **Allegations against Police Sgt. 31545 of the Negombo Police in respect of Channa Prasanka Fernando**

This refers to your fax dated 30th September 2004 sent to me alleging the commission of serious offenses by the above named Police Officer of the Negombo Police. The National Police Commission has taken serious note of your complaint and this is one of the first matters which has been taken up for action by the newly established (w.e.f. 1.10.2004) Public Complaints Unit at our Head Office with Mr. B. Anton Jeyanathan, Retd. DIG at its head, as Consultant.

The S.S.P. Negombo has confirmed that P.S. Subasingha had been produced in M.C. Negombo in case No. B 3118/04 and that criminal proceedings will be instituted against him under Section 316 of the Penal Code.

Further, disciplinary proceedings too will be taken against him.

Additionally, further investigations are being made against the same officer in regard to his misdeeds of alleged abduction etc. on 16.9.2004.

Ranjit Abeyesuriya, PC,  
Chairman  
National Police Commission

## ANNEX 3 .

Alahan Arasakumar  
Mattagala Estate,  
Talawakkale

25.05.2004.

The Director,  
Torture Prevention & Monitoring Unit,  
Human Rights Commission  
36, Kynsey Road,  
Colombo 08

Dear Sir / Madam.

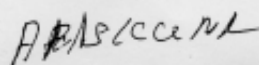
**TORTURE OF RAJAGOPAL SHARMILA (age 15)  
OF MATTAGALA ESTATE, TALAWAKKALE**

The above said Rajagopal Sharmila is my sister in law (wife's siter). She had been employed as a servant in a home in Piliyandala for three months. As the work was too hard she had left the place. The said employer in Piliyandala wanted her to come back. But she was not willing to go back. Hence the said employer had made a complaint to the Piliyandala Police that she had stolen three (03) golden bangles and had left the home. The Piliyandala Police then arrested the girl on 10.05.2004 from a house in Kotahena where she was subsequently employed. She was then detained at the Piliyandala Police and was assaulted. The Police wanted her to admit that she had stolen the bangles. Unable to bear the torture she had said that she stole the bangles.

She was then produced before the Kesbewa Magistrate in Case No. B 694/04 and remanded. She is presently in a Salvation Army Home in Borella. The next date for the Kesbewa case is 05.07.2004.

Please inquire into the torture inflicted upon Rajagopal Sharmila who is 15 years old and obtain relief for her.

Yours faithfully,



Alahan Arasakumara

## ANNEX 4 .



### Home for Human Rights

மனித உரிமைகள் இல்லம்

මානව හිමිකම් නිවහන

**For personal attention:**

Mr.N.Selvakumar  
Director  
Torture prevention and monitoring unit  
Human Rights Commission  
36, Kynsey Road  
Colombo-08

May 26, 2004

Dear Sir,

**TORTURE OF RAJAGOPAL SHARMILA (age 15)  
OF MATTAGALA ESTATE, TALAWAKKALE**

Please be informed that Home for Human Rights, Sri Lanka was contacted by Mr. Alagan Arasakumar, of Mattagala Estate, Talawakkale to pursue the matter concerning the torture of Rajagopal Sharmila, aged 15. The victim was severely assaulted and tortured by the Piliyandala Police. She is now in the Salvation army hostel, at Punchi Boralle, Colombo -08. We advised the complainant Alagan Arasakumar to lodge this complaint with you. It appears that already the complaint was handed over to the Human Rights Commission office today. Please institute investigation and help the victim.

Thanking you

Yours Sincerely,

I.F.Xavier  
Director  
Home for Human Rights, Sri Lanka

ANNEX 5 .

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Chairperson  
Dr. Radhika Coomaraswamy  
Members  
Dr. N. Deepika Udagama  
Mrs. C. C. Senanayake  
Mr. N. Selvakkumaran  
Dr. M. A. Zainudeen



මගේ අංකය  
எனது எண்  
My No.  
ඔබේ අංකය  
உமது எண்  
Your No.  
දිනය  
திகதி  
Date

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இலங்கை மனித உரிமைகள் ஆணைக்குழு  
HUMAN RIGHTS COMMISSION OF SRI LANKA

28<sup>th</sup> May, 2004.

The Director,  
Home for Human Rights, Sri Lanka,  
14, Pentrive Gardens,  
Colombo 03.

Dear Sir,

**Re.: Alleged Torture of one "Rajagopal Sharmila", a minor.**

This is to acknowledge receipt of the aforesaid allegation, as forwarded to the Commission, by your institution.

A comprehensive investigation has already been instituted, in this regard.

Thanking you,

Yours faithfully,

Nimal G. Punchihewa,  
Director, Inquiries & Investigations.





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for Torture Victims (IRCT)

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