The Tragicomedy of Constitutional Autochthony

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Contents

Introduction **9**

1. Government's delay in dealing with laws delays 17
2. Doubling the number of High Courts will drastically reduce crimes 21
3. Attorney General's Department comes under serious public scrutiny 26
4. Torture is a common practice in Sri Lanka – UN Special Rapporteur 35
5. The arrest of former DIG Anura Sennanayake and the problem of command responsibility 44
6. Kondaya, Raised to the Status of Mysterious Criminal 49
7. What Poddala Jayantha means to us 56
8. Letter to the HRC-SL; Request for special action regarding Ms M K Malani – tortured, sexually abused and incarcerated under fabricated charges by Nawalapitiya Police 60
9. Letter to the Attorney General regarding accepting apologies for human rights violations 69
10. Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Juan E. Mendez* 77

    Preliminary findings 80

        Access to places of detention 80

        Prevalence of torture and ill-treatment 80

Prevention of Terrorism Act (PTA) 82
Arbitrary arrest and detention 85
Forced confessions: evidence obtained under torture 85
Access to lawyers 87
Role of judiciary and prosecutors 87
Forensics 88
Conditions of detention 89
Overcrowding 90
Family visits 91
Remedies for torture and CIDT 91
Impunity and lack of accountability 92
Monitoring of places of detention 93
Women and Gender 93
Transitional justice process 94
Lack of accountability regarding investigations into disappearances 95
Concluding remarks 95
11. Preliminary observations and recommendations of the Special Rapporteur on the independence of judges and lawyers - Ms. Mónica Pinto* 96
Introduction 96
Preliminary observations and recommendations 98
Need for a justice system reflecting the diversity of society 98
Strengthening an independent administration of justice 99
Independent, impartial and transparent institutions 101
Judicial accountability 103

Constitutional review – an opportunity to strengthen independence 104
Implementation of international human rights law 105
Attorney-General's role 106
Police's important role in the criminal justice system 107
Access to a lawyer and other due process guarantees 107
Judicial delays 107
Access to justice 108
Education and training 109
Transitional justice 110

INTRODUCTION

Many of the essays published in this booklet were initially published in several publications, such as *Ceylon Independent, The Nation, and Colombo Telegraph*. All these articles are linked to a common theme, which is the need for recognising that the legal system in Sri Lanka, and in particular the criminal justice system, is facing the threat of being alienated from the people, to an extent that they are losing confidence in it altogether. This, in turn, threatens the moral and social fabric of Sri Lanka, as no nation can remain together if its legal system is itself in serious peril.

That the legal system is faced with such a crisis is something acknowledged virtually everyone. However, despite this acceptance, there is very little conversation in Sri Lanka on how to face this challenge, and what are the priority areas that need attending, to turn the ship around.

These short essays, together with several other publications that I have published in the recent years, are products germinating from the desire to get this problem to the attention of the whole nation, as the most important problem facing the nation.

Often, it is argued that while many problems such as the legal system crisis do exist, the main priority at the moment should be economic development, and these other problems should wait till such a development takes place in the economy. However, the premise, on which the reflections contained in these essays is based, is that no significant economic development can take place in Sri Lanka if it does not first address the crisis of its legal institutions.

My hunch, however, is that talking about the economic development as a priority is only a pretext. The actual reason for unwillingness to address the legal system issue is because considerations about justice have lost significance in Sri Lanka.

What seems to be written in large letters across the sky in Sri Lanka is that the poor and the ordinary folks do not deserve justice; and the affluent and the richer people do not need justice as they have other means for dealing with their disputes. The consequence of this perspective is that matters of justice and matters of law can be dismissed as unimportant.

With independence, when the local people became the rulers of their own destiny, they found that the legal system that was built mainly by the British was too cumbersome. What we see, with the introduction of the 1972 and 1978 constitutions, is a claim that a new approach to constitutionalism is needed and these attempts were described as the creation of an autochthonous constitution.

Now, looking at it in hindsight, what becomes clear is that what was meant by "autochthonous" was the abandonment of general principles and rules, which were enshrined in the Soulbury Constitution, and paving the way to follow an ad hoc approach to the making of a constitution and laws, not guided by any kind of general principles and rules.

In Sri Lanka, when the 1972 Republican Constitution was introduced, the then constitutional affairs minister, made the following remark, which revealed the drastic nature of change which was intended by the introduction to this new constitution, which implied the replacement of all the basic notions on which the Soulbury Constitution was based:

> "This is not a matter of tinkering with some Constitution. Nor is it a matter of constructing a new superstructure on an existing foundation. We are engaged in the task of laying a new foundation for a new building which the people of this country will occupy."[1]

1. Decisions of the Constitutional Court to Sri Lanka Vol. 1,1973, p.5

With the introduction of the 1978 Constitution, the meaning of an "autochthonous constitution" was clearer, when J.R. Jayawardene, who was elected as the Prime Minister, drafted and adopted a tailor-made constitution, and made himself the Executive President. What was meant by "the executive presidency" in Sri Lanka was that the Sri Lankan President would not be bound by any general principles relating to democracy or the rule of law. He, in fact, would become the maker of the principles and the rules, without the hindrance of having to conform to what are known as the tried and tested rules of democracy and the rule of law.

While the Indian Supreme Court found a way to entrench these basic, general principles and rules as an unalterable part of their constitution, and named it the "basic structure" of the constitution, the Sri Lankan Supreme Court did not rise to the occasion. They did not protect constitutionalism by obstructing any attempt to displace the basic principles of democracy and the rule of law.

The direct consequence of this emerged soon: emergency laws became the law of the land, displacing the normal laws under which the country was governed. The very meaning of "emergency law" under international law is that these are laws that temporarily suspend some aspects of the ordinary laws of the land due to some exigencies. However, in Sri Lanka, what happened was not a temporary suspension but a permanent replacement.

Among the basic principles that were displaced was the most basic principle of a democracy and a rule of law system – that it is the duty of the State to protect the individual liberties of the citizens. The notion of individual liberties was relativized and trivialised, though there was a nominal section on fundamental rights in the Constitution. What the executive presidential power meant was absolute power, which is what democracies were created to prevent.

The actual consequences of this are well known, by way of the terror that was unleashed without any hindrance or constitutional obstruction. The most glaring example of what an executive president can do is the experience of large-scale enforced disappearances in Sri Lanka, which were made possible through emergency laws and regulations, and anti-terrorism law, which removed some of the basic safeguards for the right to life and liberty.

Aldous Huxley predicted that due to changes in technology and communication systems in the world, new kinds of dictatorships can emerge, which would use new modes of propaganda for adjusting people's minds to authoritarian rule. This prediction came through in Sri Lanka by the use of tongue twisting doublespeak words like autochthonous, and in the creation of a mental attitude among the people that Sri Lanka should reject what was categorized as colonial and Western ideas.

This way the ideas of equality, liberty, and fraternity, and the rule of law, the independence of the judiciary, human rights, and the State obligation to protect the liberties of the individual, were treated as alien concepts. Not only the substance of these ideas but also procedural laws and rules, which were considered integral to the practice of such ideas, began to be treated as alien. A laxity began to be spread into all institutions, including institutions dealing with the administration of justice. Such laxity was not regarded as hostile to the very possibility of remaining as a nation, but instead treated as part of our own ennobling way of doing thigs. What was, in fact, descent to barbarism came to be regarded as quite an honourable way of doing things in our own style. Rejection of notions labelled as Western became an integral part of national ideology.

It was a people's revolt against that system that brought about the electoral changes that replaced the Mahinda Rajapaksha regime in 2015. The slogan under which the opposition rallied was that there would be an abolition of the executive presidential system. What has been proven over the last year and a half is that,

while there has been some tinkering with the original notion of executive presidency, through the passing of the 19th Amendment to the Constitution, it is not possible to replace the executive presidency, as envisaged in the 1978 Constitution, without the replacement of the general principles and rules that constitute the basic structure of a democratic form of government.

It is unfortunate that the new government has not even expressed, by way of policy, that it will completely replace the 1978 version of a constitution with a constitution that is based completely on the universally accepted norms and principles of democratic governance. What has happened so far can be compared to the clearing of muddy waters just to get a little bit of water to quench the dire thirst. There has not been any cleaning up of the water supply to ensure that it is pure water that will sustain the life of the nation. We are still drinking the muddy waters from the reservoirs created under the so-called "autochthonous approach" to the constitution.

In Sri Lanka, during the last 40 years or so, an "autochthonous constitution" came to mean a highly localised comedy. The overall ruling framework in the country became, and has remained, comic. The cynical way everything is done in every aspect of life reflects the comic nature of the country's constitutional structure. Unfortunately, neither the government, nor the country's civil society organisations, have awaken to realise that as long as this comical arrangement remains, there can be no return to good governance under a democratic framework of law.

Among the things that have become most comic are the institutions responsible for the administration of justice, namely the policing, Attorney General's Department, and judicial institutions. It is the claim of each of these institutions that they do not have adequate personnel and adequate resources to run these institutions in a manner that such institutions will fulfil the aims for which they exist.

These short essays, together with the considerable amount of similar writings, we hope will create a conversation on our

present predicament, with the view to abandoning the comic ways in favour of wiser ways of ruling ourselves by creating for ourselves a structure of governance within which universally well-established principles of democracy and the rule of law will become integral. From the ashes of a period of self-destruction, we hope we would be able to re-kindle a fire, where best practices of self-governance can be established within as a short period as possible.

In the 3rd Century B.C., when Sri Lankan State was first established, Sri Lankans had the benefit of being guided by Dharmasoka's conception of statehood, in which building of social responsibility, as the corner stone of the nation, was integral. For Asoka, the spread of Buddhism was equal to the building of a society on the basis of social responsibility. The eminent Indian historian Romila Thapar, in her book, *Asoka, and the Decline of the Mauryas* has succinctly expressed this in the following words:

> "In the past, historians have generally interpreted Asoka's *Dhamma* almost as a synonym for Buddhism, suggesting thereby that Asoka was concerned with making Buddhism the state religion. We propose to show that this was not his intention, although he himself, as a firm believer in Buddhism, was convinced that it was the only way to salvation. The policy of *Dhamma* was a policy rather of social responsibility than merely of demanding that the entire population should favour Buddhism. It was the building up of an attitude of mind in which social behaviour, the behaviour of one person towards another, was considered of great importance. It was a plea for the recognition of the dignity of man, and for a humanistic spirit in the activities of society."

The Constitution and the laws of Sri Lanka must revive social responsibility as the foundation of the nation. When this

is understood as Dhamma, in the manner it was understood by Dharmasoka, there would be no incompatibility at all with the general notions of democracy and human rights, as these are understood universally. One of the direct consequences of this would be tolerance and respect for everyone.

Dharmasoka wrote the following in one of his edicts:

> "… On each occasion one should honour the sect of the other, for by doing so one increases the influence of one's own sect and benefits that of the other; while by doing otherwise one diminishes the influence of one's own sect and harms the other. Again whosoever honours his own sect or disparages that of another, wholly out of devotion to his own, with a view to showing it in a favourable light, harms his own sect even more seriously. Therefore, concord is to be commended, so that men may hear one another's principles and obey them …" [2]

It is time we immediately consider and introduce best practices of self-governance, from our own history and from wherever in the world they may originate, to build the brightest future for all citizens, while this time around remaining vigilant to those versed in doublespeak, who may use any notion to disguise ad-hoc misrule.

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June 2016

2. From the Twelfth Major Rock Edict of the Mauryan Emperor Ashoka, inscribed in the third century B.C., as found in *Somanatha the many voices of history*, by Romila Thapar.

Related writings of the Author

"Gyges' Ring – The 1978 Constitution of Sri Lanka" – published by the Asian Human Rights Commission

"Deterioration of the Legal Intellect in Sri Lanka - A Miraculous Cure is Possible" - published by the Asian Human Rights Commission

"Narrative of Justice in Sri Lanka told through stories of torture victims" - published by the Asian Human Rights Commission

"අලුත් ව්‍යවස්ථාවක් කුමටද?" (Why do we need a constitution?) - published by Wijesuriya Grantha Kendraya

"*Undermining of the Legal and Political Systems"* - published by Wijesuriya Grantha Kendraya

1

Government's delay in dealing with laws delays

Journalist, Poddala Jayantha in a moving article, written in Sinhala, recalls his ordeal which took place exactly 7 years ago in the evening of June 1st that shocked the entire nation. A threat which has been made to him by the brother of the then President Mahinda Rajapaksa, Gotabhaya Rajapaksa, was to be carried out on that fateful day. He was picked up at Embuludeniya junction by a group of people who had arrived in a white van, and was severely beaten up. He recalls about being beaten about hundred times on his head, chest, lower abdomen and then being put inside the van which was in fact a mobile torture chamber.

He was blindfolded and his hands were tied behind his back, they shaved his beard and hair, and put his hair inside his mouth, they have also severely beaten him up, broken the fingers of both his hands and then tried to break both his legs. They had inserted a wooden pole beneath his legs on which they broke his left leg and also caused severe injuries to the other leg. Then with the hair still inside his mouth they had tied his mouth with his hair inside and then threw him out of the moving van into a ditch and left him near the Angoda hospital road near a shrub jungle. It was a driver of a passing by three wheeler, who saw his body and then brought several other three wheeler drivers who have been kind enough to take him to a hospital. He recalls with gratitude those brave people who despite of the terror ridden times came to save his life.

This incident that happened seven years ago, is quite fresh in the minds of many people as it has remained, as a reminder of the

terrible times, people in Sri Lanka had to live through. Jayantha is recalling this incident, at a time he is witnessing again the leaders of the very regime who caused such a terror, now again campaigning on behalf of media freedoms. Poddala Jayantha reminds us in the last paragraph of his article, that the only way to stop such tyranny from raising its head again is to strengthen the law enforcement mechanisms in the country for it to be capable of inquiring into crime and to punish the perpetrators of such crime. The perpetrators of this terrible crime against Poddala Jayantha and more importantly those who masterminded occurrences of such terror, have never been brought to justice. That alone is a clear indication of how bad Sri Lanka's criminal justice system is, despite of the defeat of the Mahinda Rajapaksa regime, nearly 18 months back. Somehow, the new government has not been able to convince the Sri Lankan people that restoring of a functional criminal justice framework is a priority for this Government.

16th National Law Conference

The 16th National Law Conference was held last month and the participants at that conference also noted that justice institutions in Sri Lanka does not inspire the confidence of the people. Thus, at the highest levels, the country's legal profession itself, has loudly proclaimed that justice establishments in Sri Lanka belongs to an endangered category.

According to reports on the 16th National Law Conference participants' attention was drawn more seriously to the laws delays. It has belatedly noted what many people have already noted for many years. Like that the country does not have adequate number of prosecutors. In fact, there are only fewer than 50 state counsel looking into large amounts of files. One state counsel noted that the files when piled up stand higher than his own height. So it is no surprise that as much as five to seven years it has taken to file an indictment and much more time is taken before the end of the trial which still leaves further time for the appeals.

What the Conference failed to say is that such delays ridicules the very idea of justice. While, it was good of the participants at the Conference to have noted justice delays, it must however, be said the Conference proceedings do not show that the participants used the occasion to express their outrage adequately. After all, justice delays reduces the lawyers' life into a comedy. The sheer wastage of their lives and even more so the lives of their clients should have made this Conference an occasion to get across the message to the Government that the Government's own delays in dealing with the delays of justice is inexcusable.

If the lawyers who participated were as sharp as their profession requires them to be they should have pointed out that the problem really is not the justice delays but it is the Government's delays to deal with a Government's primary duty to enforce the law in the country. What good can the legal profession do if the law enforcement does not receive the highest attention of the Government.

The law enforcement is threatened only because the Government does not provide the country with adequate financial and other resources to have adequate number of judges, prosecutors and competent criminal investigators. Not having adequate budgetary allocations for this all important function, should have brought a collision between the lawyers and the Government, and that should have received expression at the National Law Conference. What that means is that, it is not only the government that is failing but the organised legal profession itself is failing to defend the legal system and their profession.

Is not Sri Lanka capable of affording a functional justice system

Imagine if there aren't an adequate number of doctors to attend to the needs of the people in the country. The result will be that many patients will die or suffer in other ways. Or there is another possibility that there may emerge fake doctors as the

patients somehow want to see a doctor when they are ill. These fake doctors may even give various things which may act as a placebo effect which gives an appearance of being medicine but in fact it is not. Likewise, in the case of the absence of adequate number of competent criminal investigators, prosecutors and judges so many very terrible consequences will follow. A distorted justice system is a source of grave sufferings. Also like in the case of fake doctors, within the justice system too all kinds of things may happen which may give the appearance of something being done but in fact nothing of real substance of justice will be done. The Law Conference gives some examples of this. The investors may not want to come when they know that enforceability of contracts in Sri Lanka takes a very long time as Sri Lanka is ranked 161 amongst 189 countries in a survey conducted by the World Bank on the efficiency of enforcing contracts; accused charged for rape, child abuse and even murder and many other grave crimes may get away with a suspended prison term; witnesses may not come to court as they get tired after many visits to the courts as postponements are made and as a result and unjust outcome may result in cases; and what is even more dangerous is that some people may seek the assistance of criminals to make wrongs right instead of resorting to institutions of justice. Anyone familiar with what is taking place in our courts and police stations may add a lot more to this list.

Why does the government fail to improve the system of justice?

It cannot be that the leaders of the government is unaware of what has become of our system of justice. Only possible conclusion to arrive at is that maintaining of a functional system of justice is not a priority as far as the government is concerned.

The implication is that the Government is not concerned with the wrongs that the citizens suffer from. How then can the government claim that it gives priority to ensure good governance?

2

Doubling the number of High Courts will drastically reduce crimes

This article is an attempt to demonstrate that doubling the number of High Courts could drastically reduce the occurrence of serious crimes in Sri Lanka, as only the High Courts have the jurisdiction to conduct trials regarding serious crimes. Prolonged delays in adjudication have undermined the effectiveness of these Courts acting towards discouraging criminals from committing crime and fearing the capacity of the State to enforce effective punishments.

Increasing the number of High Courts is an essential measure for reducing serious crimes. It is suggested that the number of such courts should be doubled at the very least. This together with hearing of trials on a day-to-day basis could make a dramatic change to end delays of adjudication.

This measure aims to address the most difficult issue in the criminal justice field in Sri Lanka: the delay in adjudication. It is simply impossible to create a significant change in this situation without increasing the number of High Courts where the trials for serious crimes take place.

As there are 28 High Courts existing at present, increasing this number will not create a great burden on the government's finances.

By increasing of High Courts it is implied that the number of High Court judges and the Court staff and the necessary material and infrastructure resources as well as the premises need to be

provided. And all this will not create an unbearable burden on the Government's finances.

However, the impact of implementing this proposal will be immense.

On one hand, it will significantly resolve the problem of delays in the adjudication of criminal trials. Thus, while the change will immediately take place in the High Courts, it will set a tempo for change throughout the court system, as well as in the other institutions such as the Attorney General's Department and the police.

The most significant achievement that could take place through this change is a major reduction in serious crime in Sri Lanka. This is based on the view that delay in the adjudication in criminal trials is the major cause for the increase in crimes in Sri Lanka. It is also based on how the theory of deterrence works in terms of crimes.

Speedy adjudication ensures that there would be speedy punishment of cases where the accused are found guilty. It is a universally accepted norm in criminal justice that certainty of punishment is the greatest deterrence against crimes. Delays in criminal trials mean the absence of such certainty. And it also means creating the hope for criminals to escape from punishment due to various extraneous factors that may result from such delays.

In any event, even if a person is found guilty after such a delayed trial, the impact of the punishment will be much less than the impact of punishment meted out within a reasonable time. One reason for this is that by the time the accused is found guilty of committing a particular crime, the memory of that crime would have already been lost due to the prolonged delay. This is what invariably happens in Sri Lanka. The social impact of punishment depends much on the impression that such a punishment would make on the people who have heard about such crime and who would expect such crime not to go

unpunished. However, the memory of the crime itself and even such expectations are forgotten as a result of prolonged delay.

Thus, taking a significant step by way of increasing the number of High Courts, this long held curse of prolonged delays can be brought to an end, to a great degree. As a result, people who hear about crimes will also hear within a reasonable time that the criminals have been found and have been punished.

Naturally, the greatest impact would be on the criminals themselves. The prolonged delays, as they exist in Sri Lanka now, have created an impression among the criminals that they have a greater likelihood of escaping punishment, and that in any case their liberty will not be in jeopardy for a long time to come. Naturally, the knowledge of such delays will bring quite a lot of joy to the minds of criminals who are contemplating commission of serious crimes. Creating the possibilities of speedy trials within Sri Lanka can dash such hopes.

The decrease in serious crimes will have enormous impact in the form of enhancing mental health in Sri Lanka. The ease with which crime takes place is one of the major causes for anxiety among the people. The people fear the threat to their lives and that of their loved ones as well as the threat to their property. Increasing the number of High Courts in Sri Lanka could significantly reduce this.

Among the beneficiaries of speedy trials are the vulnerable groups, such as women and children, in particular. It is a daily complaint heard that rape and sexual abuse have increased in great proportions in Sri Lanka. Delays in criminal trials have contributed to this insecurity. Due to this insecurity, in a great many instances, women and parents often do not even make complaints to lawful authorities about being victims of crime. The people who suffer in silence are many. This culture of silence can be broken if a measure such as the increase of High Courts is taken, and this results in speedy trials.

Such a measure will also have a great impact on the Attorney General's Department and the Department of the Police Services.

Both these departments are considered in low esteem, mainly due to the fact that they are unable to convince the people that they have the will and capacity to bring criminals to book. The result is a great demoralisation among the staff of these institutions. Speeding up of trials into serious crimes will encourage the better elements of these institutions to emerge and thus create an attitudinal change among the staff of these institutions.

If a change is achieved in the performance of High Courts, it will have a definite impact on other courts. It will create an impetus for working with greater energy and for achieving better results. In fact, the entire engine of criminal justice may receive a great push towards improvement if this singular measure of the increase of the number of High Courts were to take place soon.

Naturally, this will create a demand for better resources, from within the entire system itself. The age-old lethargy and apathy in all the institutions related to the justice sector could be significantly reduced.

The overall impact will also be felt within the political system. Today, the people also look upon the political system with great cynicism. This system seems to be connected with crime, either through direct involvement of politicians in crime or their indirect patronage. As speedy trials into serious cases will adversely affect the narcotics trade and the other crimes such as money laundering, it will have a direct impact on the political system.

For example, had there been a possibility of speedy trials, serious crimes in Sri Lanka, such as the type of crimes that the Rajapaksa regime is accused of engaging in, may not have taken place at all or taken place to a limited extent only. Those who are talking about ending the type of political culture represented by the Rajapaksa regime should seriously reflect upon the means by which those aims can be achieved.

One of the means is to increase the number of High Courts in Sri Lanka and thereby create the possibility of speedy trials

into serious crimes becoming an actuality. Thus, the increase in the number of High Courts will have an impact on the overall criminal justice system in Sri Lanka, as well as on the entire social ethos of the country, including its political system.

Therefore, we hope that this singular measure of the increase of the number of High Courts in Sri Lanka will receive the attention of the government leaders, its policy makers, as well as all the opinion makers in Sri Lanka, including the civil society and the mass media.

3

Attorney General's Department comes under serious public scrutiny

The role of the Attorney General's Department, in terms of upholding the justice system in Sri Lanka and the rule of law, is being critically examined from many quarters. The UN Special Rapporteur on the independence of judges and lawyers Ms. Monica Pinto, severely critiqued the Attorney Generals' Department in her Preliminary Observations and recommendations following her visit to Sri Lanka on 7th May 2016. Also, the UN Special Rapporteur against torture and ill-treatment Mr. Juan E Mendez also examined the role of the Attorney General in terms of impunity and lack of accountability regarding the violations relating to torture and ill-treatment as well as other human rights abuses.

Also, the Anti-Corruption Fund (ACF) in a report bearing No. 177, exposes how the cases that have been submitted by the Financial Crime Investigations Department (FCID), to the Attorney General's Department, are lying dormant at the Department as there are delays in taking action by the Attorney General's Department. Meanwhile, the Asian Human Rights Commission in Hong Kong has enumerated a series of defects of the Attorney General's Department that obstruct the administration of justice and the achievement of the rule of law in Sri Lanka.

Speaking about strengthening the independence of administration of justice the UN Special Rapporteur for the independence of judges and lawyers, Ms. Monica Pinto, states:

> *"… The country needs to conduct a strict exercise of introspection, so as to improve the quality of its judiciary and of the Attorney-General's office. This includes reviewing and publicizing the criteria for the appointment of judges and the causes for removal through disciplinary proceedings, providing quality legal and technological training, including mandatory training in international human rights law. "The judiciary is a national asset", said one of my interlocutors. It is also a permanent institution, one of the three branches of the State, which has a fundamental role to play in a democratic society based on the rule of law; therefore it should be robust and efficient."*

Speaking particularly of the need for transparent, decentralised, and democratic approach to the administration of Justice, the UN Special Rapporteur particularly points to the appointments of judges as well officers to the Attorney General's Office.

She states, *"… The instances participating in the appointment of judges, counsels of the Attorney-General's office and judicial staff should publish the selection procedure, including the criteria and methods to be followed." In this regard, she points to the role that the Chief Justice needs to play in these matters: "…The Constitution provides for the Chief Justice to head many instances dealing with administrative matters in the field of justice and this restricts very much his abilities to manage such an important branch of government."*

She points to the strict and rigorous recruitment process that is essential for justice systems of high quality. What she says with regard to judicial officers in this regard, can also equally apply to the recruitment to the Attorney General's Office; judicial officers should be appointed when meeting personal and technical requirements and after competitive examinations held at least partly anonymously. They should be trained in technical

matters, including the administration of tribunals or the analysis of complex forensic evidence, as well as in human rights law, including gender and women's rights. The lack of a known and established criteria regarding the appointment of judges will equally apply to the members of the Attorney General's Department.

She goes on to point to the need of independent impartial and transparent institutions, and also points to the need for independence, impartiality, competence, due process, as well as the right to appeal a decision to a higher body as essential requirements of a proper disciplinary proceedings. Mentioning that transparency is an essential requisite of the rule of law, she states "institutions in Sri Lanka, including those that are crucial for rule of law regime, are generally opaque", meaning that they are neither transparent (allowing all light to pass through) nor translucent (allowing some light to pass through). Referring to the Constitutional Council, she states,

> *"The constitutional council should publish the rules of procedures it established for itself and applies in discharging its appointment functions as well as criteria used to evaluate candidates' suitability for a given position. Such publicity would contribute to dissipating possible accusations of deliberate opacity and arbitrariness."*

Speaking about the appointments to the Constitutional Council, which as of present is seven politicians and the remaining three civil society representatives, she states,

> *"To avoid the politicization of the appointment processes under the purview of the Council and to increase its legitimacy, this current composition should be changed so as to include more civil society representatives, including possibly representation from the Bar Association and academia."*

Specifically, on the Attorney General's role, Ms. Pinto goes on to state that

> *"…The Attorney-General is also de Chief Prosecutor, and, as such replaced the position of the Independent Prosecutor which existed in the past. In such a capacity, the Attorney-General should issue clear and proper guidelines for the investigation and prosecution of crimes, specific guidelines could be developed for the investigation and prosecution of serious human rights violations, including torture, and violations of international humanitarian law. He should also monitor how cases are substantiated so as to avoid the delays incurred by his office. Even in 'ordinary' non-conflict-related and non-political cases, the Attorney-General's office takes too much time to produce an indictment. This is but one of the reasons for the long judicial delays in the administration of justice in Sri Lanka and which court users of to endure [sic].*
>
> *"The Attorney-General's office acts as the representative of the State, which by no means should be equivalent to defending the government. His office should also be able to make a neat separation between the State and the public interest they act on behalf of and the persons behind the institutions so as to avoid any possible conflict of interest. Such conflict of interest have arisen for instance in cases where the Attorney-General's office appears in the defence of police officers or military officers in cases of habeas corpus applications, as if the court decides that the respondent are responsible for the crimes they are accused of, the same office would be called to prosecute them."*

Comments by UN Special Rapporteur against torture and ill-treatment

Mr. Juan E. Mendez, UN Special Rapporteur against torture points to the fact that a modern accusatory system begins with affording more guarantees for the defendant. He states, "In it, the public prosecutor is first and foremost the guardian of legality."

And, he goes on to state that

> *" … Prosecutors must enforce the law against criminals but should also actively prevent miscarriages of justice by way of torture and manipulation of evidence, and intervene early on in the process. The accusatory system is more conducive than the inquisitorial system for the respect for human rights; but in its modern form it gives a lot of power but also heightened responsibility to prosecutors."*

Mr Mendez, points out the importance of judges and prosecutors upon the obligation to consider bail for lesser and non-violent offences and to ensure medical examinations, by forensic doctors properly trained by the "Manual on Effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment", also known as the Istanbul Protocol, as soon as any suspicion of mistreatment arises. Then the Rapporteur points out the duty of the Attorney General to initiate prosecutions against whomsoever may be responsible for torture or mistreatment, including the superiors who may have tolerated and condoned that act.

This reference to Superiors is quite important within the context of Sri Lanka, although literarily thousands of cases have been received each year, no action has ever been taken against officers above the rank of OICs – Officers in Charge, for their responsibility to condone the practice of torture and ill-treatment. In this context, particularly the role of ASPs, who are required by the Police Departmental Orders to supervise the conduct of

police stations, is important. The use of torture and ill-treatment at police stations will come to an end if the ASPs play their role of supervising the officers of these police stations and take action against those who violate the law or the police regulations. There is no recorded instance in recent times when any ASP has done his duty in this regard.

The Anti-Corruption Front Report

In the ACF Report bearing No. 177, dated 16th May 2016, there is detailed enumeration of 38 cases, in which, according to the Report, the criminal investigations department or the FCID have completed their investigations. All the cases mentioned are those involving allegations of serious corruption, involving Minsters of the previous Government or other very senior officers involved in government administration.

Amounts involve and vary from LKR 2 Million to 700 Million. In all these cases where the investigations have been completed the status of the indictments is that either such status is indicated as "not yet "known, or "status of charges or indictments unknown", "AGs advise is unknown", and "delay in the AGs Department".

The AHRCs listing of the defects of the AGs Department

The prosecutor's role is played in Sri Lanka by the Attorney General's Department. This Department has also seen serious degeneration of quality due the following factors.

1. Under the previous Mahinda Rajapaksa government, the entire department of the Attorney General was brought under the control of the Presidential Secretariat. This was a fundamental violation of the tradition of independence of the Attorney General's Office, as was maintained for a long period. Bringing the Department under the control of the Presidential

Secretariat was a blow to this independence, and it also brought down the image of the institution before the public eye. It also brought severe demoralisation into the institution. Although the new government has acknowledged this problem, it has not done enough to correct the damage done and raise the status of this Department.

2. The Department is also perceived as having seriously suffered the politicisation processes, as mentioned in the above paragraph, which applies to the entirety of the public service.

3. During the previous government, the Department also abandoned the earlier held position regarding non-appearance on behalf of public officers, who were respondents in fundamental rights applications before the Supreme Court, relating to torture and ill-treatment. The department officers not only began to appear for the defence of these officers, they also often prevented issuing of Leave to proceed in fundamental rights application by providing information which were bias, even before Leave to proceed had been issued.

The applicants in these cases had no way to contradict the information provided by some of the officers of the Department as the applicants did not have any notice of the information provided by these officers to the courts. The following observation of the UN Special Rapporteur for independence of judges and lawyers is relevant:

"… The Attorney-General's office acts as the representative of the State, which by no means should be equivalent to defending the government. His office should also be able to make a neat separation between the State and the public

> *interest they act on behalf of and the persons behind the institutions so as to avoid any possible conflict of interest. Such conflict of interest have arisen for instance in cases where the Attorney-General's office appears in the defence of police officers or military officers in cases of habeas corpus applications, as if the court decides that the respondent are responsible for the crimes they are accused of, the same office would be called to prosecute them."*

4. It is acknowledged that the Department does not have adequate number of State Counsel; it is often said that the number available is less than half of he required number. One of the results of inadequate number of State Counsel is that it often causes the delay in criminal trials and also leads to rather unprincipled forms of settlement of cases purely for the sake of speedy ending of cases. This has included, sometimes, agreements to grant suspended sentences, even for serious crimes such as rape and sometimes even murder.

5. Extraordinary delays in filing of indictments in the High Court regarding serious crimes.

The UN Special Rapporteur on torture and ill-treatment states:

> *"…We understand that the average delay for State Counsel to bring a criminal case before the High Court after remand ranges from 5 to 7 years. This is a serious violation of due process and the presumption of innocence, and results in what is commonly known as an 'anticipated penalty' without trial. It also violates the principle that provisional detention should be the exception and not the rule. I urge Sri Lanka to consider measures to make more non-violent offenses bailable and to experiment with alternatives to incarceration.*

6. The Attorney General and his Department has failed to issue clear and proper guidelines for the investigation and prosecution of crimes and also to make specific guidelines for investigation and the prosecution of serious human rights violations, including torture, and violations of international human rights law.

   For all appearances, on matters of public law, the Attorney General's Department acts not as if it has a role in the protection of the rights of the people, but as if its role is to represent the State, however repressive the State may be. The Attorney General's Department acts more like a defender of repression rather than a Department acting to protect individual rights.

   The Attorney General has also failed to ensure that his department does not contribute to the delays in the courts and has failed to issue instructions to State Counsel to avoid delays.

7. As the Attorney General acts also as a legal advisor, this office should be exercised as it was in the earlier period, to advise purely on the basis of legal principles and not to justify illegal and unjust actions of the State. In the recent decades, there is nothing on record to show that the Attorney General opposed unjustifiable actions taken by the Executive, particularly in order to suppress dissent, limit media freedoms, and use the legal process to harass individuals. Cases against the former Army General Sarath Fonseka, particularly immediately after the Presidential elections, in which he was the common opposition candidate, spring to mind instantly. There are also other cases like that of Jayaprakash SittampalamTissainayagam.

It is time for the Government and the Attorney General's Department itself, to seriously examine the nature of damage the institution has suffered during the previous decades and to take the necessary initiatives for reform to prevent the department becoming an obstacle to the achievement of rule of law in Sri Lanka.

4

Torture is a common practice in Sri Lanka – UN Special Rapporteur

The UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment Mr Juan E Mendez, published his preliminary findings on 7th May 2016 following an official visit to Sri Lanka. He has observed that torture is a common practice in Sri Lanka and structural reforms are required to prevent it.

In his concluding remarks he states,

> *"…The current legal framework and the lack of reform within the structures of the armed forces, police, Attorney-General's Office and judiciary perpetuate the real risk that the practice of torture will continue. Sri Lanka needs urgent measures adopted in a comprehensive manner to ensure structural reform in the country's key institutions. A piecemeal approach will not be compatible with the soon-to-be-launched transitional justice process and could undermine it before it really begins."*

Findings

In his findings he states that "…I am persuaded that torture is a common practice carried out in relation to regular criminal investigations in large majority by the Criminal Investigation Department (CID) of the police…." And, he goes on to state that "... Fewer cases are reported today than during the conflict period and perhaps the methods used by the police forces are at

times less severe. But sadly the practice of interrogation under physical and mental coercion still exists and severe forms of torture, albeit probably in less frequent instances, continues to be used...", and that "… Both old and new cases continue to be surrounded by total impunity."

Then he makes the following observations based on testimonies from victims and detainees whom he and his team of forensic experts met during his country visit:

> *"… I received many testimonies from victims and detainees who took the risk to speak out, despite concerns either for their own safety or their families. I was able to conduct thorough interviews and forensic examinations in a few cases, with the assistance of a forensic expert that accompanied me during my mission. I found the testimonies truthful and many were substantiated with physical evidence that is conclusive of torture. The forensic expert conducted a number of medical examinations that confirmed physical injuries consistent with the testimonies received. The forensic expert also analysed photographs taken shortly after the alleged torture and ill-treatment, and concluded they are diagnostic of severe physical torture.*
>
> *The nature of the acts of torture consists mainly of transitory physical injuries caused by blunt instruments (essentially punches, slapping and, occasionally, blows with objects such as batons or cricket bats) which heal by themselves without medical treatment and leave no physical scars. There were also several accounts of brutal methods of torture, including beatings with sticks or wires on the soles of the feet (falanga); suspension for hours while being handcuffed, asphyxiation using plastic bags drenched in kerosene and hanging of the person upside down; application of chili powder*

> *to face and eyes; and sexual violations including mutilation of the genital area and rubbing of chili paste or onions on the genital area. While these methods of torture were in some cases of short duration, in other cases torture occurred over a period of days or even weeks during interrogation."*

PTA and the failures of the Magistrates

The UN Special Rapporteur observes that under Section 15(a) of the Prevention of Terrorism Act, some detainees continue to be detained in TID facilities, as they are considered by the Secretary of the Defence as a threat to national security.

He observes the following regarding the hearings before the Magistrates:

> *"… The hearings held before a magistrate, for the purpose of judicial control of the detention, do not amount to meaningful safeguards against either arbitrariness or ill treatment. The magistrates essentially rubber-stamp detention orders made by the Executive Branch and do not inquire into either conditions of detention or potential ill-treatment in interrogation."*

The Rapporteur has conducted random interviews of defendants held under the PTA, or under charges of ordinary offences for over ten years in remand detention and others sent to "rehabilitation" in lieu of prosecution, which is supposedly voluntary on their part. He goes on to state, that "… Obviously, if after many years of detention the State does not have sufficient evidence to charge a detainee, the latter should be released unconditionally."

The Rapporteur recommends that,

> *"… The Government should repeal the current PTA. In the context of any replacing legislation, if*

at all necessary, a robust and transparent national debate should take place that provides for full participation of civil society. We understand that the Government is contemplating statutes on National Security, surveillance and intelligence services. Under any circumstance, those pieces of legislation should include protections against arbitrary arrest, absolute prohibitions on torture or cruel, inhuman or degrading treatment, provisions for access to legal counsel from the moment of deprivation of liberty, strong judicial controls over law enforcement or security agencies, and protections for the privacy rights of citizens. The Special Rapporteur on Human Rights while Countering Terrorism has produced very useful guidelines to incorporate in legislation of this sort. …"

The Rapporteur also expresses concerns about the allegations he has received recently of the so called "white van abductions", and about the absence of clear rules in the law that says arrests have to be authorised by a judge.

He further, observes,

"… In practice the decision to arrest a person is made by a police officer. For that reason, it is important that detentions are made transparent, with proper identification of the arresting officer, and offering reasons based on objective evidence. Otherwise, distrust of the authorities will persist."

The Rapporteur then goes on to make his observations on the reasons that may lead to the practice of torture and observes that the Sri Lankan criminal justice system and investigation practices somehow may indirectly incentivise the use of torture.

He observes:

"… The first is the role of confessions of suspects in criminal investigations, which currently seems to

be the primary tool of investigation for the police. The need to extract a confession in order to build a case is in itself a powerful incentive to use torture. A second aspect is the practice of conducting the investigation while the suspect is in custody, rather than determining the detention based on preliminary investigations. Authorities have on a regular basis justified prolonged detention on the ground that the investigation was complex, or evidence hard to find, ignoring the fact that, outside of detentions in flagrante delicto, the evidence should be procured before the arrest. This access to the detainee for continuous questioning can also be an incentive for torture, aside from other considerations regarding conditions and legality of detention…."

The Rapporteur states that the Attorney General told the UN delegation that the statements made to the police do not form part of the criminal record in ordinary crime cases, though he acknowledged that under the PTA, statements made to a Senior Police Officer, are fully admissible in Court. He states further that in both cases, police routinely extracts self-incriminatory statements so the admissibility or not of the statements does not protect the detainee from possible coercion. In any case, the PTA provision is in direct contradiction with the obligation under the Conventions against torture to exclude all declarations made under torture.

Rapporteur then directs his observations regarding faultiness of the rules relating to the access to lawyers. The accused provides a statement to the police as routine practice and is never informed about the right to a lawyer. This according to the Rapporteur, amounts to an inadequate and meaningless legal protection, which fuels the widespread fear and mistrust of the police system among the population. He recommends "… It would be important to establish a clear rule that persons must have access to a lawyer from the moment of deprivation of liberty. A current proposal to amend the Criminal Procedure Code that includes access to

counsel only after a statement is taken by the police in the initial 24 hours of detention is not appropriate to effective assistance of counsel and would, therefore, violate due process."

Judicial oversight of police action is superficial

The Rapporteur in examining the role of the judiciary and the prosecutors finds fault with the prevalent practices in Sri Lanka regarding their dual obligations of prevention and accountability. He states

> *"… A modern accusatory system begins with affording more guarantees for the defendant. In it the public prosecutor is first and foremost the guardian of legality. Prosecutors must enforce the law against criminals but should also actively prevent miscarriages of justice by way of torture and manipulation of evidence, and intervene early on in the process. The accusatory system is more conducive than the inquisitorial system for the respect for human rights; but in its modern form it gives a lot of power but also heightened responsibility to prosecutors."*

He points out that judges and prosecutors should take it upon themselves as a matter of legal obligation to consider bail for lesser and non-violent offences and that they should ensure medical examination of the suspects so as to exclude any suspicion of mistreatment while in custody. They should initiate prosecutions to whosoever might be responsible for torture and mistreatment including superiors who may have tolerated and condoned such acts, ensuring that investigations, detentions interrogations arrests and conditions of incarceration takes place within the framework of rule of law.

Deficient and pronounced overcrowding in places of detention

The Rapporteur goes on to observe that there are serious defects relating to detention which results in acute lack of adequate sleeping accommodation, extreme heat, and insufficient ventilation, limited access to medical treatment, recreational activities and educational opportunities. He states that "…These combined conditions constitute in themselves a form of cruel, inhuman and degrading treatment…."

Regarding over-crowding he refers to his visits to prisons where he observed level of population exceeding capacity by well over 200-300 percent:

> *"… Vavuniya Remand Prison offered a striking example of such overcrowding. One of its halls hosted 170 prisoners in what my team and I estimated to measure less than 100 square meters, providing less than 0.6 metres per person. In the same building, other prisoners were forced to sleep on the staircase for lack of space in the detention areas. In addition, we saw cells designed for one person occupied by four or five inmates. The larger prisons in Colombo were built in the mid-19th century and walls, roofs and staircases are literally crumbling on the prisoners. The Government has indicated that Welikada prison will be closed and a new prison will be built in Tangalle, but we understand the latter is not even in the planning stages yet. While replacement of old prisons is a good idea, in the meantime it is urgent to conduct maintenance and repair the unsafe conditions that amount to cruel, inhuman and degrading treatment or punishment…"*

Defects in torture prosecution and provisions for fundamental rights

Talking about the Torture Act that came into effect in 1994, he observes that there had been only a few prosecutions. In the prison system there is no formal complaint mechanism available to inmates to make complaints about torture and ill-treatment, or any other matter. The complaint mechanisms available against the police are also inadequate.

He makes the following comments on the fundamental rights provisions:

> *"… Fundamental rights applications involve complex litigation and are thus not accessible to all. They are subject also to a 30-day term to file from the occurrence of the violation. In addition, even if successful, they result in compensation as the only remedy. The application is not available, for example, to vacate a court order that has been based on a forced confession, as it does not lie against judicial decisions."*

Impunity and lack of accountability

Like the previous Rapporteurs, who have observed the prevailing practice of impunity in Sri Lanka, the present Rapporteur also finds that

> *"… Acts of torture that occurred in the past have been well documented. The Government has an obligation to investigate, prosecute and punish every incident of torture and ill-treatment, even if it happened in the past, because under international law prosecution of torture should not be time barred. The State also has the obligation to prevent such occurrences in the present, and the most obvious preventive measure is forceful prosecution of cases reliably reported.*

> *Sri Lanka has a Victim and Witness Protection Act but potential beneficiaries complain that protection is ultimately entrusted to the police which, in most cases, is the agency that they distrust. The Government should consider amending the Act in order to make it more effective and trustworthy....”*

The Rapporteur will make a more detailed report on these matters to the United Nations' Human Rights Council at its 34th Session to be held in March 2017.

A scathing critique

The findings of the UN Rapporteur on torture and other cruel and inhuman degrading treatment or punishment, is a scathing critique of Sri Lanka's failure to carry out its obligation to prevent torture and ill-treatment. This Rapporteur's findings demonstrates that the Government of Sri Lanka, fails to honour the basic obligation to prevent torture and ill-treatment despite the many promises it has given to various UN bodies, including the Human Rights Council.

Sri Lanka seems to be trapped within an extremely defective criminal justice system that cannot do away with torture and ill-treatment. The investigators, prosecutors, and also the judiciary have not made an adequate attempt to overcome the defects of the criminal justice system. None of these institutions have shown a demonstrable will to end this universally condemned practice of torture and ill-treatment. On the other hand, the Government has failed to provide the necessary resources to undo the defects of a backward system. Therefore, Sri Lanka will continue to be condemned in international forums for its lack of will to develop a criminal justice system to be in keeping with its international obligations.

5

The arrest of former DIG Anura Sennanayake and the problem of command responsibility

Former DIG Anura Senanayake was arrested and produced before the Colombo Magistrates Court, and the Court ordered him to be remanded till 26 May 2016. According to reports, the allegations against him relate to the murder of rugby player Wasim Thajudeen. It is particularly alleged that he attempted to misdirect the inquiry into this case, at the initial stages, trying to pass off the murder as an accident. The Officer in Charge (OIC) of crimes at the Narahenpita Police Station, now also under arrest, has confessed that the former DIG instructed and directed investigations to be carried out on the basis that it involved an accident despite the observed evidence making it obvious to the OIC that there were sufficient grounds to suspect murder. The purpose of this article is not to go into the case details as such but to focus on such high ranking police officers being suspected of serious crimes on the policing service in Sri Lanka.

There are a number of criminal cases in which senior police officers of such rank as Deputy Inspector General of Police (DIGs), down to the Assistant Superintendents of Police (ASPs) and Officers in Charge (OICs), have been charged in courts; some have already been found guilty and sentenced on serious charges, such as murder. Some others are being investigated on charges of murder and related offences and of deliberate subversion of the judicial process by tampering with investigation processes and reports. Some recent cases relating to such senior officers are: the case of former DIG Vaas Gunawardana, who, with six others,

was convicted and sentenced to death on charges of abducting and murdering a businessman; the case of ASP Cooray, who was found guilty and convicted for the murder of senior Minister Jeyeraj Fernandopulle; the case of Thajudeen's murder itself, wherein, apart from former DIG Anura Senanayake, Traffic DIG Amarasiri Senaratne and former Director General of Military Intelligence (DGMI) Major General Kapila Hendawitharane have been questioned by the CID, and two Head Quarters Inspectors (HQIs) on duty in Narahenpita and Kirulapone have also been arrested along with Sumith Champika Perera, former Crime OIC of Narahenpita police; and the infamous murder case of Sumith Prasanna Jayawardena, wherein the Embilipitiya ASP W.D.C. Dharmaratne has been arrested and remanded. There have been others who have been charged for bribery and corruption.

A policing system is a monolithic system, which runs on the basis of control from the top to the bottom. It is a strict system of command and the control, and the actions of the officers of the lower ranks are entirely in the hands of the officers of higher ranks. The system works on the basis of command responsibility, which is a doctrine of accountability of superior officers regarding all other who act under their direction and command. This system can function only to the extent that the principle of command responsibility is respected and maintained within the organisation.

However, it is well known that there has been a serious crisis of command responsibility under the executive presidential system. The nature of the executive presidential system, as it evolved in Sri Lanka, was that the President could put his finger and meddle anywhere without reference to officers holding superior positions in any public institutions, including that of the police. It meant that the President, or those acting under his name, could directly give orders and get things done through any officer they wanted, without needing to consult or even inform the superior officers. This created a chaotic situation within every public constitution in Sri Lanka, including that of the policing system.

One of the earliest known instances of the President directly interfering with the policing system was when President J.R. Jayawardene kept then DIG Udugampola in the Presidential Palace itself; the DIG would give orders to other officers without any reference to the IGP or any other fellow DIG. Initially, when this arbitrary situation emerged, there were reports of conflict among the ranking police officers. However, in time, the practice became common and the system became resigned to it.

The gradual evolution of the new situation degenerated further when Gotabhaya Rajapakse, as the Secretary to the Ministry of Defence, took virtual command of the policing service also. As a "state within the state" gradually developed during those years, respect for the internal organisational structure came to be disregarded. The extent to which politicians interfered with the system came to be known as politicisation.

Although direct interferences with the system came to an end with the electoral changes in 2015, the impact of the disruptions within the system still remain a major problem to be addressed.

In reconstructing the policing system on the basis of the principle that officers at the top will take responsibility for everything that happens within the organisation, one of the matters that needs to be addressed is the recreation of the image of superior officers as those who are beyond any blame.

For the country's premier law enforcement agency to perform its function – of ensuring enforcement of the law within the entire country – it is essential that the police officers themselves begin to recognise their organisation as one within which the law is held with the utmost and ultimate respect. If the police officers themselves lose faith in their organisation and its leaders, it is not possible for this organisation to perform its primary function of upholding the rule of law.

That there is a crisis in relation to upholding the rule of law in Sri Lanka is something acknowledged by everyone. Often the blame for this is placed on the former regime, which was one that

had no respect for the rule of law. However, the people's 2015 electoral interventions, aimed to bring an end to that period, also had great expectation that the prevailing lawlessness would be brought to an end.

If this aspiration is to be fulfilled, there needs to be genuine and serious efforts on the part of superior police officers not only to be but also to appear to be persons without any blame. This means the higher-ranking officers should offer themselves as an example of persons with utmost respect for the rule of law. It is only then that these superior officers can be perceived in that light, and the rest of the officers can fall in line. Restoring of the rule of law within Sri Lanka implies, first of all, ensuring subservience to the rule of law by all officers who belong to the policing system.

It is from this point of view that the IGP and his deputies should seriously scrutinise the circumstances under which even some of its topmost officers have degenerated into being criminals. It should be a matter of intense soul searching, and the Inspector General of Police himself should initiate such soul searching. It is his duty to inculcate a policy of zero tolerance to crime within the policing system. Such a policy cannot merely be taught by instructions, it can only be taught by setting an impeccable example.

Though this can be said easily, everyone knows that doing it is not going to be easy, given that tolerance for crime has spread to the very top of the organisation. The Inspector General of Police will need the cooperation of all high-ranking officers of the organisation if he wants to inculcate the spirit of zero tolerance to crime within the policing system.

Garnering such cooperation should begin with the initiation of a series of discussions within the top ranks of the police on the issue and coming to a common understanding of the past history involving degeneration within the system which led to this situation of topmost officers engaging in the most serious crimes

such as murder. It is only through a process of internal discussion that genuine contrition about past practices can be generated. Once there is a serious acknowledgement of the problem at the very top, and a genuine regret about the past, instructions can be given in detail to lower ranking officers about the need to get back to the fundamental ideas of policing.

If there is an obvious change of heart within the policing system on this issue it will become an inspiration for the rest of the population in their pursuit of making Sri Lanka a country that seeks to establish and uphold the rule of law.

6

Kondaya, Raised to the Status of Mysterious Criminal

The name Kondaya is now a household name, following the tragic Sewwandi case, involving the abduction, rape, and murder of a little girl of around 4 years. Discovery of the dead body led to an uproar not only in her village and the neighbouring villages but also throughout the country. There was a demand for immediate inquiries and for prosecution and also for vengeance.

As usual, the local police failed to make any arrests for some time and instead began to float stories that were reported in the media, and various people were named as possible suspects. The first was the father and the grandfather in the same family, who happen to be the males in the house.

So, simply because they were male, the police developed a suspicion that they might have done this, and before any evidence was collected, their suspicion was transmitted to the media and the media gave it to the whole nation. These days it is not only the whole nation; because of social media and the Internet, it was also discussed in the Sri Lankan circles outside Sri Lanka.

The arrests were made, and later the "suspects" were found to have nothing to do with the crimes relating to the little girl's abduction, rape, and murder, and they were released.

The next suspect was a young boy, who happened to have a computer and Internet facilities, and on that basis he was suspected as the possible culprit. Again, the police suspicion was taken as fact and proof, and the information was leaked to the

media, and again the same kind of publicity greeted the local village, the country, and the Sri Lankan circles abroad.

In the case of Kondaya, the DNA results have themselves proven and confirmed and he was positively identified as the person who could have not committed this crime. And so, the boy was also released, after many days in custody, and after being tortured.

Later, someone else was charged. And now the trial is over, and he has been found guilty of the charges by a high court.

The story does not end there. In fact, at this point, a series of new stories begin to emerge. The Kondaya and the boy both sought legal advice and they filed fundamental rights applications against the police officers who illegally arrested, detained, tortured, and also generated massive media publicity, blackening their names in the local community and wider.

Next, we hear that there is a case against both persons and the police have filed criminal charges, in order to try to manipulate them, by using the powers of arrest, for the purpose of trying to obstruct the proceedings in the actions that they have filed against the police.

Against Kondaya, according to media reports, the charges that the police have alleged and the offences that the police have alleged is that somebody like Kondaya was seen to be in a position that would have been likely to have committed an unnatural offence against an animal. Again, with this, Kondaya began being portrayed as a person who will do any type of offence.

But, the worst was yet to come. Just a few days back, the people in Gampaha Minuwangoda, and other villages, witnessed a completely new phenomenon. Two police officers were walking behind a carriage on which loudspeakers were tied, and someone was talking to the villagers through the loud speakers with the message that the police have got information that Kondaya has joined a gang of criminals who intend to abduct children, and that

therefore there is a big danger of children being kidnapped. So, parents and adults were being warned that children must be kept inside the houses at all times and the doors and windows should be shut at all times. The police cautioned that due to the heavy heat, families are likely to keep their windows and doors open. However, they should understand the danger and that despite the heat, windows and doors must be kept closed.

Now, what evidence the police have, of this particular person being a part of a criminal gang, planning such criminal activities, has not been revealed. Besides, even if there were any allegations of the sort, the duty of the police was to investigate and to act within the procedures described by law and to bring the matters to court and act only in the manner that they are supposed to act within the rules that are well established. The suspects that are facing investigations have a right to protection, and this protection includes the protection of their reputation. In any case, there is no law that authorises the police to go about making such announcements through loudspeakers, labelling any accused as a serious criminal. The policemen that engaged in such activity, obviously with the knowledge of the senior officers of their police station, were clearly acting against basic rules of law and decency.

But, what is more worrying is about the possible consequences of such announcements.

One of the following things could happen to Kondaya in the following days:

He could be attacked by mobs or even be killed by mobs because, naturally, people will be very angry with anybody who is engaged in an organised manner seeking to abduct their children. Nothing offends parents and adults more than such types of crime.

The second possibility is that it may be said that Kondaya was arrested, and then he tried to escape, and in the process police had to use force and in that process he was injured and killed. Such stories have been commonly reported in the recent past.

The third possibility is that a group of criminals can be indirectly mobilized to go and attack this suspect and to either injure him or murder him. And, it will be said that the mobs attacked this person who was killed.

The result of this announcement is that if any one of these things were to happen to Kondaya, nobody will care. They would think, at last, a menace to society has been removed.

These are the anxieties created in people, particularly, with relation to the security of their children, and in them adjusting their minds to the elimination of such persons even through illegal means. This experience we have had, in terms of both the suppression of the JVP rebellions and the LTTE and other groups in the North and the East. Mental conditions can be created within which otherwise normal and reasonable people can tell themselves that under these circumstances if some extraordinary action is taken, even if these actions violate basic laws, it is okay, given the dangers that are posed to their person or to society at large.

The problem is that it makes no difference at all to complain about all these matters to the higher authorities or to the police. The people have gotten used to the belief that it is futile to make such complaints, because unless there is heavy political pressure, as in the Embilitpitiya case, there would not be any investigations into this matter. That is the impression that has been created throughout the country about how the premier law enforcement agency works.

In one way, there is nothing to be surprised about such behaviour, because 29,000 persons who work today as policemen were those who were recruited in 2006, purely from a political point of view, as mostly reserved police officers, i.e. the lowest ranking police officers. Neither were such persons subject to any interviews, nor did they undergo the normal one-year programme of training, given to other police officers. Most of them do not have a strong ability to read or write, and are certainly devoid of critical faculties, even basic levels. Police work requires high

degree of critical faculty, because, very serious judgements have to be made by these officers, which affect the individual liberties of human beings.

A basic principle is already established in common law, which was reported by one of the greatest authorities on British law, A.V. Dicey, who is also credited with coining the term rule of law, which has now become a common term used throughout the world.

He described that, by then, in England, a practice had been established that arrest is illegal, per se. Arrest can be justified only if there is an investigation on the basis of reasonable grounds that a person may have engaged in the commission of crime. Only then, he or she could be arrested, for the purpose of such investigation.

The second ground that is allowed as an exception to the general rule, which is against arrest, is that a person can be arrested to carry out a sentence meted out by the judiciary.

A.V. Dicey goes further to state that it is established law in Britain, in the mid-19th century, for it being the duty of the magistrate, upon finding that a person has been arrested outside those two grounds, to criminally punish those who arrested the person.

Further, it is the duty of the magistrate to see that the victim who has been illegally arrested is compensated. And, that is the basis of the law introduced to Sri Lanka through our penal codes, criminal procedure code, and our constitutional law.

The exact words of A.V. Dicey are as follows:

> "The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restraint is in England prima facie

> illegal and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial or because he has been duly convinced of some office and must suffer punishment for it. Now personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law i.e. (speaking again in very general terms indeed) under some legal warrant or authority and, what is of far more consequence, it is secured by the provisions of adequate legal means for the enforcement of this principle. These methods are twofold; namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of habeas corpus".[3]

However, today, this most important principal, on which the freedom and liberty of the individual rests, is being flouted in the most casual manner. How can good governance be established in a society like this? How can the officers win the confidence of the people, when the situation is such?

The new IGP appointed has been put in an unenviable position. He has to take steps to correct the heavy load of problems inherited from the past. These problems include the 29,000 police officers out of a total cadre of 80,000 police that are basically not qualified to do their job.

Furthermore, the practices established in flouting the law when making arrests and detention and also illegal killings

3. Introduction to the study of the law of the Constitution, 10th edition, London, Macmillan, 1959, with an introduction by E.C.S Wade Q.C., pp. 207-08

entrenched in the system need to be eliminated. Will the new IGP be up to this task? The people will soon talk about it and his term of office will be judged partly on this basis, i.e. whether a significant reform was initiated during his term. (Naturally such a process cannot be completed within a short time.)

Next, it will be judged on the basis of whether the IGP had the cooperation of the government to achieve this task, particularly in the allocation of necessary resources, in order to engage in significant reform.

It is not only the IGP who will be judged on this issue, of course. The entire country's legal system will be judged on this issue. If the legal system does not prove it is up to the task of making a fundamental change, then what is implied is that the Sri Lankan society is heading towards an even worse form of peril than what it has witnessed in the years that followed the 1971 rebellion right up to the 9th of May 2009.

7

What Poddala Jayantha means to us

I do not know Poddala Jayantha personally. However, I have felt for several years and still strongly feel that I as a human being, and we as Sri Lankans, owe a serious obligation to him.

I remember the first day I heard about the cruel way he was dealt with some seven years back. Though no stranger to the extreme forms of cruelties that have taken place in Sri Lanka in the recent decades, or perhaps because of the knowledge of these things, what I heard about this incident left a deep sense of disappointment within me.

Now, reading his own published statement about the incident in a Sinhala publication, seven years after the events, my sense of disappointment in the Sri Lankan State, and in us as a community, re-emerges, fresh, as it was when first felt.

The expertise with which the abduction into a mobile torture chamber was carried out, the speed with which the series of acts of cruelty were done, and the utterly emotionless and remorseless manner in which it was completed, are all reminders of a training that some persons have received to become torturers on sheer command. The torture industry in Sri Lanka has reached this advanced stage.

However, now, in this present moment, what I see in my mind's eye is the sheer horror and depravity of the one who gave the command to carry out this horrible act. That command came from a man who had by then become very smart about the use of cruelty to achieve his ends. Perhaps on hearing that his commands

had been carried out the same way as he wished, he would not only have been happy but also thrilled. Such is the way of the human brain, which can play tricks by sophisticated techniques of mental perversion. The pleasure of power addiction is like the pleasure of drug addiction.

However, the greater disappointment is in US. We have made it possible for these things to happen in the land that we call ours. What really surfaced in this incident more sharply, as it has in various ways in other similar incidents that can be counted in the thousands, is why and how we have become incapable of outrage against moral depravity and depredation.

This drama of cruelty was done in a way for it to become a spectacle for all of us. We were all supposed to see this and be awed by the power of a cruel master who was telling all of us – "beware, this is what I am capable of". This message was brought to us through a mobile torture-team. To the producing mastermind, the whole nation was his theatre. This was that producer's way of teaching us all a lesson.

What is disappointing about ourselves is that we have all become humble learners in the traditional book on cruelties that has moulded us all, where we have such punishments as breaking of legs and bones. The threats of breaking legs and bones are not uncommon in our parlance. There is an underwritten fear in our minds about such threats. However, we dismiss these kinds of threats perhaps as bad humour. However, Poddala Jayantha was used as an example to demonstrate that such things can be done and all that is needed for such things to happen is for one of us, who has become a monster, to become capable of giving such a command.

A society that has become so timid it is now incapable of outrage in the face of such acts and words has no other option but to watch such horrible spectacles of inhuman cruelty.

If we are to become our own saviours, we have to discover the capacity for outrage against moral wrongs. Every moral

wrong that happens in the public sphere, is an insult to the whole population. A population that puts up with such insults allows itself to be demeaned. Such a population will be visited by many such cruelties packaged and sent by its rulers, who would have learned that acts of extraordinary cruelty are a useful means of subduing the ruled.

Democracy becomes possible only if a population learns not to tolerate insults and becomes truly capable of expressing its outrage in a manner that the rulers become aware that the people in the country are not willing to be treated as fools.

A population becomes capable of moral outrage only when it sees social responsibility as the core value that keeps the society together. It is the sense of responsibility to each other that creates a strong society.

In the 3rd Century B.C. when under the influence of the Great Dharmasoka, Buddhism was bequeathed to Sri Lanka, it was envisioned as a great philosophy to unite people together by a sense of moral responsibility. Romila Thapar, one of the eminent historians India has produced, in one of her great books, *"Asoka and the Decline of the Mauryas"*, makes this point sharply:

> "In the past, historians have generally interpreted Asoka's *Dhamma* almost as a synonym for Buddhism, suggesting thereby that Asoka was concerned with making Buddhism the state religion. We propose to show that this was not his intention, although he himself, as a firm believer in Buddhism, was convinced that it was the only way to salvation. The policy of *Dhamma* was a policy rather of social responsibility than merely of demanding that the entire population should favour Buddhism. It was the building up of an attitude of mind in which social behaviour, the behaviour of one person towards another, was considered of great importance. It was a plea for the recognition of the dignity of man, and for a humanistic spirit in the activities of society."

What happened to Poddala Jayantha is something so serious that it should, even belatedly, lead to an adequate response from the society as a whole. This can be done only if the society willingly re-examines its own position in relation to the value attached to social responsibility. It we accept responsibility for each other and are willing to examine where we have failed, on that score alone, we could lay the foundation for a society that does not ask: “Am I my brother’s keeper?”

8

Letter to the HRC-SL; Request for special action regarding Ms. M. K. Malani – tortured, sexually abused and incarcerated under fabricated charges by Nawalapitiya Police

Dr. Deepika Udagama
Chairman,
National Human Rights Commission
Head Office,
No. 165 Kynsey Road,
Borella, Colombo 08
Sri Lanka

Dear Dr. Deepika Udagama,

Request for special action regarding Ms M K Malani, presently being held at the Dumbara-Bogambara Prison – tortured, sexually abused and incarcerated under fabricated charges by Nawalapitiya Police

The Asian Human Rights Commission is bringing this case to your notice as a case that requires, special attention given the grave violations of human rights involved and continuing imprisonment of the victim on fabricated charges.

This case may have come to your notice already. In any case we set out the basic facts of the case below;

THE CASE NARRATIVE:

According to the detailed information received by the Asian Human Rights Commission (AHRC), Ms. M K Malani, 38 years old, was a resident of a line-house (estate housing) at Dholosbage Estate in Nawalapitiya, Kandy District. She was married to Mr. R.P. Rengan Selvam and they have six children, the youngest being a son aged five years. The family is poor and destitute. The husband was a laborer, while Malani supported the family by plucking tea in the tea-estates. Mr. Selvam was addicted to liquor and as a result she suffered regular domestic violence. When she was expecting their sixth child she was severely assaulted by her husband and was treated in hospital for several months.

Due to the abuse, Malini had started a relationship with Nadaraj Thambiraj Shivakumar, and left her husband to live with him, taking her youngest son with her. She has been living with Nadaraj for the past five years. In early January 2016, Rengan extended an invitation to Malini and her new husband to visit him and expressed eagerness to see his youngest son.

On January 5, Malani, Nadaraj and her youngest son visited Rengan, and during the visit Rengan in his usual behavior started to hurl abuse at Malini. Later at around 10 p.m., he assaulted Malini and pushed her to the ground, at which both she and Nadaraj with their son left for Malini's parents' house.

On January 7, Malini learned that Rengan had been killed. She immediately visited the Gampola Police Station to make a complaint, but the police refused to accept her complaint since Rengan's residence is not situated within the Gampola Police Division. Instead, the police officers informed her that some police officers from the Nawalapitiya Police Station would be arriving and she could go with them to the Nawalapitiya police station to lodge a complaint.

Several hours later several police officers attached to the Nawalapitiya Police Station arrived, and asked Malini to go along with them to the Nawalapitiya Police Station in the police jeep, to which she agreed.

At the Nawalapitiya Police Station, Malini asked some officers to record her complaint. Having waited for some time, she realized that the officers instead began to continuously question her about the incident. The officers then accused her of killing Rengan and implicated Nadaraj in the killing as well. She vehemently refused the allegations. Malini also observed that the police officers did not start any investigation regarding her complaint, nor did they ask about any details of the crime or the crime scene. The officers only continuously harassed Malini to admit to the commission of the crime.

After several hours of questioning, Malini was taken to an upper floor of the police station by Criminal Investigation Department (CID) officers, and her son was separated from her at that time. While she was being interrogated about the murder, to which she confessed not knowing anything, several police officers started kicking and assaulting her with their fists. She was then asked to keep her hands on the floor and police officers trampled on them with their shoes. She was assaulted with a plank and her clothes were torn and chili paste was rubbed on her face. Later she was hung from the ceiling with both hands tied and she was verbally abused and severely beaten. When she asked for water, she was told to urinate and drink. Her clothes were then removed and the CID officers started to sexually abuse her. Once again she was hung from the ceiling and severely beaten. In the night when she cried out in pain, she was given some balm while her son was watching her.

Several days later, on January 10, she was finally produced before the Magistrate of Nawalapitiya and remanded at the Dumbara- Bogambara remand prison in Kandy. She was once again produced before the Magistrate on April 1, and continues to be in detention.

Matters arising from the above narrated facts

1. Torture of Ms M K Malani, a woman of 38 years old, aggravated also by the fact that the torture took place in front of her 6 year old child.

2. Sexual abuse by policemen
3. Incarceration under fabricated charges

A short comment on each of these violations;

1. **As pointed out by the UN Special Rapporteur on torture and other cruel inhuman and degrading treatment or punishment, Mr Juan E Mendez, torture and ill-treatment remains common practice in Sri Lanka and there are cases involving brutal forms of torture taking place. If the facts narrated by the victim in this case is correct, then this is one such case.**

   The Special Rapporteur has also pointed out how torture remains the means by which information is collected in criminal investigations. This again is a case in point. According to the narrative by the victim no questions were asked nor were there any credible investigation conducted before arresting her for the murder of her husband whom she had left five years ago. She went to the police station on hearing of the death of her husband to make a complaint and instead, she was arrested and questioned on allegation that she has murdered her husband. What was the basis of this allegation?

   It is not difficult to figure out whether there was any credible basis to base any allegations against her by examining the relevant books which should be in the possession of Nawalapitiya Police. It is possible for the Human Rights Commission, either directly or through Superior Officers to examine these documents. In any event, the victim alleges that she was tortured. It is possible to verify her allegations on this matter through forensic examination. Though sometime has lapsed it is possible by forensic means to verify whether she has been subjected to torture.

In a situation such as this, we very respectfully submit that the Human Rights Commission of Sri Lanka, has the power and the duty to have the victim examined forensically, and thereby be in a position of verifying her allegations. We are sure that the Commission will share the concern that if the allegations are prima facie credible, allowing her to suffer further incarceration itself would constitute violations of her basic human rights. A torture victim in her position deserves to be examined as fast as possible and if any relief is to be genuine it should begin with intervention to end her incarceration.

Therefore, we would first of all, respectfully request the Commission to cause her to be examined by a forensic pathologist and thereby commence investigation into the allegation of torture at the earliest.

In this case the allegation of torture and incarceration are linked. If the police had independent evidence of her being involved in the murder then why was there a need to torture her in the first place? The torture suggests that the police were attempting to extract information forcibly. Why was there such a need? Thus, if the allegations of torture is prima facie correct, then it also points to the fact of an illegal incarceration, and a falsified case. If the case is falsified, then the issue is, as to why the police needed to falsify a case. This again takes us to a serious matter relating to human rights in the present context of Sri Lanka. It is a well-established fact that a large section of police officers in Sri Lanka are incompetent and are not qualified to carry out criminal investigations , particularly into serious cases such as murder. It is a publicised fact that about 29,000 police officers were recruited as reserve officers in 2006 and this was done without any reference to any criteria or verification of any qualifications. This means almost one third of the police force in Sri Lanka can be said to be disqualified for any serious investigations into crimes by the very nature of their appointments. These reserve officers have now graduated into various higher ranks in the

service, despite of their lack of qualifications. It is a matter of concern for all those who are concerned with human rights to take up this matter seriously and in particular when the cases like the present case arise, where there is a clear indication that the process of arrest, detention and incarceration have all been done, without following any legal or procedural rules.

2. **The victim alleges sexual abuse. The Human Rights Commission is aware that sexual abuse while in custody, ranks among the gravest crimes and also amounts to torture. An allegation of sexual abuse while in custody requires, immediate reaction on the part of everyone who owes legal obligation for investigation. We therefore, urge that the Human Rights Commission would cause an inquiry into the matter immediately. If the allegations are found to be prima facie correct, then would take the necessary actions on the one hand to assist the victim of such sexual abuse and on the other to take action against the perpetrators. Again, the issue of incarceration on fabricated charges and the sexual abuse if correct, is deeply linked. Can the accusers against individuals be also the perpetrators of her sexual abuse? There is an enormous incongruity between those who are prosecuting a person when they also are alleged to have been involved in sexual abuse of the suspect. We believe that the Human Rights Commission will appreciate the grave miscarriage of justice involved in such a situation.**

   Therefore, instead of letting the victim suffer incarceration further, it would be the duty of all those who are involved in the protection of her rights to raise this matter of a grave injustice involved in those accused of sexual abuse be also the persons involved in pursuing criminal charges against the victim.

Both the accusations of torture by assault and also sexual abuse in custody which also amounts to torture would place the victim in a position to deserve psychological assistance at this stage. As the UN Rapporteur against torture and ill treatment has raised this issue of psychological assistance, and treatment we would respectfully request the Human Rights Commission to take this case up as one of the first instances in which the Commission takes an active stance to provide such assistance to this victim and thereby recognise her right to receive such assistance.

3. Continued incarceration

If the victim's version is true, then she has suffered torture, sexual abuse and is being incarcerated on the basis of request by the same persons who cause the above mentioned violations of human rights. We strongly recommend the Human Rights Commission to begin to establish the principle that arrest is prima facie illegal as is the most fundamental position in the common law stated very clearly already in 1861 by A V Dicey. (The full quote for your easy reference is as follows)

> *"The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restraint is in England prima facie illegal and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial or because he has been duly convinced of some office and must suffer punishment for it. Now personal freedom in this sense of the term is secured in England by*

> *the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law i.e. (speaking again in very general terms indeed) under some legal warrant or authority and, what is of far more consequence, it is secured by the provisions of adequate legal means for the enforcement of this principle. These methods are twofold; namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of habeas corpus".*[4]

It should be the duty of all who are concerned with law and human rights to resist the easy manner in which, people are being sent to remand prisons in Sri Lanka merely on the allegations by the police. Particularly in instances like the present one where the conduct of the police is highly questionable there is ample justification to question the police version of the events in this case. It is not difficult to find out at all whether there was independent evidence which would justify a reasonable suspicion that this victim is in fact involved in this crime. If it is not so, it is the duty of all concerned to see that she be released. It is within the power of the Human Rights Commission to point out to an illegal detention when there are strong grounds to do so.

In raising the following issues what we are attempting to do is to take up the issues raised and recommendations made by the UN Special Rapporteur on torture, Juan E Mendez, preliminary observations following his visit to Sri Lanka in May 2016. We believe that the Human Rights Commission as consisting of today is competent and quite capable of providing a credible leadership in dealing with serious abuses of human rights as those alleged by the victim in this case.

4. Introduction to the study of the law of the Constitution, 10h edition, London, Macmillan, 1959, with an introduction by E C S Wade Q.C., pp. 207-08

We would also like to assist the Human Rights Commission by making the following suggestions in order that it may discharge its duties diligently and also without delay.

We would like to suggest that the Human Rights Commission request the professional assistance of forensic doctors, and psychologists, on a voluntary basis to assist them in their inquiries. We are aware that there are many conscientious pathologists and forensic experts as well as persons qualified in the field of psychology are available in Sri Lanka and are willing to assist in inquiries of this nature if they are requested to do so. Perhaps the Human Rights Commission should form groups of such persons whose assistance could be called upon whenever the Commission requires such assistance. Given the peculiar circumstances of Sri Lanka and the constraints on budgets and others such matter which are unfortunately impediments standing on the path or protection of human rights the Commission can develop suitable methodologies to enhance its work which are contextually justifiable.

We take this opportunity to also state that the Asian Human Rights Commission will be willing to assist in any manner possible, if the Commission requires any such assistance. What we are concerned about is of raising the levels of protection of persons with the efforts of the Human Rights Commission as well as community resources, so that debacles caused by particular political circumstances in the country could in some way be overcome in the area of the protection of the rights of persons.

Thank you,
Yours Sincerely,

[signed] [signed]

Bijo Francis **Basil Fernando**
Executive Director Director of Policy and Programmes

P.S. For the purpose of public education we will publish this letter

9

Letter to the Attorney General regarding accepting apologies for human rights violations

15th June 2016

Mr. Jayantha Jayasuriya, PC.,
The Attorney General
The Attorney General's Department
Hulftsdorp, Colombo 12,
Sri Lanka

Dear Mr Attorney General,

Regarding a State Counsel's application to the Supreme Court to end a fundamental rights application relating to torture and fabrication of charges on a mere police apology

We have learnt through media reports that on 14th June 2016, when a fundamental rights application filed by Mr. Mohamed Amir came up before the Supreme Court, a State Counsel from the Attorney General's Department informed the court that the police were willing to apologise to the petitioner for torture and fabrication of charges for possession of illicit drugs.

The facts of the petition were that during the riots in 2014, caused by the intervention of the "Bodu Bala Sena", the

petitioner was assaulted by a group of people and then taken to the Aluthgama police station, which proceeded to file charges against him for the possession of illicit drugs. The petitioner filed a fundamental rights application arguing that his rights had been violated by these acts.

On the basis of the information given by the State Counsel at the hearing on the 14th of June – that the police are willing to apologise to the petitioner – an apology was tendered by the Officer-in-Charge of the Aluthgama police, with the promise to the Supreme Court that the police officers will withdraw the charges filed against the petitioner.

The question that we wish to raise with you relates to the legitimacy and propriety of the State Counsel intervening on behalf of the police in order to enable the tendering of an apology for the serious allegations of torture, as well as the serious allegation of fabricating charges about the possession of illicit drugs. Both allegations against the police are of a serious nature. Is it the policy of the Attorney General's Department that even such cases can be brought to an end by a mere apology and a promise to withdraw fabricated charges?

In our view there was no basis for the State Counsel to make an intervention for this purpose as the conclusion that the State Counsel, on behalf of the Attorney General's Department, should have drawn from the willingness of the police to make an apology is that they admit to the violation of the rights of the petitioner on both allegations. When the police admit having committed these violations, is it the policy of the Attorney General's Department that the police can escape the ramifications by tendering an apology to end the matter?

On the admission of the commission of such serious violations, which also amount to crimes, was it not the duty of the State Counsel to inform the Supreme Court that, as the police have admitted to committing these violations, they should be dealt with for violating fundamental rights and also separately

proceeded against for criminal actions, because both acts amount to serious crimes?

Is it not the duty of those who represent the Attorney General's Department before the Supreme Court to inform the Supreme Court of the legal situation arising from the police admitting the truth of the allegations made by the petitioner and clearly put before the Supreme Court the legal consequences that should follow under these circumstances?

According to the available reports, the State Counsel who represented the Attorney General's Department has not engaged in discharging his duties in placing before the Supreme Court the actual law relating to the matters that have arisen during this case.

A fundamental rights violation is not merely a violation against an individual; it is a violation of the State's obligation to protect the rights of individuals. Therefore, mere willingness on the part of the petitioner to accept an apology does not in any way expiate or expunge the violation committed by the State in the failure to protect the rights of the individual. The very reason for the existence of the fundamental rights jurisdiction is to ensure that the State's duty to protect individual rights is not violated under any circumstances.

In any case, what was the need for the State Counsel to intervene on behalf of the police, particularly when the police admit that they have violated the rights as alleged by the petitioner? The police could have used their own lawyers to make whatever applications to court that they wanted. The duty of the State Counsel is not to intervene on behalf of the police in this case, but to explain to the court the position of the law arising out of the factual situation admitted in court.

One cannot help concluding that the State Counsel's intervention was for the purpose of indicating to the Supreme Court that the matter could be brought to an end by way of an apology. The stamp of approval of the Attorney General is thus

given to this scheme. Through the State Counsel's application, the police have found an easy escape from liability.

The State Counsel has forgotten two more matters relating to fundamental rights: the illegal arrest and illegal detention of the petitioner. From the facts of the case, it is quite clear that there was no reason for the petitioner to be taken to the police station and for detaining him. The charges filed against him were admitted to be false and fabricated. It is quite clear that there was no reason to arrest or detain him. Whether this matter has been raised in the petition or not, on the plain reading of facts it is very clear that such illegal arrest and detention has taken place. That matter is itself of paramount importance. To reiterate the importance attached to preventing illegal arrest and detention in the common law tradition we quote here what the eminent British jurist AV Dicey wrote in 1885:

"The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restraint is in England prima facie illegal, and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it. Now personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law, i.e. (speaking again in very general terms indeed) under some legal warrant or authority, and, what is of far more consequence, it is secured by the provision of adequate legal means for the enforcement of this principle. These methods are twofold; namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of *habeas corpus*."

We have no way of knowing whether a State Counsel is given a firm grounding on the principles of the common law, particularly relating to the personal freedoms and the protection of personal liberties. The particular conduct of the State Counsel in this case does not show that he has had the benefit of such an education.

We are writing to you to request you to inquire into this matter and to take whatever appropriate actions necessary to scrutinise the legalities of the issues involved. Besides this, apology or no apology, the police officers involved need to be criminally charged for fabricating possession of drugs charges against an innocent citizen. This is an enormously important matter and this terrible practice is being carried out at different police stations. As the officer whose duty it is to advise the State on legal issues, we think that you are obligated to clarify these matters to your department, as well as to the public at large.

As we were writing this letter to you, we learned that the Special Narcotics Raid Unit, in collaboration with the STF, seized 91.3 kilos of cocaine valued at Rs 2 billion at the Rank Container Terminal Container Yard in Orugodawatte on the morning of 14th June 2016.

We wonder if this too will come to the same end: by the tendering of an apology at some future time when the public will have lost interest in the matter? What is at stake here is therefore is the very meaning and relevance of law in Sri Lanka and what is to become of a nation that has trivialised the law to this extent. We look forward to hearing about your actions in relation to this matter.

We want to explain to you why the Asian Human Rights Commission is raising these matters for your attention. I am sure that you would not consider it to be a controversial statement if one were to state that the legal system in Sri Lanka has suffered profound disturbances, particularly during the last four decades. The following quote from the Honorable Minister for Foreign

Affairs, Mr. Mangala Samaraweera, made at the august assembly of the United Nationals Human Rights Council, makes it very clear that the above statement is not of a controversial nature:

"Accountability is essential to uphold the rule of law and build confidence in the people of all communities of our country in the justice system. We also recognise fully the importance of judicial and administrative reform in this process. These are essential factors that must be addressed for the culture of accountability and the rule of law which have been eroded through years of violence to once again be ingrained in our society."

The erosion of the legal system means the erosion of the foundation of our nation. This erosion has today gone to the extent of shaking the very moral and ethical foundation of our society. As a person learned in the law, you know what this means. It means that our very existence as a civilised society is deeply in peril. Once this process is set in, there are can be only be two alternative outcomes: either the process will be stopped or we will face ever deepening collapse of every institution and aspect of our constitutional, legal, judicial, societal and moral fabric. That is where we stand today. It is from that perspective that we are alerting you of this. As the chief legal officer of the country, there lies a great responsibility on your shoulders if we are to take the alternative that we should take, towards rescuing all that is so fundamental to us.

If everyone who bears responsibility in the sphere of the administration of justice makes an excuse on the basis that his institution does not have adequate officers, adequate premises, adequate resources and the like, then who is to bear the responsibility for the necessary rescue that we need to face to secure our own survival? Where there are such resource limitations, it is the duty of those who are responsible for these institutions to explain matters plainly to the government and to obtain the necessary resources. On the issue of the administration of justice, the taxpayer will not begrudge national resources

being allocated to the extent necessary to ensure the existence of functional institutions. Therefore, the moral backing of the society exists for the leaders of such institutions who are willing to take bold initiatives and to demand what they in fact need from the government, who bears the responsibility to supply them. If, instead, the resource limitation is used as the excuse for poor quality services in the area of law and justice, the contribution would be towards the impending doom.

Both as the chief of the main prosecuting agency in the country, and the chief legal advisor to the government, you and your department owe an obligation to this society to ensure that our prosecution system does not fail us and that the government receives the advice needed to ensure that the protection of the legal system becomes its most primary obligation.

Every day everyone everywhere in the country is crying foul about everything that is happening within the justice system of Sri Lanka. That cry is heard within the country and also outside the country. The failure of every ambition of the country - such as its inability to draw adequate investments to ensure economic growth, the failure to ensure a corruption-free bureaucracy that will galvanize every aspect of the country's life, the failure to maintain a proper healthcare system that is free from neglect, as well as the deterioration of the education system, and even failing to ensure that people receive drinking water that is not contaminated – all relates to the functioning of our justice system. It is our justice system that has the capacity to make us a socially responsible nation. All kinds of irresponsibility, which has given rise to so many diverse forms of grievances, can be traced back to the dysfunctional nature of our institutions of justice.

The matters we have raised about this one case adequately explain all the aspects that are really wrong in our justice framework. We have lost the attachment to upholding norms and standards, which are the building blocks of a justice system. The examination of this one case will reveal to you what has gone

wrong in the system as a whole. That is the rationale for our intervention.

Thank you,
Yours sincerely,

[Signed]

Basil Fernando

Right Livelihood Award Laureate, 2014
Director of Policy and Programmes
Asian Human Rights Commission, Hong Kong.

Cc:

1. Ms. Mónica Pinto, UN Special Rapporteur on the independence of judges and lawyers
2. Mr. Juan E. Mendez, UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment

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Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Juan E. Mendez*

United Nations Special Rapporteur on the independence of judges and lawyers and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Official joint visit to Sri Lanka – 29 April to 7 May 2016

Colombo, 7 May 2016

**This statement should be read in conjunction with the preliminary observations and recommendations of the Special Rapporteur on the independence of judges and lawyers.*

Introduction

At the invitation of the Government, my colleague, Ms. Mónica Pinto - the Special Rapporteur on the independence of judges and lawyers - and I visited Sri Lanka from 29 April to 7 May 2016 to assess the situation and remaining challenges

concerning torture and other cruel, inhuman or degrading treatment or punishment and the independence of judges and lawyers. We would like to express our appreciation to the government for extending an invitation to visit the country, for their full cooperation during our visit, and for the efforts displayed, in particular by the Ministry of Foreign Affairs, to facilitate and organize official meetings. In addition, we would like to thank the United Nations Resident Coordinator and the United Nations Office in Sri Lanka for supporting the preparations of the visit.

Sri Lanka is at a crucial moment in its history. While the armed conflict has ended after more than 30 years, much of the structures of a nation at war remain in place as the fabric of Sri Lankan society has been ravaged. Sri Lankan citizens continue to live without minimal guarantees against the power of the State. It is now critical and urgent to replace the legal framework that allowed serious human rights violations to happen and set up sound democratic institutions and legal standards that will give effect to and protect human rights embodied in the constitution of Sri Lanka as well as the international human rights treaties it has voluntarily ratified.

Officials we spoke to identified as the main threats and challenges of the country international terrorism and organized crime, as is the case with most countries in the world today. However, they can never justify the continuation of repressive practices or a normative framework that contributes to violations of fundamental rights and civil liberties.

The elections of January and August 2015 brought an opening in the democratic space and the change in government has led to some promising reforms, such as the re-instatement of the Constitutional Council. Yet, more reforms are expected and necessary before the country can be considered to be on a path to sustainable democratization governed by the rule of law.

There is a need to recover the momentum of reform and accelerate the process of positive change within a comprehensive and inclusive framework.

During my visit I had the opportunity to visit detention facilities and military camps in the Southern Province (Boossa Prison, Boossa TID detention facility, Galle Fort military camp), Western province (Kalutara South Senior Superintendent's Office, Panadura Police Station), North Western Province (Puttalam and Kalpitiya Police Stations), Northern Province (Joint Operational Security Force Headquarters in Vavuniya ("Joseph camp"), Vavuniya Remand Prison, Vavuniya Police Station, Vavuniya TID office, Poonthotam Rehabilitation Centre in Vavuniya) and Eastern Province (Trincomale Naval Base). In Colombo I visited the Criminal Investigation Department and Terrorism Investigation Division facilities (commonly known as the 4th and 6th floor), the Welikada Prison complex and Borella police station.

I also had the opportunity to exchange views with a number of high ranking officials, including representatives of the Ministry of Foreign Affairs, the Ministry of Defence, the Ministry of Law and Order, the Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs, the Ministry of Woman and Child Affairs, the Ministry of Health, the Attorney General's Office, the National Police Commission, the National Human Rights Commission, the Governor of the Eastern Province, as well as representatives of the Sri Lankan civil society, international organizations, victims and their families.

The Special Rapporteur on the Independence of Judges and Lawyers, during her visit, had the opportunity to engage with a variety of stakeholders, including judges, lawyers and civil society organizations, the details of which can be found in her statement.

I will now share some of my preliminary observations and recommendations. I will further develop my assessment in a written report, which I will present to the 34th session of the United Nations Human Rights Council in March 2017.

Preliminary findings

Access to places of detention

My team and I were given unrestricted access to all places of detention and unimpeded access to interview detainees in private. However, I would like to note with concern that some detainees told us they had been informed of our visit in advance and in a few cases had even been told not to speak to us about their treatment while in detention. Some of those interviewed while in custody where evidently reluctant to share with us the details of the treatment received.

Prevalence of torture and ill-treatment

Article 11 of the Sri Lankan Constitution states no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Through the Torture Act passed in 1994, Sri Lanka has made torture a criminal offense that largely coincides with the international definition in the UN Convention Against Torture (CAT).

After many interviews conducted by my team and myself at random throughout my visit with both detainees and those who have been released, I am persuaded that torture is a common practice carried out in relation to regular criminal investigations in large majority by the Criminal Investigation Department (CID) of the police. In cases where there is a real or perceived threat to national security there is a corresponding increase in acts of torture and ill-treatment during detention and interrogation in Terrorism Investigation Division (TID) facilities.

I have interviewed survivors and examined documentation regarding the practice of torture from previous years as well as its prevalence today. Fewer cases are reported today than during the conflict period and perhaps the methods used by the police forces are at times less severe. But sadly the practice of interrogation

under physical and mental coercion still exists and severe forms of torture, albeit probably in less frequent instances, continues to be used.

Both old and new cases continue to be surrounded by total impunity. In addition, procedural norms that entrust the police with investigative powers over all criminal cases and, in the case of the Prevention of Terrorism Act, allow for prolonged arbitrary detention without trial, are still very much in place and open the door to – almost invite – police investigators to use torture and ill-treatment as a routine method of work.

I received many testimonies from victims and detainees who took the risk to speak out, despite concerns either for their own safety or their families. I was able to conduct thorough interviews and forensic examinations in a few cases, with the assistance of a forensic expert that accompanied me during my mission. I found the testimonies truthful and many were substantiated with physical evidence that is conclusive of torture. The forensic expert conducted a number of medical examinations that confirmed physical injuries consistent with the testimonies received. The forensic expert also analysed photographs taken shortly after the alleged torture and ill-treatment, and concluded they are diagnostic of severe physical torture.

The nature of the acts of torture consists mainly of transitory physical injuries caused by blunt instruments (essentially punches, slapping and, occasionally, blows with objects such as batons or cricket bats) which heal by themselves without medical treatment and leave no physical scars. There were also several accounts of brutal methods of torture, including beatings with sticks or wires on the soles of the feet (falanga); suspension for hours while being handcuffed, asphyxiation using plastic bags drenched in kerosene and hanging of the person upside down; application of chili powder to face and eyes; and sexual violations including mutilation of the genital area and rubbing of chili paste or onions on the genital area. While these methods of torture were in some cases of short duration, in other cases torture occurred over a period of days or even weeks during interrogation.

Prevention of Terrorism Act (PTA)

A special piece of legislation called the Prevention of Terrorism Act (PTA) applies to investigations into national security-related offences. It provides for detention without trial for prolonged periods of up to 18 months, with judicial supervision. A magistrate must periodically review the detention order. During my interviews with PTA detainees it appeared that a number of them are transferred around various TID or CID facilities in the country without lawyers or family being informed.

Under Section 28 of the Human Rights Commission Act the detention authorities are bound to inform the National Human Rights Commission (NHRC) within 48 hours of an arrest made under the PTA or other emergency regulations as well as in case of transfer or change of location. I understand that nowadays, with the changes at the NHRC, such arrests and detentions are again communicated, more or less regularly, but this is not the case with transfers or changes of detention facility.

Under Section 15(a) of the PTA, some detainees continue to be detained in TID facilities (as opposed to remand prisons) because the Secretary of Defence considers them a threat to national security. The hearings held before a magistrate, for the purpose of judicial control of the detention, do not amount to meaningful safeguards against either arbitrariness or illtreatment. The magistrates essentially rubber-stamp detention orders made by the Executive Branch and do not inquire into either conditions of detention or potential ill-treatment in interrogation.

Persons detained under the PTA then go on to be prosecuted at the High Court for securityrelated offences, most frequently based on charges related to aiding or abetting the LTTE insurgency. These cases have languished in court for years with the defendants remaining in detention. In random interviews, I found several inmates who have spent ten years in remand detention under the PTA, or under charges of ordinary offences, without having been proven guilty of any offence. Some are bailed out by courts, though they continue to be prosecuted.

Others are sent to "rehabilitation" in lieu of prosecution, which is supposedly voluntary on their part.

While there were around 24 rehabilitation facilities right after the end of the conflict, rehabilitation now consists of one year in detention (on occasion extended to 15 months) at Poonthotam Rehabilitation Centre in Vavuniya, at the end of which the individual is deemed

"rehabilitated" and released. Forty persons (39 male, 1 female) are currently held in Poonthotam Rehabilitation Centre in Vavuniya. I have been informed that they will be released in the course of the following months. My team and I interviewed some of these forty persons, who told us they have been deprived of liberty since 2009 or earlier.

The head of the Poonthotam Rehabilitation Centre in Vavuniya told us that 12,146 detainees have been processed through the PTA system to date. I asked for specific information on how many persons were prosecuted instead of being rehabilitated, how many were convicted, how many acquitted or how many are still held in arbitrary detention under the PTA in remand prisons. I have not yet received these figures. The NHRC has also not been able to obtain these statistics to which they should definitely have access.

Living conditions and other benefits are considerably more humane in rehabilitation than in prison, including the fixed term of detention, periodic home leave of four days' duration and vocational training. However, not all security related prisoners are invited to rehabilitation and it is unclear what selection criteria are used. Obviously, if after many years of detention the State does not have sufficient evidence to charge a detainee, the latter should be released unconditionally. In addition, from persons who have gone through the rehabilitation process, we have heard credible stories that they are frequently harassed, followed and threatened with further arrests after their release. At least in a few cases a new, post-rehabilitation detention has been documented. Harassment sometimes extends to members of

staff of civil society organizations that provide counselling and other services to rehabilitated persons.

It is obvious that rehabilitated persons are not immune from investigation of possible new crimes; but in such cases the authorities should be very transparent on the reasons and evidence on which a detention order rests. The very manner of the arrests of rehabilitated persons alleged as happening recently - by plainclothes agents, after days of being followed and after asking questions to family members, neighbours and associates - raise fears in the respective communities and only add to distrust about the motives for these re-arrests.

Effectiveness against terrorism and organized crime does not require breaking down the minimum guarantees for the protection of life, liberty and personal integrity. On the contrary, practices that are contrary to international principles de-legitimise the State. Perhaps some special measures need to be taken in exceptional cases but these must without exception be taken in the context of full respect for international human rights obligations.

The Government should repeal the current PTA. In the context of any replacing legislation, if at all necessary, a robust and transparent national debate should take place that provides for full participation of civil society. We understand that the Government is contemplating statutes on National Security, surveillance and intelligence services. Under any circumstance, those pieces of legislation should include protections against arbitrary arrest, absolute prohibitions on torture or cruel, inhuman or degrading treatment, provisions for access to legal counsel from the moment of deprivation of liberty, strong judicial controls over law enforcement or security agencies, and protections for the privacy rights of citizens. The Special Rapporteur on Human Rights while Countering Terrorism has produced very useful guidelines to incorporate in legislation of this sort.

Arbitrary arrest and detention

I have received allegations of recent so-called "white van abductions" – a reference to practices that in the past led to enforced disappearance of persons. The situation today cannot be compared to the past, but the persistent allegations of white van abductions are a reminder that arrests should be conducted transparently and that senior officers must be accountable for them. I raised this issue with the authorities who have said that all arrests are done by police in uniform using officially marked vehicles. The cases that we looked into seem to have resulted in acknowledgement of the detention of the person. However, I intend to continue to look further at the evidence.

There does not seem to be a clear rule in the law that says that arrests have to be authorized by a judge. In practice the decision to arrest a person is made by a police officer. For that reason, it is important that detentions are made transparent, with proper identification of the arresting officer, and offering reasons based on objective evidence. Otherwise, distrust of the authorities will persist.

Forced confessions: evidence obtained under torture

While there are many reasons that may lead to the practice of torture, there are particulars in the Sri Lankan criminal justice system and investigations practices that somehow may indirectly incentivize its use. The first is the role of confessions of suspects in criminal investigations, which currently seems to be the primary tool of investigation for the police. The need to extract a confession in order to build a case is in itself a powerful incentive to use torture. A second aspect is the practice of conducting the investigation while the suspect is in custody, rather than determining the detention based on preliminary investigations. Authorities have on a regular basis justified prolonged detention on the ground that the investigation was complex, or evidence hard to find, ignoring the fact that, outside of detentions in

flagrante delicto, the evidence should be procured before the arrest. This access to the detainee for continuous questioning can also be an incentive for torture, aside from other considerations regarding conditions and legality of detention.

The Attorney-General told my delegation that statements made to the police do not form part of the criminal record in ordinary crime cases, though he acknowledged that under PTA statements made to a senior police officer are fully admissible in court. In both cases, however, police routinely extract self-incriminatory statements, so the admissibility or not of the statement does not protect the detainee from possible coercion. In addition, the PTA provision is in direct contradiction with the obligation under CAT to exclude all declarations made under torture. Also in both cases, statements are made before the detainee has access to legal advice or representation.

Supposedly, a confession that is recanted under allegation of being coerced gives rise to a procedure called *voir* dire, described as a "trial within a trial" designed to determine whether coercion was used or not. This is a cumbersome process and it is rarely used. In practice, therefore, the law does not allow for a rigorous application of the exclusionary rule mandated by the Convention, and for the same reason does not reduce the likelihood of torture as a means to obtain a confession.

I understand that with the *voir* dire procedure the burden is on the State (Attorney General) to prove that the statement was not coerced. That is, of course, the proper standard as regards burden of proof; however, at the end of the *voir* dire the admission of confessions as evidence before the court is at the discretion of the judge. Judicial discretion to admit evidence tainted by torture, under any standard, is a violation of the exclusionary rule of CAT, a standard also required by customary law. A better application of the exclusionary rule, based on its primary object of discouraging torture, would be to ban altogether statements against interest that are not made before a judge, after advice of counsel and following a warning regarding the right to

remain silent without adverse consequences to the defendant. At the very least extrajudicial statements that are recanted by the declarant when he or she appears before a magistrate must always be excluded. I have been assured by the authorities that confessions alone are not sufficient evidence for a conviction, as other corroborating evidence is needed. In practice, however, 90 per cent of convictions are based on a confession alone or as the main evidence.

Access to lawyers

The result of these normative gaps in the rights of a criminal defendant is that the accused provides a statement to the police as a routine practice and is never informed about the right to a lawyer. This amounts to inadequate and meaningless legal protection, which fuels the widespread fear and mistrust of the police system among the population.

It would be important to establish a clear rule that persons must have access to a lawyer from the moment of deprivation of liberty. A current proposal to amend the Criminal Procedure Code that includes access to counsel only after a statement is taken by the police in the initial 24 hours of detention is not appropriate to effective assistance of counsel and would, therefore, violate due process.

Role of judiciary and prosecutors

A judiciary that is independent and impartial is essential to the fulfilment of the most important obligations regarding torture and cruel, inhuman or degrading treatment or punishment in international law, including to make ex officio inquiries and order the investigation into allegations of torture or coercion and to ensure the safeguards are upheld. They have a dual obligation of prevention and accountability.

In practice, in Sri Lanka, both courts and prosecutors are static and have a passive role of deciding cases based solely on

the evidence that is brought to their attention by the parties to the litigation; in criminal cases, that means that they rule almost exclusively on the basis of what the police provides them as evidence.

A modern accusatory system begins with affording more guarantees for the defendant. In it the public prosecutor is first and foremost the guardian of legality. Prosecutors must enforce the law against criminals but should also actively prevent miscarriages of justice by way of torture and manipulation of evidence, and intervene early on in the process. The accusatory system is more conducive than the inquisitorial system for the respect for human rights; but in its modern form it gives a lot of power but also heightened responsibility to prosecutors.

It would be important for judges and prosecutors to take it upon themselves, under a sense of legal obligation to consider bail for lesser and non-violent offences; to order medical examinations by forensic doctors properly trained by The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the Istanbul Protocol) as soon as any suspicion of mistreatment arises; to initiate prosecutions against whomever may be responsible for torture or mistreatment, including the superiors who may have tolerated or condoned that act; and more generally to ensure that all aspects of the chain of criminal justice (investigations, detentions, interrogation, arrest and conditions of incarceration) comply with the rule of law.

Forensics

The forensic procedures and quality of the forensic medical expertise seem quite acceptable in terms of deaths in custody and forensic autopsies, but there are still some insufficiencies in the clinical forensic examination of living victims. A specific medical report model for the forensic examination of survivors of torture and ill-treatment has been put in place by the official forensic services, but the report model still leaves a large margin

for improvement. Specific training in the forensic medical investigation and documentation of torture and illtreatment is needed.

Judicial Medical Officers (JMOs) undertaking medical examinations need to do so in a timely manner in order for those tests to be meaningful. They should examine both the physical and psychological trauma.

There is a need to improve the legal framework of JMOs, including guarantees for their professional and institutional impartiality and independence in practice. The reports of JMO examinations are not currently given to the person examined, which violates the standards of the Istanbul Protocol. Those reports should be made available to the accused as of right and not place the burden on the accused or his defense counsel to request it through the courts.

In practice, only about 20 per cent of cases that come before a Magistrate have a JMO examining the accused. Such exams should be done routinely at the initial custody hearing, and performed by qualified forensic doctors.

Forensic capacity in the JMOs is reasonable, except for the deficiencies mentioned above. Yet there is a need for more training for judges, prosecutors, lawyers and the police about how to interpret forensic medical examinations.

Custody hearings are an essential guarantee against mistreatment. Their object is to ensure that the person has not been arbitrarily detained, that there are indeed substantial grounds to presume that a crime has been committed and the person is *prima facie* responsible, and to ensure that at the arrest and thereafter there has not been any mistreatment. In practice in Sri Lanka, judicial oversight of police action is superficial at best.

Conditions of detention

With regard to the treatment of prisoners by staff in penitentiaries and remand prisons, I note with satisfaction

that in conducting my interviews I did not receive any serious complaints.

I am deeply concerned, however, about the conditions of life in all prisons, all characterized by very deficient infrastructure and pronounced overcrowding. As a result, there is an acute lack of adequate sleeping accommodation, extreme heat and insufficient ventilation. Overpopulation results as well in limited access to medical treatment, recreational activities or educational opportunities. These combined conditions constitute in themselves a form of cruel, inhuman and degrading treatment.

TID facilities also suffer from excessive heat, absence of ventilation, limited access to daylight and exercise, prolonged or indefinite isolation in some cases, and lack of electricity so that some inmates spend about 12 hours a day in the dark.

I visited the underground detention cells located inside the Trincomale Naval Base, which were discovered in 2015. These cells were presumably used to hold persons who are now counted among the disappeared and are currently under seal as a crime scene. I understand that CID is heading an investigation that has not yet resulted in indictments. Needless to say, the conditions must have been horrific.

Overcrowding

During my visit I observed levels of population exceeding capacity by well over 200 or 300 per cent. Vavuniya Remand Prison offered a striking example of such overcrowding. One of its halls hosted 170 prisoners in what my team and I estimated to measure less than 100 square meters, providing less than 0.6 metres per person. In the same building, other prisoners were forced to sleep on the staircase for lack of space in the detention areas. In addition, we saw cells designed for one person occupied by four or five inmates. The larger prisons in Colombo were built in the mid-19th century and walls, roofs and staircases are literally crumbling on the prisoners. The Government has indicated that Welikada prison will be closed and a new prison will be built in

Tangelle, but we understand the latter is not even in the planning stages yet. While replacement of old prisons is a good idea, in the meantime it is urgent to conduct maintenance and repair the unsafe conditions that amount to cruel, inhuman and degrading treatment or punishment.

An aggravating factor is that the congested prisons are a direct result of lengthy sentences for non-violent and drug related offences. Suspects are subjected to lengthy remand periods with many being detained for years and some even up to ten to 15 years. We understand that the average delay for State Counsel to bring a criminal case before the High Court after remand ranges from 5 to 7 years. This is a serious violation of due process and the presumption of innocence, and results in what is commonly known as an "anticipated penalty" without trial. It also violates the principle that provisional detention should be the exception and not the rule. I urge Sri Lanka to consider measures to make more non-violent offenses bailable and to experiment with alternatives to incarceration.

Family visits

Family visits take place once a month for convicted, and once a week for remand inmates, but in reality many relatives live far away and therefore visit infrequently. The prison authorities should install phones so that inmates can communicate with their families. Even when longer visit time is officially granted (i.e. one hour) the bureaucratic and security requirements of the visit (body search, security screening, documentation and registry of the visit, etc.) are counted within that allocated period, reducing the actual visit time to a few minutes. For some cases (PTA) extra burden is put on visitors including undressing for highly intrusive and demeaning body searches.

Remedies for torture and CIDT

The Torture Act depends on the discretion of the Attorney-General to file charges under it. Since 1994 there have been only

five or six prosecutions, but not a single conviction yet under the Torture Act.

In the prison system there is no formal complaint mechanism available to inmates. With respect to the police, the recently installed Police Commission is a venue for complaints of police misconduct, but the process is still incipient. In practice, the only effective avenues for complaints are through the NHRC, and the possibility of filing a "fundamental rights" case before the Supreme Court.

Fundamental rights applications involve complex litigation and are thus not accessible to all. They are subject also to a 30-day term to file from the occurrence of the violation. In addition, even if successful, they result in compensation as the only remedy. The application is not available, for example, to vacate a court order that has been based on a forced confession, as it does not lie against judicial decisions.

The National Human Rights Commission has been resurrected with a credible composition of its members in 2015, but it needs to be further strengthened and afforded more resources to deal with serious violations and to monitor the conduct of official agencies. Proceedings before the NHRC hold some promise for the victims but they do not seem capable of solving the problem of impunity for serious human rights violations, including disappearances of the past and torture of the past or present. Until serious prosecutions for torture take place, the public will continue to think impunity reigns.

Impunity and lack of accountability

Acts of torture that occurred in the past have been well documented. The Government has an obligation to investigate, prosecute and punish every incident of torture and ill-treatment, even if it happened in the past, because under international law prosecution of torture should not be time barred. The State also has the obligation to prevent such occurrences in the present, and

the most obvious preventive measure is forceful prosecution of cases reliably reported.

Sri Lanka has a Victim and Witness Protection Act but potential beneficiaries complain that protection is ultimately entrusted to the police which, in most cases, is the agency that they distrust. The Government should consider amending the Act in order to make it more effective and trustworthy.

Monitoring of places of detention

The Government must ratify and implement the Optional Protocol to the Convention Against Torture (OPCAT) as a matter of national urgency. Among other things, this will allow a national system of regular prison monitoring by independent experts.

Currently prisons and detention centres are visited by the International Committee of the Red Cross, a Visiting Committee and NHRC, as well as by some very credible non-governmental organizations. But a national preventive mechanism as contemplated in OPCAT would provide for scheduled and unannounced visits by a national authority as well as by the Subcommittee on the Prevention of Torture (SPT), a very credible and professional international treaty body.

Women and Gender

We are encouraged to see that an Action Plan for Gender Based Violence is moving forward and scheduled to be presented to Parliament. However, underreporting of gender based violence remains a serious issue.

Relative to the conditions of detention for men, the female wards of Welikada prison and Vavuniya Remand Prison showed conditions that were better and more humane.

Transitional justice process

Sri Lanka and the international community have agreed to a process to reckon with the legacy of human rights violations left by the long and cruel armed conflict that ended in 2009 (see Human Rights Council resolution 30/1). International standards require that societies approach national reconciliation by conducting truth-seeking and disclosure, justice through criminal prosecutions of perpetrators of serious crimes, reparation to victims and meaningful reform of institutions.

My colleague Pablo de Greiff, Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non Recurrence, has explained these steps in conversations with the Sri Lankan authorities and civil society, stressing the need for a comprehensive transitional justice strategy that takes into account the links between the different mechanisms. Similar recommendations were made by the Working Group on Enforced and Involuntary

Disappearances in their preliminary observations at the end of their visit in 2015.

Transitional justice mechanisms are an important aspect of my mandate because, if implemented in good faith, they can fulfil the State's obligations under the CAT, specifically those related to investigation, prosecution and punishment of torture, to provide reparations and to prevent torture in the future.

The mechanisms by which these four steps are accomplished are left, of course, to decisions made by the Sri Lankans themselves. As everywhere else, those decisions should be adopted following consultations with all stakeholders in a transparent and broadly participatory exercise that is just and earns the trust of the population.

A transitional justice agenda needs to be trusted by victims and other stakeholders in order to be effective. Stopping torture altogether will not be enough, but it is a step that is absolutely indispensable. The necessary confidence in the transitional justice system will otherwise not be there.

Lack of accountability regarding investigations into disappearances

We heard estimates ranging from 16,000 to 22,000 pending cases of missing persons from the time of the conflict and its immediate aftermath. Disappearances need to be resolved.

Experience shows that disappearances are almost always the occasion for torture of the most horrifying kind, and the prolongation of uncertainty about the fate and whereabouts of the disappeared constitutes cruel, inhuman and degrading treatment for their next of kin. That is why we hope to see an operative Office of Missing Persons soon that will conduct serious and profound investigations into each case.

I join my colleagues of the Working Group in encouraging ratification by Sri Lanka of the 2008 Convention on Enforced Disappearances.

Concluding remarks

The current legal framework and the lack of reform within the structures of the armed forces, police, Attorney-General's Office and judiciary perpetuate the real risk that the practice of torture will continue. Sri Lanka needs urgent measures adopted in a comprehensive manner to ensure structural reform in the country's key institutions. A piecemeal approach will not be compatible with the soon-to-be-launched transitional justice process and could undermine it before it really begins.

In closing, I would like to again thank the Government for the invitation and extend my gratitude to the high ranking officials with whom I met. I would also again like to express my sincere gratitude to the representatives of the Sri Lankan civil society, international organizations, victims and their families for sharing their information and insight with me.

11

Preliminary observations and recommendations of the Special Rapporteur on the independence of judges and lawyers - Ms. Mónica Pinto*

United Nations Special Rapporteur on the independence of judges and lawyers and Special Rapporteur on torture and other cruel, inhuman or degrading treatent or punishment

Official joint visit to Sri Lanka – 29 April to 7 May 2016

Colombo, 7 May 2016

** This statement should be read in conjunction with the preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.*

Introduction

At the invitation of the government, my colleague, Mr. Juan E. Méndez – the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment – and I visited Sri Lanka from 29 April to 7 May 2016 to assess the situation and remaining challenges concerning torture and other

cruel, inhuman or degrading treatment or punishment and the independence of judges and lawyers. We would like to express our appreciation to the government for extending an invitation to visit the country, for their full cooperation during our visit, and for the efforts displayed, in particular by the Ministry of Foreign Affairs, to facilitate and organize official meetings. In addition, we would like to thank the United Nations Resident Coordinator and the United Nations Office in Sri Lanka for supporting the preparations of the visit.

Sri Lanka is at a crucial moment in its history. While the armed conflict has ended after more than 30 years, much of the structures of a nation at war remain in place as the fabric of Sri Lankan society was left ravaged. It is now critical and urgent to replace the legal framework that allowed serious human rights violations to happen and set up sound democratic institutions and legal standards that will give effect to and protect the human rights embodied in the constitution or Sri Lanka as well as the international human rights treaties it has voluntarily ratified.

Officials we spoke to identified as the main threats and challenges of the country international terrorism and organized crime, as is the case with most countries in the world today. However, they can never justify the continuation of repressive practices or a normative framework that contributes to violations of fundamental rights and civil liberties.

The elections of January and August 2015 brought an opening in the democratic space and the change in government has led to some promising reforms, such as the re-instatement of the Constitutional Council. Yet, more reforms are expected and necessary before the country can be considered to be on a path to sustainable democratization governed by the rule of law. There is a need to recover the momentum of reform and accelerate the process of positive change within a comprehensive and inclusive framework.

During my visit to Colombo, Anuradhapura, Jaffna and Kandy, I had the opportunity to exchange views with a number of

high ranking officials, including representatives of the Ministry of Foreign Affairs, the Ministry of Defence, the Ministry of Law and Order, the Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs, the Chief Justice, the Attorney General, the National Police Commission, the National Human Rights Commission, Governors of the North Central, North and Central Provinces, the Judicial Service Commission, the Judges' Training Institute, the Legal Aid Commission, as well as judges from different all tiers, the Sri Lanka Bar Association, lawyers, academics and civil society representatives. During his visit, the Special Rapporteur on torture also had the opportunity to visit a large number of detention facilities, including military camps, the details of which can be found in his statement.

I will now share some of my preliminary observations and recommendations. I will further develop my assessment in a written report, which I will present to the United Nations Human Rights Council in 2017.

Preliminary observations and recommendations

Need for a justice system reflecting the diversity of society

Sri Lanka's legal and judicial system has incorporated many laws, practices and proceedings inherited from the British, but also Roman Dutch law, which is mainly applied in civil cases. The society is predominantly Sinhalese, with important Tamil and Muslim minorities, which in the North and East of the country are in a majority position.

Yet, the diversity of the population is not reflected in the composition of the judiciary, the

Attorney General's office, or the police, or in the language in which proceedings are conducted. For instance, there are very few Tamil-speaking judges appointed at the highest levels of the judiciary – in fact, with the exception of the current Chief Justice,

there are no Tamils in the superior courts (Supreme Court and Court of Appeal). Police forces, in charge of investigation and the first steps to initiate criminal proceedings, are also composed of a large majority of Sinhala-speaking people. There are also very few Tamil-speaking State counsels in the Attorney-General's office.

Thus, diversity should not only be clearly set among the criteria for the appointment of judges and the recruitment of State counsels and police officers, but qualified interpreters should be assigned to tribunals as a measure to guarantee due process.

Women in Sri Lanka have reached the highest positions in the Justice System. However, their number decreases as the hierarchy of the court increases. Sri Lanka can envisage a plan for the parity in the justice system just favoring women to engage in the justice system.

Strengthening an independent administration of justice

The country needs to conduct a strict exercise of introspection, so as to improve the quality of its judiciary and of the Attorney-General's office. This includes reviewing and publicizing the criteria for the appointment of judges and the causes for removal through disciplinary proceedings, providing quality legal and technological training, including mandatory training in international human rights law. "The judiciary is a national asset", said one of my interlocutors. It is also a permanent institution, one of the three branches of the State, which has a fundamental role to play in a democratic society based on the rule of law; therefore it should be robust and efficient.

In general, the administration of justice deserves to be more transparent, decentralized and democratic. The instances participating in the appointment of judges, counsels of the Attorney-General's office and judicial staff should publish the selection procedure, including the criteria and methods to be followed. The Constitution provides for the Chief Justice to head

many instances dealing with administrative matters in the field of justice and this restricts very much his abilities to manage such an important branch of government.

A strict and rigorous recruitment process is essential for a justice system of high quality. Judicial officers should be appointed when meeting personal and technical requirements and after competitive examinations held at least partly anonymously. They should be trained in technical matters, including the administration of tribunals or the analysis of complex forensic evidence, as well as in human rights law, including gender and women's rights.

Promotions of judges, entrusted to the Judicial Service Commission, should take into consideration not only the seniority of a person but also his or her merits. Yet, there is no proper evaluation of the performance of judges in place. Decisions on promotions lack transparency. There are no known and established criteria, which gives too much discretion to the Judicial Service Commission.

Further, the Judicial Service Commission is in charge of the transfer of lower court judges to the different jurisdictions in the country. While transferring judges after a certain number of years from one jurisdiction to another can certainly contribute to judicial independence, attention should be paid to the conditions in which such transfers are done. Judges are usually asked about their preferences, but there seems to be no clear criteria and procedures in place on the grounds of which decisions are taken. Transparency when it comes to the transfer of judges will improve if the Judicial Service Commission sets up clear guidelines for the transfer of judges and publicizes them.

Pending a constitutional amendment or revision, legislation should explicitly provide for specific criteria for the appointment of judges, their removal on the grounds of a disciplinary proceeding whose grounds are set out in the law and which should be substantiated with full respect for due process, including the right to a review.

Judges' salary should not only be intangible but also adequate to conduct a decent life for the judge and his immediate family. Judges' salaries should be considered on their own context and not been assimilated to other public servants whose functions are completely different and also their possibilities to engage in other jobs. Establishing a separate salary scale for the judiciary should also help to consider other allowances, which is especially important when judges move to different work places with spouse and children on a regular basis.

Contempt of the Court, a legitimate offense in the judicial arena, had in the past become the favorite tool of some Chief Justices to impose sanctions *inaudita* parte. Legislation should be enacted to define a clear and precise scope for the offence of contempt of court, identifying behaviors constituting contempt of the court, and setting up a procedure to deal with such cases.

Independent, impartial and transparent institutions

Democracy also requires that all bodies exercising jurisdictional functions comply with the basic standards of the right to a fair trial, namely, to be independent, impartial, and competent and to respect due process. Thus, independence, impartiality, competence, due process, as well as the right to appeal a decision to a higher body, are essential requirements to fulfill when it comes to all disciplinary proceedings. In the context of Sri Lanka, this includes disciplinary proceedings conducted by the National Police Commission with regard to active policemen, the Public Service Commission for State counsels, the Judicial Service Commission in the case of judges, as well as, evidently, removal or impeachment proceedings for judges from the Supreme Court and Court of Appeal.

Transparency is an essential requisite of the rule of law. Institutions in Sri Lanka, including those that are crucial for a rule of law regime, are generally opaque. More transparent institutions can play an important role in strengthening democracy in the country and protection from arbitrariness. In

such a context, institutions whose operational methods are not set down in legislation should urgently make available to the public the regulations and rules of procedures they are following to carry out their activities. As an illustration, the Constitutional Council should publish the rules of procedures it established for itself and applies in discharging its appointment functions, as well as the criteria used to evaluate candidates' suitability for a given position. Such publicity would contribute to dissipating possible accusations of deliberate opacity and arbitrariness.

The re-establishment via the 19th amendment of the Constitution of some of the democratic achievements first introduced by the 17th amendment of that same Constitution has been widely welcomed in Sri Lanka and by the international community. In that context, the Constitutional Council was re-introduced as the organ in charge of recommending the appointment of members of a number of independent commissions, such as the Human Rights Commission of Sri Lanka or the Public Service Commission, and approving the appointment of judges of the superior courts and important executive positions, such as the Attorney-General. The Constitutional Council consists of 10 members, seven of which are politicians and the remaining three are civil society representatives. To avoid the politicization of the appointment processes under the purview of the Council and to increase its legitimacy, this current composition should be changed so as to include more civil society representatives, including possibly representation from the Bar Association and academia.

Highly credible and competent commissioners were appointed in 2015 at the head of the National Human Rights Commission. The Commission has wisely decided to invest more time, efforts and resources in policy advice and human rights awareness-raising, so as to become more proactive than reactive. The Commission needs to be supported, it should receive more human and financial resources in order to strengthened and expand its activities and train its staff to become more knowledgeable and effective, thereby regaining the credibility it had lost in the

public's eyes. Complain proceedings before the Human Rights Commission hold some promise for victims, but they alone cannot solve the problem of impunity for serious human rights violations.

Judicial accountability

The law in force in Sri Lanka does not include a proper code of conduct for judges. Having such a code would facilitate all disciplinary proceedings. Its drafting should be entrusted to a Commission composed of both retired and sitting judges, representatives of the Bar Association and of academia. It should take into consideration international standards as provided for in the United Nations Basic principles on the Independence of the Judiciary, the Bangalore Principles on Judicial Independence and other similar instruments, including regional ones.

Accountability is a must in a democratic society. As every citizen, judges should be held accountable for their misconduct. Judicial accountability goes hand in hand with judicial independence; it does not and should not constitute undue interference or a limitation to that independence. In this context, disciplinary proceedings should be conducted in accordance with a law passed by the Parliament, which would set up a special panel composed of independent and impartial individuals and would enumerate the specific causes triggering misconduct and the corresponding sanctions which must be proportionate and adequate. The proceedings should be conducted in a way which respects due process and the possibility to appeal the decision should be provided.

Accountability of the judges of the Supreme Court and the Court of Appeal is currently carried out through an impeachment procedure before Parliament. This procedure, which is foreseen in the Constitution, lacks regulation by an ordinary law. It is implemented by the Parliament through a Standing Order. The extreme politicization of the removal procedure in force prevents its legitimacy. It is thus relevant to the independence of the

justice system that any impeachment procedure be regulated by a law passed by Parliament. This law should provide for a judicial determination of the merits of the causes triggering the removal procedure, and the findings of alleged misconduct. Legislation should explicitly stipulate what constitutes misbehavior in the light of international standards as expressed in the Bangalore Principles on Judicial Independence. The final decision should lie in the hands of a panel or appellate tribunal, essentially composed of retired judges, which should decide on the existence of misbehavior in the given case. So as to avoid any selectivity in the composition of this panel, it may be decided that when retiring, judges are automatically enrolled in a list to serve as a member of the impeachment panel or appellate tribunal.

Constitutional review – an opportunity to strengthen independence

The Sri Lankan Parliament has recently constituted itself in a Constitutional Assembly and is taking steps with the view to drafting new constitutional provisions which may amount to one or more constitutional amendments or to a new Constitution. In either case, such undertaking present an opportunity to confer constitutional status to provisions safeguarding the independence and impartiality of the administration of justice, thereby contributing to reinforcing the independence and impartiality of the justice sector as a whole.

For instance, the Constitution should include the requirements, criteria and selection procedure for the appointment of judges and prosecutors, the causes that may lead to their removal, and the proceedings to respect in case of disciplinary action, including impeachment. The composition of other national institutions should also be amended, so as to prevent politicization of the administration of justice. The Fundamental Rights Chapter should also be thoroughly revised to include the full range of human rights contained in the international treaties voluntarily ratified by Sri Lanka, and in particular provisions relating to access to justice, access to a lawyer, the right to an

effective remedy, and to a fair and public trial in full compliance with due process guarantees.

The Judicial Service Commission, which is in charge of the initial recruitment of magistrates who enter the judicial career, as well as the administration of transfers, promotions and disciplinary proceedings. This Commission is composed of the Chief Justice and two justices of the Supreme Court. Its independence and technical capabilities could be enhanced by enlarging this composition, so as to incorporate independent individuals – namely retired judges, high ranking administrative officers, sitting judges of the Court of Appeal, or representatives of the Bar Association. These individuals can also bring specific expertise and technical advice.

Implementation of international human rights law

In Sri Lanka, the Constitution is on top of the legal hierarchy. The country has ratified the great majority of international human rights treaties, including some instruments relating to the acceptance of United Nations treaty bodies' competence to deal with individual communications. However, these instruments and their related jurisprudence are deemed not enforceable at the domestic level. This extreme form of dualism is not a sustainable position because it is well known that a State may not invoke the provisions of its internal law as justification for its failure to abide by a treaty it has voluntarily ratified.

Sri Lanka should adopt urgent measures, in accordance with its constitutional process, to give effect to the rights protected in international human rights treaties which have been ratified and which are in force. It is under the duty to ensure that every person under its jurisdiction can enjoy and exercise the right protected in these instruments and, if needs be, have access to an effective remedy to seize the courts and have judicial decisions enforced by the competent authorities. At the same time, the country should enforce decisions adopted by the United Nations treaty-bodies whose jurisdiction it has voluntarily accepted.

Attorney-General's role

The Attorney-General's acts both as a legal advisor to the State and as the Chief Prosecutor. In the first capacity, the Attorney-General is called to give advice on the constitutionality of draft legislation. This is an important power in a country where there is no judicial review of the constitutionality of laws after their adoption by Parliament.

The Attorney-General is also de Chief Prosecutor, and, as such replaced the position of the Independent Prosecutor which existed in the past. In such a capacity, the Attorney-General should issue clear and proper guidelines for the investigation and prosecution of crimes, specific guidelines could be developed for the investigation and prosecution of serious human rights violations, including torture, and violations of international humanitarian law. He should also monitor how cases are substantiated so as to avoid the delays incurred by his office. Even in 'ordinary' non-conflict-related and non-political cases, the Attorney-General's office takes too much time to produce an indictment. This is but one of the reasons for the long judicial delays in the administration of justice in Sri Lanka and which court users of to endure.

The Attorney-General's office acts as the representative of the State, which by no means should be equivalent to defending the government. His office should also be able to make a neat separation between the State and the public interest they act on behalf of and the persons behind the institutions so as to avoid any possible conflict of interest. Such conflict of interest have arisen for instance in cases where the Attorney-General's office appears in the defence of police officers or military officers in cases of habeas corpus applications, as if the court decides that the respondent are responsible for the crimes they are accused of, the same office would be called to prosecute them.

Police's important role in the criminal justice system

The police force also plays an important role in judicial criminal proceedings, for this reason they should be appropriately trained. The police force should incorporate members of the different groups living in the country and speak all the languages of the country. Not only policemen should be able to communicate in Sinhalese and in Tamil, but they should be able to do so when recording the statement of detainees, so as to produce reliable pieces of evidence before the judges and to observe due process. As the police assumes the prosecutorial role before magistrate courts, its officers should be adequately trained to discharge this delicate function.

Access to a lawyer and other due process guarantees

The government has to ensure that every person detained has access to a lawyer from the moment of the arrest and that every person is told about this right. This right should be enshrined in the Constitution but pending an amendment, it should be embodied in national legislation and law enforcement agents should be entrusted with the duty to tell detainees about their rights.

The frequent practice of confessions – especially in cases under the Prevention of Terrorism Act – and the plea bargain – which is not explicitly provided for in legislation in force -, if they are kept, should be coupled with some evidence supporting them, so that the judicial proceeding fulfills its function of shedding light to the facts. Truth is but one of the goals of the judicial process.

Judicial delays

Judicial proceedings are too long, and the time they involve affect especially people deprived of liberty. It amounts to a denial of justice. Cases are regularly postponed. Judges cannot afford the number of cases they have to deal with.

The Criminal Investigations Department and the government Analyst Department are centralized in Colombo and conduct investigations for the whole justice system. Criminal prosecutors are overburdened. The backlog of Tribunals, in both civil and criminal matters, should be considered so as to be the object of some work plan to tackle the delays and to prevent their occurrence. Some elements to be taken care of are the increased capacities of the Mediation System Board, the increase in the number of judges and the establishment of some more courts in different parts of the country and some family courts, the clear cut difference in the prosecutorial services in the Attorney-General's office so as to have a strong Prosecutor's Office, and the implementation of an evaluation of performance plan.

Sri Lanka has a Mediation Board System composed substantially by retired public officers in charge of cases up to a certain amount of rupees. This system can be improved by appointing retired judges, through a public mechanism open to applications, and by raising the amount of money so as to cover more cases. In that way it may have the potential to settle many cases in just way, thus decreasing the number of judicial cases.

Access to justice

Access to justice is not only essential to give effect to the right to an effective remedy, but it is also explicitly included as one of the components of the goals of the 2030 Agenda for Sustainable Development. To exercise this right, however, Sri Lankans need to be in a position to reach the courts and to have their cases timely adjudicated. 335 judges at all instances and in the whole country, a number given to us by the Judicial Service Commission, seem insufficient for a population of more than 20 million inhabitants. Further, the number of judges does not seem enough to deal with the variety and complexity of legal issues faced in Sri Lanka. Appointing more judges also needs to be accompanied by adequate facilities and resources, including building new court houses. While the government should approach this issue globally and progressively, it should soon

take, and be seen to take, concrete measures in this direction. Increasing the number of judges and courts, should also help tackling the extremely serious issue of judicial delays. Setting up new courts and hiring more judges should further contribute to reduce the backlog and daily workload of judges, allowing them to improve the quality of their work.

In a country lacking public defense service, the Legal Aid Commission is doing important work. Its organization and its geographical display are important tools for the right of all Sri Lankans to access justice. This Commission should be supported through an adequate national budget.

Generally, judicial proceedings do not consider the victim, specially the criminal ones. All judicial actors should have the victim in mind when working. Criminal proceedings should be amended so as to be compatible with the rights of the child and thus avoiding children the cruel experience to be in court together with his/her aggressor. In this context, the establishment of family courts may be important provided that judges are trained in these matters and have the assistant of professionals in psychology, medical care, and others.

Today fundamental rights jurisdiction in Sri Lanka is vested only with the Supreme Court which acts as only instance. Many people are prevented from seizing this jurisdiction because they have to go to the capital city, Colombo, and engage a local lawyer. This jurisdiction should also be given to High Courts, which are all over the country, in every one of the nine provinces.

Education and training

Education by Law Schools should acknowledge that students are future law operators who will have to face a world whose legal order is undergoing significant change. They should be prepared to deal with different issues involving new problems and new tools. Judges, prosecutors and lawyers are all law graduates. Law curriculum should take notice and advantage

of new issues and of practical matters, including international human rights law, gender perspective, international humanitarian law, international criminal law but also evidence, complex crimes' evidence, among others.

Law has an evolving nature because it needs to adapt to social needs. All those participating in the justice system, whether judges, lawyers, State counsels or police officers, need to constantly update their knowledge. The Sri Lankan Judges' Institute should incorporate specific training in international human rights law, gender and women's rights, as well as new legal issues. The Institute's governing authorities should be advised by a board composed of retired judges, academics and representatives from the Bar.

Transitional justice

On more than one occasion, Sri Lanka resorted to *ad hoc* commissions to enquire into serious and complex crimes, as well as to shed light on past atrocities and deal with lessons learned. However, for a variety of reasons these commissions have not been as successful as hoped and they have even, by their very existence, jeopardized the development or reinforcement of competent permanent institutions.

Sri Lanka is envisaging transitional justice mechanisms to deal with its near past. These sort of mechanisms are important for the future and have a substantial value as healing processes. Whatever the decision taken, the government should ensure that the bodies set up or existing which have to deal with these issues, be composed by independent and impartial people, completely beyond any questioning by the society, well learned in law. The different elements of a transitional justice strategy should be designed in a comprehensive, holistic manner that take into account the necessary links of these different components.

Sri Lanka is in a very good moment to envisage the strengthening of its justice system as a way to reinforce a main

branch of government and as a means to ensure non-recurrence of the past. The international community should side Sri Lanka in these efforts and support it not only politically but also providing adequate training and co-operation in this field.