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article 2

2(3). Each State Party to the present Covenant undertakes:

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

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

c) To ensure that the competent authorities shall enforce such remedies when granted.

of the International Covenant on Civil and Political Rights

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About *article 2*

article 2 aims at the practical implementation of human rights. In this it recalls article 2 of the International Covenant on Civil and Political Rights (ICCPR), which reads,

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

This is a neglected but integral article of the ICCPR. If a state signs up to an international treaty on human rights, it must implement those rights and ensure adequate remedies for persons whose rights have been violated. Mere talk of rights and formal ratification of international agreements has no meaning. Rights are given meaning when they are implemented locally.

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

Some persons may misunderstand this as legalism. Those from countries with developed democracies and functioning legal systems especially may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. As persons from such countries guide the global human rights movement, vital problems outside their experience do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

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

Contents

Launch of discussions on drafting Asian Charter on the Rule of Law 2
Asian Human Rights Commission, Hong Kong

FOCUS: AN X-RAY OF THE SRI LANKAN POLICING SYSTEM & TORTURE OF THE POOR

An x-ray of the Sri Lankan policing system and torture of the poor 6
Asian Human Rights Commission, Hong Kong

The superior probability of guilt and its application by the Sri Lankan police 16
Samith de Silva, Senior Legal Advisor, Asian Legal Resource Centre, Hong Kong

The tussle between the executive president and public authorities of Sri Lanka 18
Basil Fernando, Executive Director, Asian Human Rights Commission & Asian Legal Resource Centre, Hong Kong

Response to the UN Committee against Torture on torture in Sri Lanka 25
Janasansadaya, Sri Lanka

Statement to the UN Committee against Torture on torture in Sri Lanka 35
Danish Rehabilitation & Research Centre for Torture Victims

NEPAL

Persistent systemic torture by the security forces and total impunity in Nepal 39
Asian Legal Resource Centre, Hong Kong

Launch of discussions on drafting Asian Charter on the Rule of Law

Asian Human Rights Commission, Hong Kong

With a view to drafting an Asian Charter on the Rule of Law, the Asian Human Rights Commission (AHRC) is launching a series of discussions on the relationship between the rule of law and the implementation of human rights. Wide consultations are planned to be held before writing and approving a final draft of this charter. This work is a follow up to the Asian Human Rights Charter—A People's Charter, declared in Kwangju, South Korea, in May 1998.

The radical themes of the People's Charter need to be further developed from the perspective of the implementation of rights. The AHRC has in its work consistently identified the prevailing breakdown in the rule of law throughout Asia as the primary obstacle to the achievement of human rights. It is hoped that the discussion being launched will provide an opportunity for a detailed articulation of the problems relating to the breakdown of the rule of law by ordinary people as well as concerned groups and academics throughout Asia. These observations and recommendations will subsequently be compiled into a document that reflects the common problems being faced by people in all Asian countries and would suggest means through which these problems could be addressed and remedied.

Democracy, human rights and the rule of law

There have been numerous attempts to promote democracy all over Asia, largely unsuccessful. Their failure lies in the absence of accompanying strategies to establish or enhance the rule of law. As a result, defective rule of law systems are able to distort and even destroy democratic institutions and practices. An election held without the rule of law, for instance, will merely become a farce legitimising the power of those individuals able to manipulate the process. A parliament will become fraudulent when legislative power is abused to the detriment of basic

This is the text of a statement released by the Asian Human Rights Commission on 7 October 2005 (AS-104-2005).

freedoms. The absence of rule of law creates avenues for corruption, which spreads cancerously into the democratic system. All attempts to promote democracy must therefore be associated with equally strong attempts to establish and promote the rule of law.

> **"The failure to promote democracy all over Asia lies in the absence of accompanying strategies to establish the rule of law"**

Similarly, all human rights recognised today as universal depend on the existence of operative rule of law for their implementation. The right to life, for instance, depends largely on state institutions that are meant to respect, protect and fulfil people's fundamental rights. If these obligations are not met, hunger, disease and the collapse of educational institutions will take place. The lack of effective investigation, prosecution and judicial mechanisms can also threaten people's rights to life and liberty: innocent people can be subjected to arbitrary punishments, including death. Therefore, despite the proclamations of rights in national constitutions or through states becoming parties to international covenants, people will be deprived of the enjoyment of rights in the absence of rule of law. The common article 2 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises this when it obligates state parties to take legislative, judicial and administrative measures to uphold human rights.

Breakdown in rule of law and key institutions

Vast obstacles are faced in all countries of Asia by those attempting to uphold or promote the rule of law. In some countries, the principle of the rule of law itself is rejected on the premise of maintaining order with or without law. To this effect, the law is regarded by officials and bureaucrats as an obstacle to a country's development and social stability and is at times superseded by way of executive orders. One consequence of this is the transformation of law enforcement officers into order enforcement officers. Another consequence is that barbaric acts—massacres, large-scale disappearances, extrajudicial killings and torture—are committed by the police and other authorities regardless of legal or constitutional restraints. Many governments also neglect to provide the basic financial and other resources for the proper functioning of law enforcement agencies and even the judicial system (courts). These include staff salaries and benefits, training facilities and facilities needed for investigations, such as forensic science equipment. This means that even when laws exist on paper they cannot be enforced because personnel in many institutions claim that they are incapable of carrying out their mandates due to resource limitations.

The primary institutions responsible for the administration of justice—the police, prosecution and judiciary—are now facing significant problems. Some of these have been caused by the historical development of these institutions, which may have been hampered by colonialism, feudal traditions, inherent societal discrimination and periods of internal conflict or civil

“The defective policing institution in many countries is a key obstacle to the realisation of the rule of law”

war. Others are related to the lack of independence enjoyed by these institutions to perform their duties with competence and integrity; often attempts are made by political authorities to manipulate the institutions for their own interests, thereby affecting their objectivity and impartiality. Without studying these causes and making deliberate attempts to develop these institutions, it is not possible to prevent the institutions from becoming obstacles to effective rule of law. It is also important to study how the necessary political environment for the rule of law to flourish can be created. Such studies should thus be an important component of this series of discussions.

The defective policing institution in many countries is a key obstacle to the realisation of the rule of law. Police behaviour often resembles that of the military or paramilitary forces. Such policing is unfriendly to civilians and tends to use force as its working method. Torture often becomes a common and endemic practice as a result of such policing.

Prosecution mechanisms also have fundamental problems that affect their upholding of the rule of law. In some countries, the prosecution is directly controlled by the state and used for political purposes; false charges against political opponents of the state are a common occurrence. Similarly, the prosecution mechanism in many places bases its decisions not on the rule of law but on extraneous factors, such as political pressure. Such pressure is greater in systems where no separate prosecution function exists so that the same department is responsible for state affairs as well as criminal prosecution. At times of civil conflict, practices contrary to international norms, such as state prosecutors acting as defence counsel for military and police officers accused of gross human rights abuses, have occurred in certain prosecution systems. These officers have then been advised by their counsel to fabricate statements and other evidence, which, in turn, affects the overall morale and credibility of the prosecution department.

The judiciary is another faulty institution which needs to be addressed when considering obstacles to the rule of law. Several Asian countries do not recognise the principle of an independent judiciary. Where the principle is recognised, there is often a lack of competent and qualified judges. In other countries, political regimes impose severe restrictions on the judiciary, even bringing about constitutional limitations on judicial powers. The appointment and promotion of judges as well as other administrative processes are used as leverage, preventing them from acting independently.

Supervisory mechanisms to ensure the rule of law and human rights must also be studied. In some countries, such mechanisms do not exist at all while in other countries their actual capacity for intervention is limited. Many such mechanisms suffer from limited mandates and a lack of resources.

Together with institutions, the justice and legal systems in Asia must also be scrutinised. The problems faced by marginalised sectors of society in obtaining legal redress are a significant aspect of the breakdown in the rule of law. These groups, which, in fact, are a majority in the region, are often entirely excluded from the legal process. Some of these exclusions have occurred throughout history. Women, Dalits, indigenous peoples and religious minorities are often those deprived of all access to law.

Anti-terrorism and emergency laws are another aspect of the increasingly repressive nature of legal systems in Asia. The use of such laws removes all forms of legal protection. It is for this reason that torture, mass killings after arrest and disappearances have taken place while such laws are in operation.

"The purpose of conducting Asia-wide discussions is to promote local education as well as to educate the international community about the real problems to be addressed if the rule of law and human rights are to be realised in Asia"

Towards an Asian Charter on the Rule of Law

The issues mentioned above as well as many others make it essential for there to be genuine consideration of what is involved and what is needed to make the achievement of human rights a reality. The purpose of conducting Asia-wide discussions on this issue is to document these problems in detail and to debate these matters publicly in order to promote local education as well as to educate the international community about the real problems that need to be addressed if the rule of law and human rights are to be realised in Asia.

The AHRC calls upon everyone to take an interest in order to contribute to making this project—of taking concrete steps to promote the rule of law—a success. While focused discussions will be held in various countries, the possibility of having discussions through e-mail networks, the internet and other print media will also be explored. All comments and suggestions in regard to this proposal are welcome.

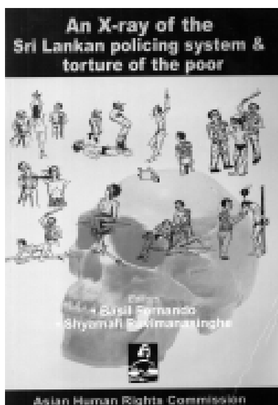
Visit the Asian Charter on the Rule of Law webpage at www.ahrchk.net/rol_charter to keep up to date with the latest discussions and get involved

An x-ray of the Sri Lankan policing system and torture of the poor

Asian Human Rights Commission, Hong Kong

An x-ray of the Sri Lankan policing system & torture of the poor is the third report produced on police torture and other abuses in Sri Lanka by the Asian Human Rights Commission (AHRC) and its sister organization, the Asian Legal Resource Centre (ALRC). The first report was 'Torture committed by the police in Sri Lanka' (*article 2*, vol. 1, no. 4, August 2002) and the second was 'Torture and the collapse of policing in Sri Lanka' (*article 2*, vol. 3, no. 1 February 2004). Together, these three reports present a significant number of cases that establish a pattern of systematic torture taking place at police stations and during routine criminal investigations throughout Sri Lanka.

The factual material and analyses presented in these reports can give rise to serious studies in many fields such as political science, constitutional studies and sociological studies. The reports may even help to initiate new approaches to the study of Sri Lanka's political, social and cultural problems. Such studies are very much needed, if only to prevent the current shallow discussions that take place. The insights gained from the study of one of the primary institutions in the country—the police—can shed light on most other problems in Sri Lanka.



In presenting this material for research, a simple fact about theory that is often forgotten in theoretical discussions on human rights must be stressed. In the words of Carl G. Jung,

> Since self-knowledge is a matter of getting to know the individual facts, theories help very little in this respect. For the more a theory lays claim to universal validity, the less capable it is of doing justice to the individual facts. Any theory based on experience is necessarily statistical; that is to say, it formulates an ideal average which abolishes all exceptions at either end of the scale and replaces them by an abstract mean. This mean is quite valid, though it need not necessarily occur in reality. Despite this

This article consists of the edited text of the preamble and introduction to a new book released by the Asian Human Rights Commission, *An x-ray of the Sri Lankan policing system & torture of the poor*, edited by Basil Fernando & Shyamali Puvimanasinghe (September 2005).

> it figures in the theory as an unassailable fundamental fact. The exceptions at either extreme, though equally factual, do not appear in the final result at all, since they cancel each other out. If, for instance, I determine the weight of each stone in a bed of pebbles and get an average weight of 145 grams, this tells me very little about the real nature of the pebbles. Anyone who thought, on the basis of these findings, that he could pick up a pebble of 145 grams at the first try would be in for a serious disappointment. Indeed, it might well happen that however long he searched he would not find a single pebble weighing exactly 145 grams. The statistical method shows the facts in the light of the ideal average but does not give us a picture of their empirical reality. While reflecting an indisputable aspect of reality, it can falsify the actual truth in a most misleading way. This is particularly true of theories which are based on statistics. The distinctive thing about real facts, however, is their individuality. Not to put too fine a point on it, one could say that the real picture consists of nothing but exceptions to the rule, and that, in consequence, absolute reality has predominantly the character of irregularity. (In *The undiscovered self*, Routledge & Kegan Paul Ltd, 1958)

"Within global human rights discourse the 'ideal average' that is often used is the experience of economically and politically more developed countries"

Within global human rights discourse the 'ideal average' that is often used is the experience of economically and politically more developed countries. However, these experiences cannot facilitate an understanding of harsh realities in other countries. For instance, how do the 'ideal average' policeman, prosecutor, judge or government compare with their counterparts described in these three reports on Sri Lanka? Should this material be dismissed because the experiences described are different to the theoretical ideal average? Or, should the reality described here be taken as a challenge, indicating the need for greater global understanding and cooperation?

The purpose of these reports is to generate discussions on policy development, which is greatly needed to address the social instability and insecurity prevalent in Sri Lanka. At present such discussions are largely based on political doctrines without being supported by any serious studies. This merely serves to confuse the issues and contributes to the encouragement of various forms of violence. The dominant discussion within the country during the last few years has in fact legitimised the use of violence by the state, particularly the extrajudicial killing of alleged 'criminals' or 'anti-social' elements.

It is also important to bring a more rational discourse on Sri Lankan problems into the international discourse regarding development theories and conflict resolution studies. All three of these reports make clear that Sri Lanka cannot make headway towards economic and social development without resolving the colossal crisis faced by its law enforcement agencies. This is also true of conflict resolution, including ethnic conflict. It should be noted that in the development of insurgencies both in the south and in the north, the nature and practices of the Sri Lankan policing system played a key role. For this reason, the problem of policing cannot be ignored in resolving the many political and economical issues plaguing the country.

"Illnesses that affect vital organs of a society affect the society in its entirety"

Why *An x-ray of the Sri Lankan policing system & torture of the poor*? The title suggests that its role is akin to a medical report indicating the extent and nature of a person's illness. A medical report also suggests the type of cure needed. In this way, details of an organisation's behavior patterns can also indicate the weaknesses and flaws of that organisation. This report is not an attempt to apportion blame or cause shame. It is also not an attempt to condemn. Like a medical report, it is only a disclosure of the major causes affecting Sri Lankan society through the spread of illness within one major organ of society, the police force.

To think that the illness is about the policing system alone would be to think of a heart disease only as a problem of the heart. But if the heart fails, the whole body dies. Similarly, illnesses that affect vital organs of a society affect the society in its entirety. This report is thus based on the assumption that the defects of the policing system affect the entire society. In looking for solutions to other problems within society, it is therefore essential that the problems of the policing system be addressed. Beliefs that other problems, such as the issue of ethnicity, are more pressing and that the problems of the policing system can wait are not rooted in reality.

That this report is launched at the time of a presidential campaign in Sri Lanka is purely coincidental. However, value may be added to the report if public discussion on fundamental problems affecting justice, the rule of law and stability in Sri Lanka is generated at this time. It is our contention that future political leadership in the country will not make even an inch of progress, unless serious consideration is given to the problem of law enforcement and radical reforms are undertaken. While most presidential candidates are probably unaware of the problems facing law enforcement, political insight and a determination to put things right will be the test of success for anyone elected to power in the future. History will remember all post-1978 presidents as having contributed to the destructive political and social instability of the country. Therefore, the challenge of future leaders is either to undo such destruction or to be undone by the forces unleashed by such destruction. This is not a prediction, but simply a statement of fact.

Established patterns of torture by the police in Sri Lanka

These cases of torture in Sri Lanka that have been documented by the AHRC and its partners over some years clearly establish certain patterns: one is that police investigations begin with the use of severe torture in order to "obtain the truth" and another is that torture is practiced merely as an abuse of power. Both of these often conclude with the fabrication of court cases.

In cases where persons are tortured allegedly for the purposes of interrogation we see the following pattern—individuals are arrested without sufficient grounds, often on insubstantial information, without a warrant and without being given the reasons for arrest. For instance, as revealed in the Supreme Court in Gerald Perera's case, the insubstantial information relied upon by the police was that a person named 'Gerald' was involved in a crime. Hence, the first 'Gerald' the police came across they arrested and mercilessly assaulted—to such an extent that he suffered renal failure and was unconscious on a life support system for two weeks. Other cases are worse, such as the case of 17-year-old Chamila Bandara, where the police had no other evidence than that some young boys were involved in stealing bunches of bananas. In pursuance of their 'information', the police arrested several young boys living in the area and severely beat them, all the while questioning them about their involvement in any thefts. The aim of the police in these instances seems to be to seek any information at all that could somehow be used in solving crimes. Even if they are unable to extract any information, most victims are willing to confess to any crime and sign any statements after their brutal torture. The police then proudly produce them before courts as suspects of unresolved crimes in the vicinity. Sometimes these tactics result in tragedy. A 52-year-old man, Hettiarachchige Abeysiri, died on 14 July 2005 as a consequence of being tortured during an inquiry into the alleged theft of a cordless telephone.

"One pattern of torture involves people being beaten up purely as a result of abuse of power"

In these cases, the police officers are producing substitutes for suspects of crimes that they have not solved. In some instances they may be aware of the identity of the real culprits, whom they have allowed to 'escape'. Producing substitutes creates the impression—among the department as well as the public—that the police are efficient and crimes are being solved. This paves the way to financial rewards and promotions.

The second pattern of torture involves people being beaten up purely as a result of abuse of power: a three-wheel cab driver, D W Munasinghe, who was slow in stopping his vehicle after being asked to do so by police officers was kicked and tortured to death; Rohitha Upali Liyanage, the owner of a motorcycle that was mistakenly taken by two police officers, was assaulted with an iron rod and suffered a leg fracture after asking for its return. R A Hemasiri, a former illicit liquor seller trying to lead a normal life, was beaten up because he refused to cooperate, as in the past, and admit to new charges. S C P Fernando was beaten up in an attempt to get him to withdraw a complaint of torture. J V Saman Priyankara had hot water poured on his thighs by a police officer acting on the instigation of a neighbour. A police officer beat up H H Priyadarshana Fernando over a family dispute in which the officer took the side of the wife. A cashier who demanded that police officers pay for their food was severely assaulted, while H Quintus Perera, the manager of a restaurant who refused to sell liquor to some policemen on a religious holiday—during which the selling of liquor is prohibited by law—was beaten so severely that he died of his injuries.

The relationship between police torture and Sri Lanka's national instability

"The dominant historical tradition in Sri Lanka has been that terror has been used as a mode of social control"

An x-ray of the Sri Lankan policing system & torture of the poor establishes that the defective policing system is fundamentally linked to Sri Lanka's persistent national instability.

The dominant historical tradition in Sri Lanka has been that terror has been used as a mode of social control. Like many other territories in earlier times, the use of severe punishment was a central feature in the management of crime and reinforcement of structural hierarchies. However, whereas in many other territories this practice has come to an end or been significantly reduced in modern times, in Sri Lanka it has continued, and is today seen most clearly in the type of policing prevalent in the country. The society has not evolved towards rational modes of social control through the rule of law and due respect to the rights of citizens. While rational laws were introduced on the one hand, barbaric practices of dealing with the population have continued on the other. In times of crisis, unmitigated powers have been given to the armed forces and police to terrorize the people with large-scale killings and other forms of cruelty. The enormous fear that such acts have instilled in the population has made people so afraid that they have even been willing to hand over their children to armed forces personnel, well aware that their children might be inhumanly tortured or even caused to disappear (see 'Tales of two Sri Lankan massacres: The relevance of Embilipitiya to Bindunuwewa' by Basil Fernando, *article 2*, vol. 4, no. 3, June 2005, pp. 47–52). Additionally, in recent times, particularly since 1978, even the limited development of public authorities collapsed with absolute power being handed over to the executive president. The model of authority introduced through the 1978 Constitution resulted in a state of anarchy in the country, inevitably affecting the policing institution as well.

Aggravating factors

Sri Lanka's prosecution system, under the attorney general's department, is extremely backward and ill-staffed, and in the years following 1978 it has gone from bad to worse. The system has not substantially changed from the time of its establishment during British rule, while vast changes have taken place in prosecution systems worldwide. A major weakness of the system is that the prosecution depends entirely on police inquiries. Thus if the police do not investigate or are negligent in investigating crime, there is hardly anything the prosecutors can do to remedy the situation. And given the type of crisis that exists in the policing system today, the prosecution system is bound to suffer severe setbacks. An attempt that was made to create an independent prosecutor's branch in the early 1970s was scrapped after 1978. The present attorney general himself has publicly admitted that he does not have a sufficient number of staff to successfully deal with the department's workload. As a result, there are enormous delays before the department is able to file cases in court.

Another serious setback that occurred after 1978 was during the operation of emergency and anti-terrorism laws, when the country was beset with tens of thousands of disappearances. During these times, some officers of the attorney general's department actually engaged in assisting those police and armed forces officials named as respondents in habeas corpus applications. These officers advised the police and military to file false affidavits before the courts. This undermined the respect that the law enforcement agencies had earlier held for the department, which is essential in maintaining its independence and integrity. Furthermore, following the 1978 Constitution all public institutions were in some way politicised, and the attorney general's department was no exception.

“Internal discipline within the police force has all but collapsed”

Delays in Sri Lanka's justice system are also well known and widely discussed. However, less widely discussed are how such delays are a major contributor to the country's social insecurity and violence. Delays in adjudication put parties who go before court in great danger of reprisals. They allow enormous space for corruption and encourage people to seek alternate methods of settling disputes—more often than not, by violent methods.

The complete absence of witness protection is another reason that torture victims and victims of other human rights abuses are mortally scared to complain about their grievances or to pursue their complaints. No justice system can function when complainants and witnesses do not want to pursue their complaints.

Internal discipline within the police force has all but collapsed, as top-ranking officers have failed to take firm positions on its proper maintenance. So-called inter-departmental disciplinary inquiries are looked upon with cynicism by both the people as well as the police officers themselves. By and large, the morale of the top-ranking officers is low. And while since the enactment of the 17th Amendment to the constitution disciplinary control of the police force has been a function of the National Police Commission, this body has proved woefully inadequate. While the commission states that the inspector general of police and other high-ranking officers resist attempts to take disciplinary action against errant policemen, the justification given for this resistance is that such action would 'demoralize' the police. This argument is ludicrous. The resistance to discipline leads to the conclusion that perhaps the behaviour of the police is acceptable.

Incompetence in handling criminal investigations is a commonly admitted reason for police failure. Higher-ranking police officers themselves have claimed that they do not have forensic equipment or training. In fact, the overall approach to the introduction of forensic science into the country remains poor; forensic pathologists are available only in city hospitals.

Proposals for reforms & obstacles to achieving them

"Suspects in criminal cases must be produced only before courts and not at the residences of magistrates"

What must be done? The following are some suggestions in view of the above:

1. Suspects in criminal cases must be produced only before courts and not at the residences of magistrates or acting magistrates. In this way the possibility of producing an impersonator can be avoided and legal representation for the suspect can be ensured. If due to exceptional circumstances someone is to be produced outside the court, the reasons for such must be given by the police in writing and included among the documents produced in court. On such occasions the magistrate should order that the person be produced in open court on the very next day of its sitting.

2. A request for a medical examination for suspected torture should be able to be made to a magistrate orally, in writing, or through a lawyer at any time once a person is under arrest. The magistrate must then make appropriate orders for the conduct of such an examination, preferably by a judicial medical officer.

3. Where a magistrate has reason to suspect that torture has been inflicted, the magistrate should inform the deputy inspector general of police in the area and request an independent inquiry. The findings of such an inquiry should be submitted to the court.

4. At least two hours before anyone is produced in court for the first time, a report pertaining to relevant investigations should be faxed by the officer-in-charge of the police station concerned to the magistrate, giving the nature of the charges and other information as required by the Criminal Procedure Code of Sri Lanka.

5. Where there are sufficient grounds to believe that any suspect charged with an offence has been tortured, the magistrate should order an independent investigation through the concerned superintendent of police, to ascertain whether the charges are fabricated and merely an attempt to cover up the torture.

6. When any concerned government agent or agency receives a complaint of torture, an immediate preliminary inquiry to ascertain the validity of the complaint should be ordered. If the complaint is found to be valid, a complete inquiry into the matter should be conducted within two weeks or in the maximum, one month. For this purpose, the Special Investigation Unit should be allocated sufficient staff to deal with torture complaints.

7. Indictments under the Convention against Torture Act, No. 22 of 1994, should be filed by the attorney general within the shortest possible time on the completion of inquiries and in no instance should there be any delay beyond three months. On the filing of indictments the attorney general's department should also inform the complainants so that they can take measures to protect themselves. Copies of intimation of filing of indictments

should be sent to the National Police Commission and the Human Rights Commission of Sri Lanka. When intimating the filing of an indictment, the attorney general's department should also inform the complainants that they are entitled to witness protection and that they could contact the state counsel of the relevant high court regarding appropriate legal measures to protect them. Furthermore, the Human Rights Commission of Sri Lanka should improve its 24-hour hotline so as to be able to intervene urgently and effectively on occasions where torture victims are being threatened or attacked.

“The inhumanity of law enforcement officers pursuing persons who have made complaints against them needs to be addressed”

8. Community organisations must be set up in every locality for the protection of witnesses. A nationwide volunteer group should be formed to intervene when people are being tortured or witnesses are being attacked. Such volunteer groups have proven effective in other countries. The community groups must also be trained to use telephones, fax machines and email facilities to communicate information regarding rights violations and to seek assistance from local and international organisations. A major effort must be made by local human rights organisations regarding victims of human rights abuses who have to flee their villages and homes due to death threats and other dangers from police perpetrators. The sheer inhumanity of law enforcement officers pursuing persons who have made complaints against them needs to be addressed if any meaningful action is to be taken for legal redress against human rights abuse by police officers. All recommendations, whether pertaining to the National Police Commission, the attorney general, or even the Human Rights Commission of Sri Lanka will remain of academic value until some basic scheme for affording protection is developed for the victims of torture and other human rights abuses. For the near future, the defense of people's basic rights will not come from the institutions of justice: the main initiatives must come from the people themselves. There is little choice in this matter: either people can continue to suffer under the yoke of a failed police system or they can take an active role in reforming the system.

It would be naive to talk about easy solutions to these problems. It may be more useful to briefly outline the obstacles that exist in bringing about solutions.

1. There is a manifest lack of decision-makers and problem-solvers in Sri Lanka today. In proposing solutions, citizens no longer know to whom such proposals should be addressed. Who is willing to listen? This is a major question not only for the average citizen but also for any person or group with some specialised knowledge on an issue. Enough has been said and published on the issue of policing that a difference should have been made by now. Instead, in the absence of any authority available to listen and make decisions, the lamentations become louder by the day, while the lack of expectation for change grows larger.

> "The loss of expectation for change regarding serious problems is itself a grave problem"

2. The loss of expectation for change regarding serious problems is itself a grave problem. It gives rise to violence and other negative behaviour, including exploitation. When the absence of authority is felt widely, criminality flourishes. Everywhere in the country there are cries about the increase in crime, but the media, while giving expression to these, have not seriously asked whether there is any authority available to produce rational solutions. The absence of expectation for a reasonable solution to a problem spreads public resignation and reluctant willingness to accept unreasonable solutions. One such unreasonable solution that has been promoted in Sri Lanka in recent times is to encourage extrajudicial killings of alleged criminals. This type of response only aggravates, rather than solves, the situation.

3. The political leadership of the country has deteriorated greatly since the promulgation of the 1978 Constitution. This constitution stands as a testament to the obvious: that no single person can be left to run a modern nation. An effective leader represents a system, not just him or herself. Rebuilding a system based on political authority is an inescapable task if the problems in the country, including those of policing, are to be resolved.

4. At the institutional level, higher-ranking police officers and the National Police Commission should try to address the problems of policing in a serious manner and forward their proposals to the political authorities and people at large. Political chaos does not absolve them of their duties to address these problems seriously and tell the government and the people the truth. No one can help an institution that does not want to help itself. In this regard the tussle between the police commission and top-ranking police officers, particularly on matters of discipline within the police force, amounts to a betrayal of the constitutional trust placed on both parties. It is childish to continue this state of tension. The constitution should prevail and both parties should put effort into developing common ground and utilize the provisions of the 17th Amendment to resolve their differences.

5. The statements of the top-ranking police officers show that their responses to the policing institution's problems are contradictory. On the one hand, almost everyone openly admits that there are very serious difficulties affecting the institution. At a private level they go to great lengths to describe not only what ails their institution but also the country as a whole. On the other hand, when it comes to day-to-day administration they engage in exercises of denial. They use one case or another where culprit policemen have been arrested to illustrate that they are doing enough to resolve the problems. The lack of frankness in analyzing the problems and the lack of willingness to take serious action have diminished the authority of these high-ranking officers in the eyes of others. Regaining their authority will depend on their capacity to stop living in a state of denial. If they put forward their problems genuinely before the

people, they will generate more sympathy and respect. But if they instead decide to carry on as usual, perhaps even exploiting the situation, then the low esteem that prevails among the public will continue.

6. Opinion makers—whether intellectuals, media persons or leaders of social organisations in Sri Lanka—have not yet made a serious effort to understand and articulate the problems of the policing system in Sri Lanka. Somehow the subject is not treated as worthy of their serious consideration. Earlier there were the Justice J. Soertsz Commission, which published its report in 1947; the Basnayake Commission Report, published in 1970; and the 1955 Sri Lanka Police Service: Suggestions for improving its efficiency and effectiveness report. However, all these reports are now mostly outdated, and nor did any of them receive much consideration or lead to real change. Perhaps the only significant development since has been the 17th Amendment to the Constitution, which gave birth to the National Police Commission and guaranteed it wide powers with which to depoliticise and strengthen the police. However, even the thinking around this development remains qualitatively poor. Who can create the debate? Obviously, debates on policing do not begin from the top: that is to say, from the state or senior officers in the system itself. The only place where the debate can start is among the public. In other words, what is required is a popular movement for the reform and improvement of policing and other branches of justice. If such a movement will not build up and bring the problem of policing to the wider attention of the society, it is very unlikely that much change will occur for the better in the near future.

“What is required is a popular movement for the reform and improvement of policing and other branches of justice”

The Asian Human Rights Commission and its partners have tried in their small way to bring this message to the Sri Lankan people. Through constant reporting on torture and police abuse, by supporting victims to pursue their cases, and by attempting to create public opinion as well as by the regular publication of statements and constant engagement with government agencies on the issue, some work has been done and some space created for the needed debate. A recent move to launch a street movement for justice has also been motivated by the same desire to achieve this objective. If people begin to articulate their immense frustrations and demand solutions, some form of response is bound to materialise. And the sooner this can be made a reality, the better it will be for everyone.

“What is required is a popular movement for the reform and improvement of policing and other branches of justice”

The superior probability of guilt and its application by the Sri Lankan police

Samith de Silva, Senior Legal Advisor,
Asian Legal Resource Centre, Hong Kong

The presumption of innocence is an integral part of the criminal law in all Common Law countries. The basic principle is that a person accused of a criminal offence is innocent until he is proved guilty beyond reasonable doubt. The sanctity of the presumption is exemplified by Lord Sanky's dictum in Woolmington vs Director of Public Prosecutions, where he stated that

> Through the web of English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the accused persons guilt… No matter what the charge is, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. (A.C. 462, [1935] AER Rep. 1, p. 405)

While the sacredness of the presumption is often spoken of in Common Law countries, it is sad to observe that in many of these not much attention is paid to the importance of upholding the presumption at the initial stages of its application. Similarly, scant regard is paid to the basic human rights associated with the presumption.

It has to be realized that the presumption of innocence is not invoked only when a criminal trial commences before a court of law, and its implications are not limited to the confines of trial proceedings in a courtroom. As Wills puts it

> When incriminatory evidence is investigated and estimated, this antecedent prima facie presumption operates in favor of the party accused. This presumption must prevail until it is destroyed by such a countervailing amount of legal evidence of guilt accumulated to produce the opposite belief. (William Wills, *The principles of circumstantial evidence*, 7th ed, p. 265)

Therefore, the application of the presumption is not limited to the confines of the courtroom. Its application begins from the moment a person is investigated.

Sri Lanka is among the countries where the presumption of innocence has received constitutional recognition (article 13[5]) in addition to its being recognized as a legal principle in criminal law. So it is an important achievement of the book *An x-ray of the Sri Lankan policing system & the torture of the poor* (Basil Fernando & Shyamali Puvimanasinghe [eds], Asian Human Rights Commission, September 2005) that it establishes so clearly how this constitutional provision is violated by the foremost law enforcement authority of the government: the police. The book details a large number of instances where the police have mercilessly assaulted and tortured people from point of arrest, even before considering whether some evidence may exist against them.

"If torturing were an effective way to tackle crime, then the conviction rate would go up under the current circumstances: but this has not happened"

Not every criminal case ends with conviction. From country to country the conviction rate varies, depending on the legal system and the ability of its crime investigation authorities. As Wills puts it (with reference to England)

> Generally the number of convictions exceeds the acquittals, and more persons who are accused of crime are guilty than innocent. But according to statistics a considerable number of persons who are put on trial are legally innocent. In any particular case, therefore, a party may not be guilty, and it is impossible without a violation of every principle of justice, to act upon the contrary presumption of a superior probability of guilt. It is for this reason the law provides as a settled and inviolable principle, that until the contrary is proved, the accused shall be considered to be innocent, and his case shall receive the same dispassionate and impartial consideration, as if he were really so. (*The principles of circumstantial evidence*, p. 265)

It is said that several years ago the conviction rate of criminal cases in Sri Lanka stood at around 40 per cent, whereas today it has fallen to below 10 per cent. Yet police assaults are on the increase. If torturing were an effective way to tackle crime, then obviously the crime rate would come down and the conviction rate would go up under the current circumstances. But this has not happened.

What is going wrong? One explanation is that the Sri Lankan police today do not use proper investigation methods but are only interested in extracting a confession after giving a couple of blows to a suspect, perhaps while introducing some piece of 'evidence' that they think may help to prove the case and close the investigation. This is far less trouble for an officer than to enter into a prolonged interrogation that might last into late hours. It is natural for most people to admit guilt after a few blows by a police officer in his premises. Many investigations end with that: the police report their findings to court, and although they do not have sufficient evidence to prove the suspect's guilt, move to keep the person in remand. The period of remand is extended a couple of times and eventually the suspect is discharged. So everything goes on.

This can be said to be the superior probability of guilt. It is what is used as the basis for police investigations in Sri Lanka today, in defiance of the presumption of innocence.

The tussle between the executive president and public authorities of Sri Lanka

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

Under the Gaullist Constitution one of the major responsibilities of the French president is that he or she shall ensure, by his or her arbitration, the proper functioning of the public authorities (article 5). However, within the last few decades Sri Lanka has witnessed a situation where not only have executive presidents failed to ensure the proper functioning of public authorities, but have in fact become the enemies of public authorities.

This is the situation that gave rise to the 17th Amendment to the Constitution. At the time, it was thought that the development of strict constitutional provisions were essential in order to place obstacles in the path of those—including the executive president—who attempted to interfere politically with the appointments, promotions, transfers and other matters relating to officers of public authorities that are considered vital in the country. The authorities recognised in the 17th Amendment are the Election Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission of Sri Lanka, the Permanent Commission to Investigate Bribery or Corruption, the Finance Commission and the Delimitation Commission. According to article 41(b)(1) of the 17th Amendment, no persons shall be appointed by the president as the chairman or member of any commission specified in the schedule to the article, except on a recommendation of the Constitutional Council. Also, all important appointments of persons within the departments controlled by these commissions—except those specified in the 17th Amendment—cannot be made without the recommendation of the said commissions.

This article consists of the edited text of chapter 10 in a new book released by the Asian Human Rights Commission, *An x-ray of the Sri Lankan policing system & torture of the poor*, edited by Basil Fernando & Shyamali Puvimanasinghe (September 2005).

This restriction placed on the president and others regarding the appointment of persons to some of the most vital public authorities, has a history. That is, since the promulgation of the 1978 Constitution, recruitment and control of important officers working in the various public authorities were arbitrarily carried out often according to the dictates of politicians or on political consideration. This had reached such calamitous levels that a specific amendment to the constitution itself was needed to put an end to the practice. Accordingly, the amendment was certified on 3 October 2001 and the common term used to describe the evil that the 17th Amendment was supposed to cure was 'politicisation'. In the unanimous passing of the 17th Amendment, there was common consensus among all the political parties that appointments to positions in public authorities should be based on objective criteria and merit, rather than on other considerations.

"While a constitutional safeguard had been created against the arbitrary intervention of the executive president, it could be prevented from operation"

Under the 1978 Constitution, there had developed a practice where the executive president was directly involved in doing away with merit-based and objective criteria for appointments to public authorities. Once this happened, there existed little possibility for these public authorities to function and perform in the manner expected from such authorities. Hence, public authorities had become dysfunctional due to undue interference by the executive president and those acting on his behalf. The 17th Amendment was proposed as a check against the president acting in such a manner.

While a constitutional safeguard had been created against the arbitrary intervention of the executive president in the running of public authorities, on a practical level, the executive president was still in a position to prevent the operation of this safeguard. Three methods could be used. First, the president could make the Constitutional Council—which is the effective body in the structure proposed by the 17th Amendment—dysfunctional. This could be done by delaying or obstructing the appointments of council members. The second method would be to delay or obstruct the appointments to the various commissions, i.e. by not submitting the nominations of proposed candidates for such positions whose merit the Constitutional Council is to consider. The third method, and the most resorted to, would be to fail to provide the funding and other resources essential for the functioning of the commissions. By this method it would also be possible to prevent a commission from doing what it is supposed to do, due to lack of competent personnel, equipment or other financial resources.

So, while the 17th Amendment proposed some serious measures to control the president from behaving in the arbitrary manner that the 1978 Constitution made possible, nonetheless, the tussle between these institutions and incumbent presidents goes on. And sadly, the balance is still in favour of the president. The president can still prevent these public authorities from

benefiting from the measures proposed by the 17th Amendment. This malady has currently affected many of the public authorities in Sri Lanka.

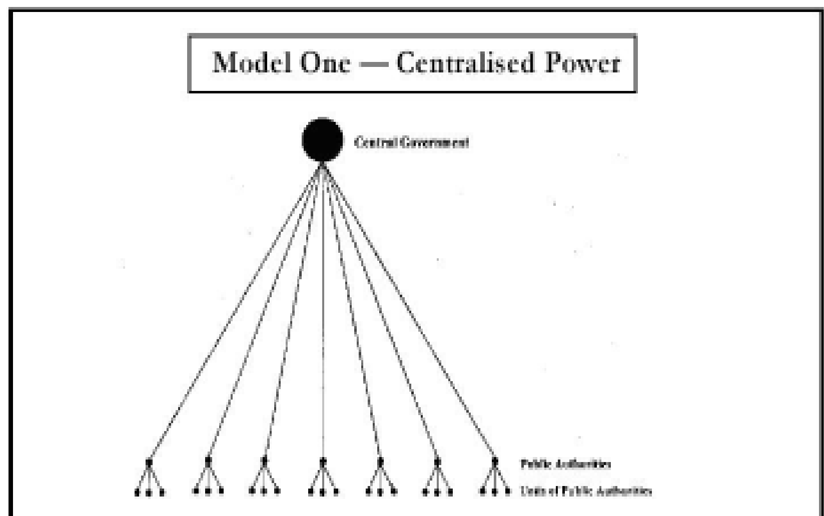
> **"While parliament proposed a constitutional framework for the control of the public authorities, it has not followed up with any practical measures to ensure proper implementation of the law it created"**

The 17th Amendment was one of the most significant measures adopted by the parliament of Sri Lanka to check the powers of the executive president. So there is also a tussle between the parliament and the executive president over the functioning of the public authorities. However, it must be noted that while parliament proposed a constitutional framework for the control of the public authorities, and thus the powers of the president, it has not followed up with any practical measures to ensure the proper implementation of the law it created. It seems that the parties that collaborated to bring about the 17th Amendment have not committed themselves to it in any decisive or consistent manner. Thus, the tension between the executive president and parliament is yet to be resolved.

Today the Sri Lankan public is faced with a grave crisis, as these public authorities are proving incapable of providing the services and facilities they were expected to provide. The 1978 Constitution still overpowers them in favour of the executive president's capacity to act arbitrarily. Much of the ideological crisis and the resultant loss of hope prevalent in the country currently also centres on the frustrations felt by the citizenry due to their inability to get vital public authorities in the country to function adequately.

The distribution of power between the centre and public authorities

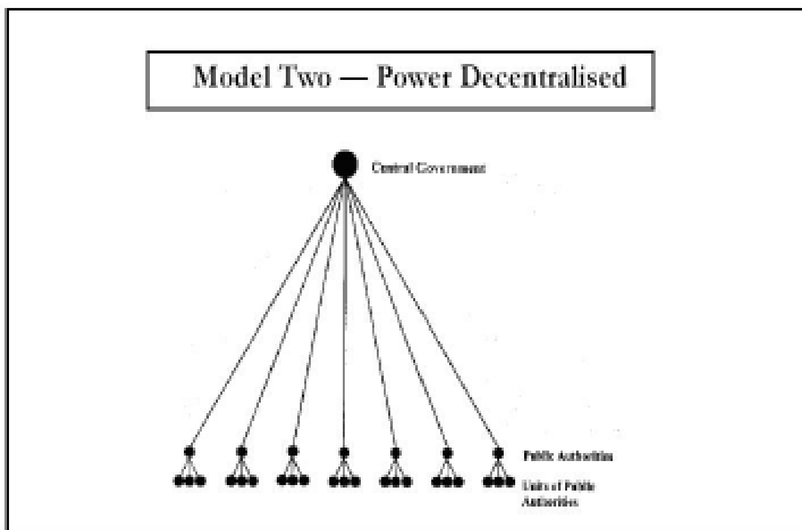
The three diagrams below describe the use of power in three different systems.



In this model, responsibilities and decision-making power is LESS distributed. That is, LESS power is entrusted to the public authorities while the centre controls more power.

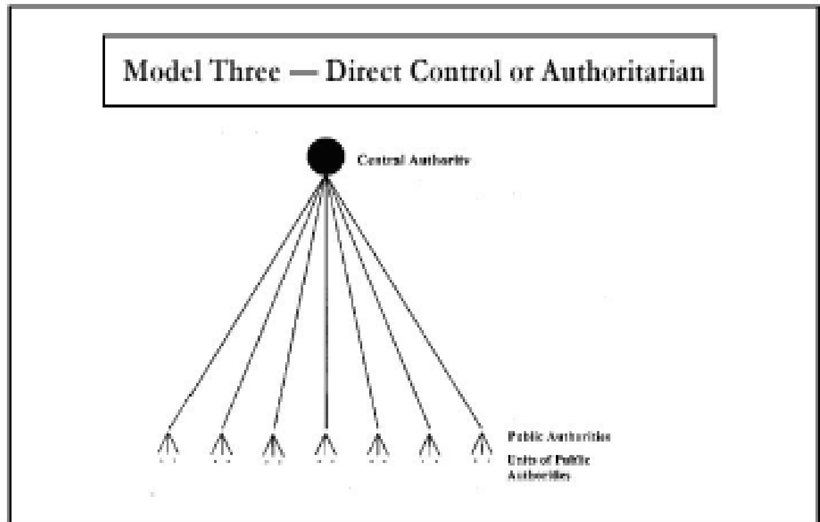
The **First Diagram** gives 'centralised power' where the central government has greater control of public authorities. However, the public authorities also have a certain degree of independence and allowance for the use of discretion. The limits of power of the authorities are defined and therefore a public authority can safely work within the boundary of power without feeling in any way that they will be in conflict with the central authority. The difference between this and the second model (below) lies with the extent of power that has been allowed to the public authorities. When compared to the second model, here it is much more limited. The model of power distribution between the central government and public authorities under both the Soulbury Constitution (1948) and the autochthonous 1972 Constitution was based on this first model.

"The central authority functioning under the 1978 Constitution has obstructed the development of the public authorities proposed under the 17th Amendment"



In this model, responsibilities and decision-making powers are distributed. Public authorities are entrusted with more powers while the centre controls less power.

The **Second Diagram** gives a situation where power is decentralised. Here, definite powers are assigned to public authorities by way of law and recognised practices. Some powers are kept at the centre. The relationship between the centre and the public authorities is defined by very clear legal demarcations. The public authorities can feel safe in making decisions and in using initiative in the areas over which they are mandated. This is the model usually followed in developed democracies. But, none of the Sri Lankan constitutions developed their constitutional ideas on the basis of this model. Perhaps what the 17th Amendment was attempting to do was to introduce this idea of more independent public authorities. However, it is difficult for that type of distribution of power to coexist with the type of absolute power vested in the centre as in the third model (below). As a result, the central authority functioning under the 1978 Constitution has obstructed the development of the public authorities that were proposed under the 17th Amendment of the Constitution.



In this model, responsibilities and decision-making powers are NOT distributed and no REAL power is entrusted to the public authorities. The centre is supposed to control it ALL.

The **Third Diagram** shows where central authority more or less completely controls power. In this model public authorities do not have any decision-making powers or avenues to use their discretion in order to achieve the objectives for which the particular public authority is created. In almost any matter, the public authorities await orders from above. If orders from above have not arrived, the holders of authority in the public institutions do not feel confident to act. They would always feel unsafe that what they do may be found fault with by the central authority. Thus, the public authorities develop a sense of dependence on the central authority to take decisions even on day-to-day routine issues, which they are supposed to do. The consequence of this on the public authorities is that they begin to avoid all responsibilities for which they were established.

Jean-Bedel Bokassa, former dictator of the Central African Republic, who is generally compared with Idi Amin

In the first two diagrams we have used the term 'Central Government'. In the third diagram we have used the term 'Central Authority'. This is because in Models One and Two, a government as an executive means a system through which an executive operates. For example, in a government headed by a prime minister, the government will be the cabinet of ministers and the system through which they operate. There can also be a government within a presidential system where the president also acts through parameters laid down by law and works together with other agencies that are considered part of the government. Nonetheless, be it the prime ministerial system or the presidential system, the functions of the government is controlled by an intricate web of checks and balances, not by a single individual. Here, the system processes all actions. However, in the power model shown in Diagram Three, the centre can in fact be just one person. This one person can decide on policy as well

as ensure that his will is carried out. Hence, here it is not the government that rules, but a single individual acting as the authority. This is the model on which the 1978 Constitution of Sri Lanka was based.

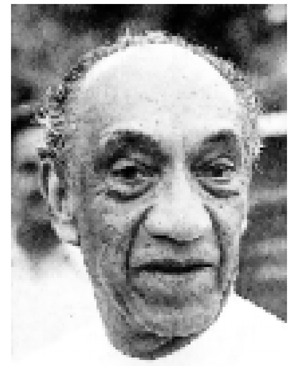
Within this model every aspect of rational government will be killed by the one authority at the helm that controls all real power. In the absence of adequate checks and balances, this authority usually tends to act irrationally. The reasonable framework that is needed to maintain relationships within the system and to act and interact through a wide web of power distribution—in a limited manner as demonstrated under Model One, or a much wider distribution of power as per Model Two—cannot exist under the application of power within the framework described in Model Three.

The direct consequence of the use of power under Model Three is the creation of anarchy. This is the reason Dr Colin R de Silva described the 1978 Constitution as being modelled after the constitution of Jean-Bedel Bokassa, the leader of the Central African Republic who declared himself emperor. The implication is that to get back to any rational form of government, the 1978 Constitution should be abandoned: the power model depicted in Diagram 3 should be eliminated.

Can the 1978 Constitution be abandoned via proper implementation of the 17th Amendment? Perhaps it can pave the way for the restoring or creating of a new relationship between the public authorities and the centre. This of course requires that the centre be genuinely willing to part with the absolute power given to it under the 1978 Constitution and allow the authorities created under the 17th Amendment to act in an independent and authoritative manner.

The collapse of the policing institution in Sri Lanka is not merely due to the defects of the policing system itself. Its defects are the direct consequence of the prevailing model of power in the country through and for which it is compelled to operate. Whatever defects existed in the pre-1978 policing system, they could have been corrected by various measures adopted within the system itself, with support from the government. However, the problems that now exist cannot be addressed without a change in the constitutional set-up.

The attempts so far to depoliticise the system and create a rational system of policing by introducing an independent National Police Commission have not produced the expected results. The main reason for this failure is that the centre (the executive president) has sabotaged the proper implementation of the 17th Amendment by, among other things, depriving it of adequate resources for its operation. Within the policing system itself, there has been a serious attempt to sabotage the commission. This is to be expected, as with any institution that is undergoing serious challenge. However, the lack of opportunity for the commission to exercise its authority due to the lack of



J R Jayewardene, former president of Sri Lanka, who created a Bokassan-style Constitution

the requisite resources has created many tensions. The result is that the fundamental problems of the policing system in Sri Lanka have not yet been addressed.

Note on publication changes for *article 2 & Human Rights SOLIDARITY*

From September 2005, *Human Rights SOLIDARITY*, the sister publication of *article 2* which is published by the Asian Human Rights Commission, has gone completely online at www.hrsolidarity.net. Although a limited number of copies are still being printed (in black and white) for interested subscribers, most readers will from now on be accessing *Human Rights SOLIDARITY* exclusively from its website.

article 2 is continuing in print, which means that subscribers will from now on be receiving the six copies of *article 2* annually and have free access to *Human Rights SOLIDARITY* online.

The annual subscription rate for *article 2* will remain unchanged. The decision to keep the rate fixed was made for a number of reasons. Among them, the rate has remained the same since the publication's inception, although costs of publishing have increased. Also, the rate was originally based on an estimated 32 pages per edition. However, as *article 2* has consistently published much larger editions, mainly due to its special reports and other featured issues (up to 116 pages), the cost of publishing has from the start been higher than anticipated.

Above all else, we believe that *article 2* has been a consistently high-quality publication that has addressed human rights and rule of law issues in Asia from an uncommon and provocative standpoint. Responses from readership in the region and further afield have reassured us of the same.

Please also be reminded that *article 2* is available in full and can be downloaded free of charge in PDF format at its website: www.article2.org.

We welcome any comments on the above or any other matters concerning *article 2*. Please email to editor@article2.org, or by post to: The Editor, *article 2*, Asian Legal Resource Centre, Floor 19, Go-Up Commercial Bldg, 998 Canton Road, Mongkok, Kowloon, Hong Kong SAR, China.

Response to the UN Committee against Torture on torture in Sri Lanka

Janasansadaya, Sri Lanka

After reviewing the 'List of Issues to be considered during the examination of the Third Periodic Report of Sri Lanka (CAT/C/48/Add.2)' [CAT/C/35/L/LKA (List of Issues), 30 June 2005] in November 2005 by the UN Committee against Torture, which considers application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by treaty parties, Janasansadaya, a human rights group based in Panadura, Sri Lanka, and a partner organisation of the Asian Human Rights Commission, prepared and submitted the following edited replies to some of the questions posed.

Please describe the measures taken to strengthen the independence, impartiality and effectiveness of the Human Rights Commission. Please give examples of successful interventions and of progress actually made, with particular emphasis on the 24-hour hotline, the central register of detainees and the effective monitoring of all places of detention. Please inform the Committee about the effectiveness of the National Strategic Plan of Action (2003-2006), in particular its specific programme to combat torture through effective monitoring and follow-up.

Since March 2005 Janasansadaya has observed that the HRC [Human Rights Commission] has begun inquiring into complaints made to it regarding police torture and has made recommendations and issued directives to the AG [attorney general], NPC [National Police Commssion] and IGP [inspector-general of police], as well as the police perpetrators, to pay compensation to the victims and take appropriate disciplinary action against the perpetrators.

Janasansadaya has also observed that the said "24-hour hotline" does exist. However, those who answer the hotline decline to reveal their identity, making it difficult for victims to follow up on their complaints—for instance, inquiring into what action has been taken or the plight of their loved ones. Furthermore, there are apparently no permanent staff employed to respond to the hotline. After office hours, the hotline is thus connected to

the mobile phones of HRC officers who may be otherwise engaged and not in a position to respond immediately. This reduces the efficiency of the hotline.

> **"There is neither an effective nor comprehensive methodology adopted by Sri Lanka to prevent or combat torture"**

Janasansadaya is unaware of any "central register for detainees". In fact, interviews with the police in May 2004 by the Law & Society Trust failed to reveal the existence of such. Thus to our knowledge this is a fabrication invented to impress the international community.

The HRC's powers to monitor places of detention are quite limited. The reason for this is that although the commission's officers are empowered to enter the main police station building, they cannot enter other buildings within the premises, such as the garage, kitchen or private quarters. From victims' experiences, torture usually takes place in these other buildings, not in the actual police station. To enter other buildings, the HRC must inform the IGP or the assistant superintendent of police (ASP) in advance, which defeats the very purpose of the visit, allowing concealment of any illegal activities.

What steps are being taken with regard to prevention, investigation, prosecution and punishment in response to allegations of torture, extra judicial executions, disappearances and other violations of human rights?

There is neither an effective nor comprehensive methodology adopted by the State party [Sri Lanka] to prevent or combat torture. The first step towards prevention must be a firm conviction of the importance of prevention together with the intent to prevent torture. These can be ascertained through statements and policy directives issued by senior government officials and authorities. However, Janasansadaya has not noted any such statements or directives made publicly or privately by the IGP. Rather, his common response, whether made publicly or to individual incidents brought specifically to his attention, is to defend police behaviour—for instance, to justify police action by saying that the officers were using "minimum force" as required by the situation.

Furthermore, senior minister Ratnasiri Wickremanayake was recently quoted in the media as saying that the IGP should be given more powers vis-à-vis the NPC, which was set up as an independent body to monitor the police force. In fact, he stated that the IGP should actually be a member of the NPC, contrary to constitutional requirements. In the face of such attitudes, the mere denouncement of torture by the late Lakshman Kadirgama, the former Minister of Foreign Affairs, while addressing the 61st Session of the CHR [UN Commission on Human Rights] does not mean very much.

What internal disciplinary processes exist within the police force? Is torture and ill treatment included in their competence and, if so, is the sentence different from the one provided for under criminal law? How are inquiries conducted and how long does it take to complete such an inquiry? How are these inquiries made public?

“Even with the victim’s perseverance, disciplinary inquiries can take many years to complete”

The Sri Lankan Establishment Code sets out general departmental disciplinary inquiry procedures of state institutions. These procedures also apply to the police department. However, the partiality of police department disciplinary hearings maybe ascertained from the following facts: (i) the inquiring officer is always a senior police officer; (ii) the prosecutor is always a police officer; (iii) the defending officer is usually a senior retired police officer; and, (iv) inquiries are held at police stations or within the office premises of senior officers. The result of such hearings is further victimization of torture victims.

To illustrate, the inquiry may take an inordinate amount of time to be completed, being postponed on numerous occasions due to the absence of the inquiring officer, the prosecutor or the perpetrator. During these times, the complainants and witnesses are required to ‘hang around’ the police stations for hours and even days, giving the perpetrators and their colleagues an ideal opportunity to pressurize the victims into either reaching a compromise or scaring them away. In other instances, the victims—who often belong to the poorer segments of society and have to forfeit their daily work and wages to attend these inquiries—simply give up in desperation. Then a verdict is given of ‘complainant not present’ and the inquiry discontinued (from the experiences of torture victim Suresh Pradeep Kumara, who finally informed the inquiring officer that he would no longer attend the inquiry against his perpetrators).

Even with the victim’s perseverance, disciplinary inquiries can take many years to complete. In the rare instances that a verdict is given, neither the victim nor the public is informed of the outcome. In fact, during a 2004 interview conducted by the Law & Society Trust with senior officers from the police legal division, the officers were unable to give details of even one completed disciplinary inquiry. The following statistics for completed and pending disciplinary inquiries by the police department in 2003 affirm the situation:

Year:	2003
Complaints received:	156
Inquiries pending:	3
Inquiries completed:	11

Finally, to give an appearance of transparency to these inquiries, sometimes civilian observers—usually retired judges—are allowed to sit in. However, they are not empowered to get actively involved or to raise objections during the sessions. If they do, they are not invited again. It is thus clear that all these procedures are merely attempts to mislead public opinion.

Do accused public officials remain at work during investigations of torture?

"The police are particularly adept at torture methods that leave minimal external injuries and thus minimize chances of detection"

The impunity granted to state officials in Sri Lanka is such that not only do police officers remain at their posts during investigations of torture, but continue to do so after being indicted by the AG before the high courts under the CATA [Convention against Torture Act, No. 22 of 1994] for committing torture.

In fact, even after the Supreme Court of Sri Lanka—exercising its fundamental rights jurisdiction under chapter III of the constitution—rules that victims have been tortured and directs perpetrators to pay compensation, in almost 99 per cent of the cases the perpetrators continue serving at their posts.

Please provide more detailed information on the instruction and training provided for law enforcement officials and other public officials with respect to the prohibition against torture, and specifically the treatment of detainees, and the measures for the prevention of torture and cruel, inhuman or degrading treatment or punishment. Please provide information on training in areas such as non-coercive investigatory techniques. What forms of monitoring and evaluation are used to assess the impact of these programmes, if any?

The Sri Lankan police department conducts several programmes on torture and other abuses. However, these are largely for the purpose of obtaining promotions within the department as well as to serve as propaganda for the international community.

In fact, with regard to the practice of torture, police officers seem better trained at innovative methods of torture rather than non-coercive investigatory techniques. They are particularly adept at torture methods that leave minimal external injuries and thus minimize chances of detection, such as the piling of books on victims' heads and hammering with poles, which is known to cause severe internal head injuries but few external injuries.

Janasansadaya is not aware of any monitoring or evaluation of the few training programmes that exist. Furthermore, no mention was made of such monitoring and evaluation in the State party's second and third periodic reports to the Committee or in its fourth and fifth periodic reports to the [UN] Human Rights Committee.

Please indicate further whether there are programmes to train medical personnel who are assigned to identify and document cases of torture and assist in the rehabilitation of victims. How many qualified Judicial Medical Officers (JMOs) have been accredited within the system? What training is provided to JMOs, particularly with respect to rape and sexual abuse? What safeguards are in place to ensure that JMOs are not subject to police intimidation and are able to examine victims independently of the police?

Janasansadaya is unaware of any such training programmes for medical professionals.

There are an inadequate number of qualified JMOs in Sri Lanka: only around 30 in the entire country. They are mostly attached to general and teaching hospitals. In district, rural and base hospitals, the examination of torture victims and autopsies are therefore conducted by senior general practitioners or District Medical Officers (DMOs), who only posses basic medical degrees such as Bachelor of Medicine/ Bachelor of Surgery (MBBS); they do not have the qualifications to conduct such examinations. As a result, examinations are conducted improperly and vital evidence is lost.

"Medical practitioners collude with the police to falsify reports, shield the perpetrators and thus promote the practice of torture"

With regard to police intimidation of medical officers, in the experience of torture victims the greater problem is the collaboration of these medical practitioners with the police to falsify medical reports, shield the perpetrators and thus promote the practice of torture. There are many incidents where after being tortured the victims were taken to a medical practitioner who issued a report stating that the victim was in good health without conducting any examinations.

In fact, often the police do not take the tortured person to a hospital but to a medical practitioner known to them personally, thereby obtaining false medical reports. These are then used in court to proclaim that the victim is in a suitable condition to be remanded.

What steps has the State party planned to take to ensure that the supervision of detention facilities is effective and independent? Are prisoners systematically examined by a doctor upon arrival at a prison? Are injuries recorded?

Janasansadaya is unaware of any systematic medical examination of prisoners upon their arrival in prison. When a remandee complains of having been tortured, prison officials may admit such persons to the prison hospital; however, these usually lack qualified personnel and adequate facilities for the treatment of torture injuries.

At other times, prison officials do not even comply with court orders for the remandee to be produced before a JMO.

Which institutions can visit places of detention? How often do these visits take place? Are the reports made public? Can NGOs make visits?

As stated above, the HRC is empowered to visit the main police station building. However, according to a circular issued by the IGP in 2004, the HRC was explicitly prohibited from visiting adjoining buildings within the police station premises—where it had been reliably noted that most torture takes place—unless the HRC obtained prior approval from the ASP in charge of the police station. Furthermore, reports of such visits have not been made public.

Non-governmental organizations (NGOs) are not permitted to visit places of detention. In reality, not even lawyers can accompany their clients to police stations or be present during interrogations, unless the police agree.

"Police stations objected to displaying posters depicting the rights of an arrested person"

Please describe how detained persons are informed about their rights (orally or in writing). Do these rights include the right to inform a relative and the right to a medical examination by a doctor of his/her own choice?

While the above question presumes that detained persons are in fact informed of their rights, the reality is that they are simply dragged to the police station, or even severely assaulted before being taken. While Sri Lanka's Criminal Procedure Code requires that a person be informed of the reason of arrest at the time of arrest, this provision seems to be confined to the legal statutes. For this reason many victims are produced in court on charges unknown to them. They then plead guilty to these charges, having been coerced by the police to do so, who threaten them with further torture.

Many police stations even objected to displaying posters printed by the HRC depicting the rights of an arrested person within their premises.

When individuals have mustered the courage to ask for the reasons of arrest, they have been mercilessly tortured for daring to question the police. After having drugs, illicit liquor or offensive weapons (bombs) planted on them they have then been remanded and maliciously prosecuted.

To illustrate: on 9 March 2004, John Pollage Udaya Saman Jayasuriya was tortured by the Kadugannawa police to such an extent that he lost four front teeth, merely because he asked the identity of the two policemen in civilian clothes who asked for his driver's licence and insurance slip. Similarly, on 13 May 2004, A.G. Ravindra had his ear cracked by the Katupotha police after asking for the reason of his arrest.

Which authority can order the initiation of a criminal investigation in cases of torture or cruel, inhuman or degrading treatment or punishment? Does this require a formal complaint by the alleged victim? Please update the data contained in the report and provide examples of cases investigated and indicate the results of the proceedings, both at the penal and disciplinary levels.

In Sri Lanka criminal investigations have rarely been initiated after torture victims lodge complaints; investigations have only begun after international human rights bodies such as the AHRC [Asian Human Rights Commission], the Committee [against Torture] or the [UN] Special Rapporteur on Torture have referred specific cases to the AG or the IGP and requested investigations. While these authorities have the capacity to initiate investigations, they do not do so without pressure from outside agencies.

How many police personnel are attached to the Special Investigating Unit of the Attorney-General investigating complaints of torture and ill treatment? How many lawyers are available to the Attorney General for the preparation of indictments? What steps is the State party taking to ensure that adequate resources are allocated for this purpose?

The Special Investigation Unit (SIU) is a non-permanent arrangement at the AG's department, which attends to cases on an ad hoc basis. There are very few personnel attached to the SIU and it is under-resourced. There are also very few personnel in the AG's department for the preparation of indictments. Due to such arrangements and the inadequacy of staff and resources, the cases get delayed for a very long time.

Please provide more detailed information about the specific measures that have been taken to fight impunity for violations of human rights, including disappearances and torture and other cruel, inhuman or degrading treatment or punishment committed by State agents. What steps are being taken to ensure that State agents and others guilty of torture violations are brought to justice?

It is difficult to think of specific measures that have been taken to fight impunity for human rights violations when measures provided by law and existing in statute books for decades have not been utilized. For example, the Establishment Code specifically provides for the interdiction of public servants charged or indicted on a criminal offence until the completion of the court case and they are exonerated. However, in numerous cases policemen indicted before the high courts under the CATA continue to serve at their posts. Not only does such action deter the course of justice, but it also sends a clear message to the perpetrators that torture is acceptable.

"It is difficult to think of specific measures that have been taken to fight impunity for human rights violations when measures provided by law for decades have not been utilized"

How many State officers have been found in torture-related cases to have violated the human rights guaranteed by the Constitution in recent years? How many State officers have been indicted under the Torture Act or the Penal Code, and how many successful prosecutions have taken place? What were the punishments meted out to such persons, and how many such officers have been dismissed from their employment with the State? The State party is requested to provide a list of these cases to the Committee if one exists.

Sri Lanka ratified the CAT in March 1994 and enacted domestic enabling legislation—Act No. 22 of 1994—in November 1994. In the 11 years this legislation has been in place, there have been only two convictions under the act before the high courts, both in 2004.

What role does the National Police Commission play with respect to complaints of torture and ill treatment? Has the National Police Commission established a public complaints procedure, as required under article 155 G (2) of the Constitution of Sri Lanka?

"Victims and other witnesses in torture and extrajudicial killing cases continue to be intimidated, threatened and even killed"

The NPC cites a lack of resources and personnel as the reason for which it cannot investigate complaints of torture received from the public. Therefore, when any of the five NPC coordinators—three of which are retired DIGs [deputy inspector-generals]—receive a torture complaint they refer it to a DIG of police, who in turn sends the complaint either to the ASP [assistant superintendent of police] or the SP [superintendent of police] in charge of the relevant police station. This officer then refers the complaint to the OIC [officer-in-charge] of the station at which the victim alleges to have been tortured. Meanwhile, the ASP or the SP may summon the victim and witnesses to record their statements. These statements may then be referred to the police legal division but are usually not, unless the IGP is notified of the incident by international sources, in which case he will request a report from the relevant DIG, who in turn will request it from the ASP or the SP.

In a recent interview, the NPC chairman explained the absence of an established public complaints procedure through a lack of resources and not seeing eye-to-eye with the incumbent IGP.

Although the 17th Amendment to the Constitution of Sri Lanka grants significant power—including authority over all police promotions, transfers, disciplinary action and dismissals with the exception of the IGP—to the NPC, it has yet to fully assert its powers. Under the view that it cannot interfere with the daily functioning of the police, the NPC has delegated these powers with regard to officers at the rank of inspector and below to the IGP. With regard to disciplinary action against officers above the rank of inspector, the NPC chairman has complained that his instructions are not complied with.

Does the State party plan to establish an effective witness protection programme, particularly for victims of torture, extra judicial killings and other abuses? Is this matter under review? In particular, have financial or other resources been allocated for this purpose?

Despite the [UN] Human Rights Committee's recommendation in 2003 of the importance of a witness protection scheme, to date there is no such programme. As a consequence, victims and other witnesses in torture and extrajudicial killing cases continue to be intimidated, threatened and even killed, such as Gerald Mervyn Perera. Janasansadaya is unaware of any financial or other resources being allocated for such purposes.

Please provide information on compensation measures ordered by the courts and actually provided to victims of torture or cruel, inhuman or degrading treatment or punishment since 1998. Can torture victims obtain compensation through a civil suit in the

absence of a guilty verdict in criminal proceedings? In this respect, please provide statistics and examples of compensation received by victims in such cases.

Under its fundamental rights jurisdiction, the Supreme Court is empowered to award compensation to victims of human rights violations. This is to be paid either by the state, the individual perpetrators, or both. However, recently the court has been awarding amounts of compensation far below what would be proportionate with the gross human rights violations found.

“The Supreme Court has recently shown reluctance to grant leave to proceed in fundamental rights cases”

In recent times the Supreme Court of Sri Lanka has also shown a certain reluctance to grant leave to proceed in fundamental rights cases, which may be a regression from earlier positive developments, for example, the strong judgments in Silva vs Iddamalgoda (2003) and in W R Sanjeewa AAL (for Gerald Perera) vs Sena Suraweera (Inspector of Police) and eight others (2003) [SCFR. 328/2002 Supreme Court of Sri Lanka].

Another disturbing trend is the attempts made by the court to induce the victims to enter into out-of-court settlements with the perpetrators. This results in the perpetrators being fully exonerated, and also prevents the victims from petitioning the court for further violations of their rights.

Torture victims or families of those killed in custody may seek compensation via civil suits. In fact, a few victims have instituted action in the district courts against their perpetrators and the state, for example, L Madusanka vs. Iddamalgoda et al [MR 32765 Colombo District Court], and Kusumawathi’s case [MR 5130 Kalutara District Court]. However, proceedings before the district courts are time-consuming and costly, and many victims cannot afford them.

In the case of L Madusanka vs Iddamalgoda, for instance, although the case was instituted in 2002, a date for trial has been fixed for November 2005. Inordinate delays have occurred due to the inability or willful neglect of the police in handing summons to the defendants and also due to delays in filing answers by the AG’s department. These court delays also provide ample opportunities for the intimidation of victims and for the perpetrators to abscond.

In a positive development, the HRC has begun to recommend compensation for victims. However, the compensation recommended has to date [at time of writing] not been paid by any of the perpetrators.

What are the arrangements for payment of compensation to successful complainants? Does the State or the individual officer pay this compensation? Is the payment made in a lump sum or instalments, and what safeguards are in place to prevent further harassment or intimidation of complainants?

What provisions are made for victims to have their own legal representation in criminal cases? What rights do complainants’ lawyers have to cross-examine defendants and witnesses?

“There is no need to trade in any special equipment for inflicting torture, as the police seem to have an enormous talent to improvise ingenious instruments”

In accordance with the Criminal Procedure Code, a torture victim—the aggrieved party—has the right to retain a lawyer to look after their interests in court. However, in practical terms this right depends on the discretion of the court. In certain instances, lawyers may be prevented from conducting cross-examinations or even participating in the trial at all, such as in the Bindunuwewa massacre case.

This situation is worsened when cases are prosecuted in the magistrates' courts, for instance, when police have charged perpetrators with causing simple hurt. In such cases, the police lead the prosecution against the defendant, a fellow policeman. With the victim's legal representative being unable to actively participate in the trial, the likelihood of partiality is enhanced.

What services exist for the treatment of trauma and other forms of rehabilitation of torture victims? What financial allocations have been made for this purpose?

We are unaware of the existence of any such facilities and interviews conducted by senior police officials of the legal range of the police department and the army revealed that there are no such facilities.

What safeguards are in place to prevent cruel, inhuman or degrading treatment in schools?

In May 2005, the Ministry of Education issued a circular (ED/01/12/01/04/24) prohibiting corporal punishment in schools and also warned that teachers found to mete out such punishment to students would be liable for disciplinary action. However, Janasansadaya has found that many schools, especially among those falling under provincial councils, had not received this circular. Regardless of the circular, corporal punishment and ill treatment are still prevalent in schools throughout the country.

Please indicate whether there is legislation in Sri Lanka aimed at preventing and prohibiting the production, trade, export and use of equipment specifically designed to inflict torture or other cruel, inhuman or degrading treatment. If so, please provide information about its content and implementation. If not, please indicate whether the adoption of such legislation is being considered.

To our knowledge there is no need to trade in any special equipment for inflicting torture. The police seem to have an enormous talent to improvise ingenious instruments of torture as indicated by the numerous horrifying reports from victims.

Describe the measures taken to disseminate information on the submission of reports and on their consideration by the Committee, particularly on the Committee's concluding observations.

Janasansadaya is not aware of any measures being taken to disseminate information regarding the submission of reports to or the concluding observations of the Committee. To date the government has also not made any public statement in this regard.

Statement to the UN Committee against Torture on torture in Sri Lanka

Danish Rehabilitation & Research Centre
for Torture Victims

The Danish Rehabilitation and Research Centre for Torture Victims (RCT) has had close cooperation with the Family Rehabilitation Centre (FRC) in Sri Lanka since 1993. More recently in 2003 RCT has begun cooperation with the Asian Human Rights Commission (AHRC) in support of their work to prevent police torture in Sri Lanka. In the course of our work in Sri Lanka RCT has had the opportunity to follow the torture issue at close range both from the perspective of rehabilitation of torture survivors and the prevention and elimination of torture in Sri Lanka. RCT has only just returned from a longer mission to Sri Lanka, which provided an opportunity to meet with important stakeholders on the torture issue. Based on these concrete experiences RCT would like to comment on a number of issues that are of the utmost importance if Sri Lanka is to become a country free from police torture.

RCT is alarmed at the large number of reports of torture of persons in police custody. RCT has met with a number of torture victims from the Colombo and Kandy areas and in many of these cases the police torture was committed for the purpose of extracting confessions and as a result of the lack of proper investigation skills. The police torture is directed not only towards political prisoners, but also towards those accused of committing petty crimes. The victims are mainly men, but RCT is aware of a large number of cases of torture of children and sexual torture of women. RCT urges the [UN] Committee [against Torture] to conduct an independent inquiry into these issues under article 20 of the [UN] Convention against Torture [and Other Cruel or Inhuman Degrading Treatment or Punishment].

This is the text of a written statement prepared by the Danish Rehabilitation & Research Centre for Torture Victims to the 35th Session of the UN Committee against Torture, November 2005, in consideration of Sri Lanka.

“RCT would strongly urge the Committee to underline the importance to enact a strong witness protection program in Sri Lanka”

RCT has witnessed a severe lack of protection for torture victims that have the courage to stand up for their rights and file cases against the perpetrators. Many of these victims have experienced serious threats to themselves and their families and have been urged to settle the cases outside the legal reach of the courts system. The death of torture victim Gerald Perera in 2004 is a shocking and horrific example of the lack of protection provided for the torture victims. RCT would strongly urge the Committee to underline the importance to enact a strong witness protection program in Sri Lanka to ensure that torture victims will continue to come forward with their testimonies, so that the perpetrators may be brought to justice. The victims need to be protected from the police and not by the police. Not providing for the protection of torture victims is in direct violation of the Convention against Torture, article 13.

RCT has worked with the rehabilitation of torture victims in Sri Lanka for over a decade and it is alarming that no state efforts have been made to enact national legislation or policy as regards the right to rehabilitation. Torture victims in Sri Lanka have no inherent right to rehabilitation which is in direct violation of the Convention against Torture article 14. RCT urges the Committee to underline the importance of and the state obligation to ensure the access to rehabilitation for all torture victims.

RCT would like to raise its concern as regards the expiration of the mandate of the National Police Commission (NPC) in Sri Lanka on 27 November 2005. This important body set up under the 17th amendment to the Sri Lankan Constitution, which may investigate public complaints against the police, has slowly and despite severe budgetary constraints taken up cases of police torture and police violence. Most recently the NPC has recommended the interdiction of more than 100 police officers due to allegations of torture. It is therefore extremely unfortunate and alarming that no efforts have been made to ensure the continuation of the mandate of the NPC. The President has the possibility of extending the mandate of the existing Commission, but the appointment of members for a new Commission rests in the hands of the Constitutional Council, which is not functioning. Thus, there is a real risk that the NPC will seize to function after the 27th of November 2005. This would be in direct violation of the Constitution of Sri Lanka and will represent a deterioration of the human rights situation in the country especially as regards the fight against impunity in cases of torture. RCT urges the Committee to raise this matter with the State Party [Sri Lanka] as a matter of the utmost urgency.

RCT has experienced the severe difficulties and flaws within the judicial system in Sri Lanka. RCT has been made aware of the particular difficulties experienced in the Magistrate Courts and RCT has learned that a suspect has no right to legal representation prior to appearance at the Magistrate Court and that the representation provided in the courts often are lawyers

that work closely together with the police. Further, the suspect is often produced before the Magistrate outside regular working hours having the effect that they have no right to legal representation and in many instances the Magistrate does not even see the suspect. Despite the great lack of impartial lawyers, RCT has met with several independent lawyers, who have provided representation for torture victims. These lawyers have been faced with threats and intimidations towards themselves and their families. Further, the suspect should be produced before a medical officer within 24 hours of his/her arrest to ensure that their condition is suitable for remand. Such an examination is often falsified or the wrong person is brought to the examination as no identification is required prior to the examination.

"RCT is deeply concerned about the apparent deterioration of the rule of law in Sri Lanka"

RCT is deeply concerned about these issues and the apparent deterioration of the rule of law in Sri Lanka. RCT urges the Committee to take up these issues and recommend that suspects only be produced before the Magistrate Court during working hours and that the suspect be provided adequate and impartial legal representation. In particular, RCT wishes to stress the importance of the protection of lawyers, so as to ensure impartial representation for the torture victims. Further, the medical examination should be carried out properly ensuring the verification of the suspect and the preparation of truthful reports.

Victims of torture have the right under the Constitution to file Fundamental Rights Applications. However, the 30-day time limit imposed in the Constitution for the filing of such complaints reduces the possibilities for victims of torture to file such applications. Many victims have experienced severe mental and physical trauma and the injuries they have sustained make it difficult for them to make complaints within such a short time period. RCT urges the Committee to compel the State Party to abolish such a time. Further, the Attorney General's department should be encouraged to file indictments against the perpetrators of torture in the shortest possible time and efforts should be made to end the delays in adjudication resulting in court trials that take many years.

RCT acknowledges that the Human Rights Commission (HRC) [of Sri Lanka] as of recently has stepped up its efforts on the torture issue. RCT is encouraged by the fast track approach to torture cases taken by the HRC, the staff upgrade which has recently taken place and the increased number of cases referred to the Attorney General's office by the HRC. RCT has also learned that the HRC will step up its efforts to visit places of detention, including police detention facilities, prisons, psychiatric facilities and detention centers for women and juveniles. However, RCT wishes to underline that the HRC still needs to consider a number of issues. Therefore RCT urges the Committee to further encourage the HRC to continue its efforts at improving its staff and establish a clear policy statement on the torture issue. Further, the HRC should improve and develop its complaint procedure ensuring a more speedy consideration of torture

“RCT is alarmed by the situation of the policing system in Sri Lanka”

complaints. The HRC should keep up the pressure on the police and the Attorney General's Office. Finally, the mandate of the HRC will run out on 26 March 2006 and the HRC should take all appropriate steps to ensure the further existence of the HRC after this date.

RCT was alarmed to learn of the recent attack on the premises of the HRC and of the fact that the attack may have been perpetrated by staff members of the HRC. An independent and impartial inquiry into the attacks should be conducted and possible suspects within the HRC should be suspended and the suspects should be prosecuted. This attack has further underlined the importance and effect of the continued efforts of the HRC in cases of human rights abuses.

In general, RCT is alarmed by the situation of the policing system in Sri Lanka. The police lack a basic knowledge of human rights and the investigation methods are very inadequate. In many instances the police have expressed that they feel they have no other means of solving a case than resorting to the use of torture. Without a well-functioning, independent and non-corrupt policing system there is not much hope of eradicating torture in Sri Lanka. RCT encourages the Committee to raise this issue with the State Party and recommend better training for police officers, a higher level of discipline within the ranks of the police and a higher level of accountability.

Finally, RCT also wishes to stress the importance of the signature and ratification by the State Party of the Optional Protocol to the Convention against Torture (OPCAT). The adoption of the OPCAT was an important milestone for the prevention of torture in places of detention and after its entry it will be an important instrument in the ongoing fight to eradicate torture. The Committee should urge the State Party to without delay sign and ratify the OPCAT and to start the process of establishing a national preventive mechanism.

Persistent systemic torture by the security forces and total impunity in Nepal

Asian Legal Resource Centre, Hong Kong

Introduction

This document has been prepared in order to supplement the information provided to the UN Committee against Torture (herein referred to as the Committee) by other human rights NGOs, in light of the Committee's consideration of the State Party's [Nepal's] second periodic report during its 35th session.

The situation in Nepal has undergone significant degradation since the notorious 1 February 2005 royal takeover. The Asian Legal Resource Centre (ALRC) has produced this update document in order to inform the Committee about new barriers to the implementation of the [UN] Convention against Torture (CAT) and violations that have occurred in Nepal during this most recent period.

On 1 February 2005, King Gyanendra dismissed the government of Prime Minister Sher Bahadur Deuba, declared a nationwide state of emergency and suspended the rights of the people of Nepal to the freedom of expression and assembly and the freedom of the press. The king assumed power by putting armed soldiers and police on the streets and appointed a new 10-member cabinet the next day, composed of royalist supporters, placing himself at the head of the cabinet. The king stated that he would restore democracy and peace in the country in three years. The ALRC was among the many international actors, including states and NGOs, which immediately condemned the king's actions and expressed deep concern for the lives of the Nepali people. Mass arrests, torture, disappearances and the repression of demonstrations and the freedom of expression followed the royal takeover.

This is the edited text of a supplementary document prepared by the Asian Legal Resource Centre to the 35th Session of the UN Committee against Torture, November 2005, in consideration of Nepal. Please also see *article 2*, vol. 3, no. 6 (December 2004) and vol. 4, no. 1, (February 2005) for further documentation on the situation of human rights in Nepal.

> "Nepal's Torture Compensation Act is ineffective in preventing torture and enabling the prosecution of cases of torture"

Since then, the ALRC and its sister organisation the Asian Human Rights Commission (AHRC) have continued to receive a large number of cases of torture and other human rights violations. This has been possible despite the fact that the ability of local human rights activists to conduct fact-finding concerning such cases has been greatly curtailed during this period, due to the risks to their lives that conducting such work entails. It is worth noting that a significant number of human rights defenders have been threatened into limiting or abandoning their activities, or even forced to leave the country during this period, and that the full extent of the use of torture and other grave human rights abuses remains hard to ascertain.

During the 34th Session of the Committee against Torture, the Government of Nepal was requested to provide answers to a list of issues [CAT/C/35/L/NPL, 30 June 2005]. These included requests for clarifications concerning steps taken, among other things, to bring the definition of torture into line with the Convention against Torture, and make torture a criminal offence under the Criminal Code; to ensure that the right to be free from torture is upheld; to investigate and prosecute perpetrators of torture, extrajudicial executions and disappearances; to provide witness protection; and, to provide adequate compensation and rehabilitation to victims.

The ALRC notes with concern that the collapse of the rule of law in Nepal and the worsening of the human rights situation since February 1 mean that there has been at best stasis, and most commonly regression concerning these issues, rather than any progress.

Failings of the Torture Compensation Act

The Constitution of Nepal prohibits the practice of torture. In furtherance to the ratification of the CAT, Nepal's domestic law, entitled the Torture Compensation Act 2053 B. S. (1996) (hereinafter the Act), is ineffective as a tool for preventing torture and enabling the prosecution of cases of torture. The Act falls short of the standards set in the Convention.

The Act does not define torture as a crime. The liability cast upon the perpetrator by virtue of the Act and by article 14(4) of the Constitution is limited to providing damages. In the absence of any other law to punish the perpetrators of torture, the perpetrators enjoy absolute impunity.

Given the absence of strict adherence to any legal and procedural framework to ensure the recording of arrests and details regarding detention, the operation of section 5, which reads that, "The victim may file a complaint claiming compensation in the District Court of the District in which he was detained within 35 days of having been subjected to torture or of released from detention", is limited in its scope. The time span of 35 days and the jurisdictional clause prescribed in the Act often works as an impediment to the lodging of complaints under the Act.

Furthermore, the amount of compensation as provided for in the Act and the manner of realization of compensation also dilutes the concept of *jus cogens* as it applies to torture. The recently promulgated ordinance on communication [Ordinance Amending some Nepal Acts Related to Communication, promulgated on 9 October 2005], which is widely criticized as curtailing the freedom of the press, provides for a higher value fine to be levied from editors and publishers responsible for 'violating' the ordinance through alleged acts of defamation as compared with compensation for acts of torture under the Act. Any compensation that is to be paid in a case of custodial torture is paid by the state. The rider attached in section 6(2) of the Act, which provides for compensatory damages for frivolous litigations ["While trying a complaint pursuant to sub-section (1) if it is found that the complaint was filed with malafide intention the district court may impose a fine up to five thousand rupees on such complaint"], effectively prevents anyone who is aware of the existing legal framework in Nepal from approaching the court.

"No law in Nepal provides for the concept of burden of proof favouring the victim in cases of torture"

The true intention of the legislative process is also made clear from section 10 of the Act, which provides for defence at the expense of the state for the perpetrators ["Concerning the complaint in accordance with section 5, if the chief of the concerned office requests, the Government Attorney shall appear in the court on behalf of the employee and defend him"]. Neither the Act, nor any other law in Nepal, provides for the concept of burden of proof favouring the victim in cases of torture.

Torture by the army and police forces

The ALRC and AHRC have received documentation of a large number of cases of arbitrary arrests, illegal and incommunicado detentions, torture, extrajudicial killings and forced disappearances in Nepal over recent years. Such practices have continued and increased since February 1. Torture is routinely and systematically used by the authorities, and the failings in legislation and the judiciary afford total impunity for the perpetrators of these acts, with no viable avenues for redress for the victims.

Typically, persons are arrested arbitrarily and detained incommunicado. Access to lawyers, medical services and family members are denied for those detained illegally. Of around 5000 detainees interviewed by ALRC sources, some 80 per cent stated that they were not brought before a court within the 24-hour period prescribed in the Constitution of Nepal. A similar proportion of detainees reports having been subjected to torture and ill-treatment while in custody. Cases of ill-treatment and torture recorded by the ALRC include: lengthy periods of blindfolding and handcuffing; beatings, including of the genitals; whipping using sticks and pipes on the soles of the feet, the legs and back; strangulation; death threats, including placing guns to the head; electrocution, in particular via the ears; and hanging upside down and repeatedly being dunked under water. The torture is severe to the point that many victims repeatedly lose consciousness.

“Persons arrested by the police are handed over to the army to be detained and tortured”

It must be added that although a few organisations visit detention centres on a regular basis, access to the rooms in which detainees are being held is not granted. Furthermore, such organizations are not granted permission to interview detainees who have not already been taken to court, and so the aforementioned figure only applies to those persons who have been produced before the courts. The most serious cases, where persons are detained incommunicado for lengthy periods and are subjected to the most brutal forms of torture, and potentially to forced disappearance or extrajudicial killing, remain hidden from external scrutiny. Even the ICRC [International Committee of the Red Cross] has terminated its visits programme to army barracks due to a lack of unhindered access.

In every recorded case of arrest and detention by the army, the interviewed victims claim to have been tortured severely. The army at present wields significant power in Nepal without any effective, functioning form of civilian oversight.

The army has no specifically expressed constitutional right to arrest and detain civilians. It has been detaining civilians despite the fact that the constitution clearly limits its jurisdiction to military personnel. It has previously systematically denied that it was detaining civilians, despite the fact that it is widely known and reported on by NGOs that hundreds of persons have been held in army barracks. It has also reportedly openly lied before the courts about having persons in detention, including before the Supreme Court, in cases where habeas corpus writs have been lodged. The army now publicly acknowledges that it is detaining people, despite the fact that such detentions are illegal, but has in no way halted the use of illegal detention, which serves as an indicator as to the levels of impunity and the collapse of the rule of law in the country.

In the current context the army and police operate in collusion, with persons arrested by the police being handed over to the army to be detained and tortured in its barracks. Although military courts do not have jurisdiction over crimes committed against civilians by the army, the army is persistently detaining civilians in its barracks, and the courts claim to be investigating allegations of torture of civilians by the military. The lack of transparency and inconclusive results of such investigations continue to foster impunity in Nepal. These factors combine to enable systematic torture to be carried out in total impunity, without any workable prospects for effective investigation or for the victim to receive adequate reparation.

Detainees who are released from army barracks are routinely placed under surveillance. In most of the cases they are threatened with further arrest, torture or even death if they report that they were subjected to torture, or if they lodge a complaint before a court. Detainees are also released on the condition that they respect regular summons to present themselves at army barracks, in order to make sure that they have not reported their case anywhere. The ALRC has received information concerning

victims being further detained and tortured as a result of accusations that they had shared information with outsiders. In many cases, released persons are also threatened with similar punishment if they refuse to work as spies against the Maoists.

> "Torture is also endemic within police detention facilities"

The use of torture is also endemic within police detention facilities. Police officials reportedly take bribes from actual criminals, who are then released. Following this, they find substitutes for the criminals that they have released. They make use of torture to force confessions from other detainees, who are often held arbitrarily. Corruption plays a significant role in perpetuating the use of torture in Nepal, with the poor being the major victims of this phenomenon.

Victims of torture are detained illegally and incommunicado, until the physical traces of torture have receded or disappeared. They are then charged with the offences of the released criminals, based on confessions extracted under torture, and the police prepare documents to show that they were only arrested within 24 hours before they are brought to the courts. The courts reportedly turn a blind eye to this practice, enabling the semblance of adherence to the constitutionally prescribed 24-hour period. So the use of torture has been allowed to become endemic and go unpunished, causing significant barriers to attempts by victims to gain reparation at a later stage.

Custodial deaths of torture victims and so-called "suicides"

Since October 2004, according to the authorities just five detainees have died in army barracks as a result of "suicides". The ALRC has been informed that there are credible reasons to suspect that these persons, all of whom were accused of being Maoist cadres or sympathisers, in fact died as the result of torture by members of the army. No proper investigations have been conducted into their deaths. The five were, as follows:

1. **Dipendra Rayamajhi**: A permanent resident of the Panauti area of Kabre district who reportedly committed suicide on 26 June 2005 at the Sinhanath Army Barracks in Bhaktapur district by hanging himself using an electric wire in his cell.

2. **Dorje Sherpa**: Reportedly committed suicide in Shreejang Army Barracks in Singhdurbar, Kathmandu on 27 May 2005 by hanging himself from a window using his shoelaces.

3. **Sadhu Ram Devkota**: Reportedly committed suicide at around 3:40pm on 19 December 2004 at the army barracks in Balaju, Kathmandu by hanging himself from a window with his shoelaces.

4. **Chakra Bahadur Sherestha**: A schoolteacher who reportedly committed suicide at about 7pm on 15 November 2004 at the Dhadingbeshi Army Barracks by initially trying to use a belt to hang himself and later using a sleeping bag rope.

5. **Top Bahadur Ale Magar**: Arrested on 16 October 2004 allegedly while collecting money for the Maoists, he reportedly killed himself on October 20 at the Bhairabagan Army Barracks in Maharajgunj, Kathmandu.

"The power to detain persons for a year without judicial scrutiny has enabled torture to flourish in Nepal"

Following their release from army barracks, many detainees have reported witnessing the torture of co-detainees, and that those who were tortured until they were in critical physical conditions were taken to the army hospitals but never brought back, giving rise to fears that they died as a result of torture. As is widely known, a great number of people have disappeared following arrest by the army in Nepal.

Anti-terrorist measures and torture

Since November 2001, the government has imposed anti-terrorist legislation that allows the security forces to arrest and detain people for a period of one year without judicial scrutiny. The Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) which was introduced in November 2001 was replaced by the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA), which ran for two years. Since then the TADO has been successively reintroduced every six months, most recently in the absence of parliament, since it was dissolved in February.

Section 9 of the TADO provides that if there are grounds to believe that a person might commit terrorist activities if not prevented from doing so, he or she can be detained preventively for a maximum period of one year, as follows:

> Section 9. Power to keep under Preventive Detention
>
> In case there exist appropriate grounds for believing that a person has to be stopped from doing anything that may cause a terrorist and destructive act, the Security Officer may issue an order to keep him under preventive detention for up to six months in a humane place. If there are reasonable grounds to believe that the person has to be prevented from committing any terrorist activities for longer than that, on the approval of His Majesty the Government's Home Ministry, the Security Officer can issue an additional six months' order of preventive detention.
>
> [Unofficial translation]

The wording in this provision can be loosely interpreted to permit abuse by the security forces. The burden of proof of innocence is on the accused.

This power to detain persons for a year without judicial scrutiny has enabled torture to flourish in Nepal. Persons being held under preventive detention have no access to their lawyers. The ALRC has received information that many detainees are held for more than a year under these provisions.

The provisions included in the TADA and the TADO are limited to the arrest of persons suspected of terrorist activities. The army does not have any powers to detain accused persons; it is supposed to hand them over to the police for detention.

Terrorist activities are considered as crimes against the state, and should be dealt with under the State Cases Act. Under this act, the police investigate cases and have the power to arrest persons. These arrestees are then to be brought before the Appellate Court of Nepal within 24 hours. After completing the preliminary investigation and having collected primary evidence, the case should be handed to the public prosecutor, who brings the charges against the person in court. The Appellate Court then decides on whether to give permission for the detention of persons for a maximum period of 60 days. Only the court has the power of decision on whether the person should remain in detention for further investigation or can be released on bail.

“There is no case where the Military Court has taken impartial and independent action on a complaint of torture”

In practice, however, all those arrested on allegations of being involved in terrorist activities are detained by the army for prolonged periods of time, without having any formal allegations or charges made against them. Under such circumstances, the detainees are systematically subjected to torture.

The preventive detention of persons under the TADO for one year is a significant violation of the provisions under the constitution and Nepal's international obligations, notably under the International Covenant on Civil and Political Rights. It is open to abuse and its duration is unjustifiable, both in terms of preventing and investigating alleged terrorist activities.

Lack of effective and independent investigations into torture

There is no mechanism in Nepal to provide for impartial investigations into cases of torture. Inquiries are conducted by the state police, if at all. However, Supreme Court jurisdiction cannot be invoked in cases where the army is accused of torture, by virtue of the rider attached to articles 86(1) and 88(2)(a) of the Constitution of Nepal. It is precisely for this reason that a writ of habeas corpus cannot effectively be invoked in cases of illegal detention and torture whenever the army is alleged to have committed torture in custody.

The army also employs various means by which to deny the reasons for arrests and details regarding detention to detainees' relatives. In the absence of the express power to arrest civilians, the army is reported to be employing measures including directing the local police to perform arrests. The army then takes custody of the detainees. In cases where the relatives of detainees have moved the court for the production of the said detainees, the court has turned down the requests on the ground of a lack of jurisdiction.

The Military Court, to which concerns about detainees must be addressed, suffers from a lack of impartiality and transparency. There is no known case where the Military Court has taken any impartial and independent action on a complaint of torture. This has resulted in absolute impunity being enjoyed by the army in cases of torture.

> “Where the courts entertain applications and order the release of persons, they are often immediately re-arrested on further charges”

There are no practical means by which to ensure civilian oversight of the armed forces in Nepal. Since the declaration of the state of emergency, a series of ordinances has been promulgated by the king to expand the powers of the armed forces on the pretext of countering the insurgency. Functioning public offices, including the National Defence Council, have been further corrupted due to nepotism and a lack of transparency. Even the National Human Rights Commission has not been immune from this degradation.

Rearrests used to circumvent court decisions

In cases where the courts entertain applications and the release of persons is ordered, such persons are often immediately rearrested on further charges, ensuring that they remain in custody indefinitely. For instance, Kumar Rai, a 41-year-old employee in a carpet industry, was first arrested at his room around 3pm on 27 February 2004, by a group of 4–5 security personnel dressed in civilian clothes. After nine days of illegal detention and torture, he was released on the condition that he report to the army barracks on a daily basis. He was rearrested on 15 March 2004 and later released from Mahabir Gan, Chauni the next evening. On March 17, Kumar was once again arrested and subjected to torture while in detention. A habeas corpus writ filed on 5 August 2004 by his wife, with assistance from local NGO Advocacy Forum, was dismissed. On 4 January 2005, Advocacy Forum again filed a habeas corpus writ on Kumar's behalf and on January 31, the Supreme Court issued orders for him to be released. However, Kumar was given another detention order under TADA and Advocacy Forum had to file a third habeas corpus petition on 2 May 2005. He was finally released on May 26, on Supreme Court orders. The reason for his repeated arrests is unknown.

In one case known to the ALRC where officers of the National Human Rights Commission and lawyers appearing on behalf of a detainee insisted upon his release, once the bail application had been allowed, the security forces surrounded the court premises and threatened to use force to take the released detainee into custody on new charges. This is reportedly a common occurrence. There are reported to be numerous cases where when an application is filed for bail and the release ordered, officials from the National Human Rights Commission are forced into taking the released detainee to a different place under the cover of darkness, to enable the person to be released out of the view of the armed forces.

Limited access to courts

The inaccessibility to the courts in Nepal is also pertinent to the persistence of torture there. Very few lawyers are willing to take cases of torture to court. Those who dare to accept briefs are threatened by the perpetrators directly and indirectly so that they are forced to withdraw from providing professional help to their client. Since torture is not defined as a crime in law, the

courts treat a case of compensation for torture as a civil affair, and the victims are directed to pay huge amounts in court fees prior to adjudication.

Apart from the procedural traps facing torture victims in the courts, there is a demonstrated lack of understanding about the purpose of the Convention against Torture and the basic concept of torture among the members of the judiciary in Nepal. Often the judiciary justifies the use of force given the current circumstances in the country. This attitude also explains why the amount of compensation for acts of torture is often far below that which has been prescribed. The judiciary is also confused about application of the law on compensation for torture. For instance, the District Court of Morang dismissed applications filed by the wife of a torture victim who was also a convict on the grounds that the Torture Compensation Act only applies to under-trial prisoners and not to convicts.

“There is a lack of understanding about the purpose of the Convention against Torture and the basic concept of torture among members of the judiciary in Nepal”

Conclusion and recommendations

The breakdown in systems and institutions compounded by the total collapse in the rule of law that has been accentuated by the royal takeover together mean that torture is endemic, systematic and conducted with total impunity in Nepal. Claims to the contrary by the State Party before the Committee should be viewed as nothing more than fabrications. The cases known to the ALRC represent but a fraction of the actual violations that have taken place in the country, especially in 2005. As previously stated, the threats proffered and restrictions imposed on the human rights community in Nepal, especially since 1 February 2005, have led to an inability to document a significant number of cases of arbitrary detention, torture, extrajudicial killing and forced disappearance. In view of the above, the ALRC urges the Committee to recommend that the Government of Nepal immediately

1. Make torture a crime. The domestic law must be amended in accordance with the Convention against Torture so that any proceedings initiated under the Torture Compensation Act are considered and dealt with as grave criminal offences, prescribing imprisonment as punishment where guilt is proven.

2. Ensure that all arrests and detentions are systematically documented. The Committee should intervene to ensure the release of all those who are illegally detained by the police or the security forces. The lack of documentation on arrests and detention is one of the greatest hindrances for any judicial intervention in cases of illegal arrests, detention and torture in Nepal.

3. Provide witness protection. In the absence of a witness protection programme, all steps taken to reduce torture and custodial violence will fail to deliver results, thereby causing a continued lack of confidence in the system among the people of

Nepal. Steps must also be taken to ensure that anyone found to be threatening or engaged in intimidating a witness is dealt with through strictly-enforced laws.

4. Review the conduct of the army and instruct it not to detain civilians illegally and unconstitutionally. The army must be instructed to release all detainees without delay, notably those who are minors and to whom the State Party also owes obligations under the [UN] Convention on the Rights of the Child, to which it is a party. The engagement of an international body to ensure compliance with such orders would be advisable.

5. Withdraw all legislation—including the TADO, ordinances and provisions in domestic law—legitimising pre-trial detention beyond a period of 24 hours.

6. Increase compensation paid to victims of torture through legislative amendments. Compensation must be paid by the perpetrator, though an additional liability should be provided for by the state.

7. Reverse the presumption regarding the burden of proof in all cases of torture.

8. Provide all necessary assistance to the National Human Rights Commission and other human rights organisations in Nepal that are inquiring into cases of custodial violence and torture. All instances of intimidation against human rights defenders must be stopped, and seriously addressed.

9. Guarantee adequate resources to ensure the proper functioning of the legal and medical professions in Nepal, and where necessary ensure that they receive adequate and appropriate training, with the assistance of the United Nations, to fulfill their obligations.

The Asian Human Rights Charter on enforcement of rights and the machinery for enforcement (www.ahrchk.net/charter)

15.1 Many Asian states have guarantees of human rights in their constitutions, and many of them have ratified international instruments on human rights. However, there continues to be a wide gap between rights enshrined in these documents and the abject reality that denies people their rights. Asian states must take urgent action to implement the human rights of their citizens and residents.

15.4.a The judiciary is a major means for the protection of rights. It has the power to receive complaints of the violation of rights, to hear evidence, and to provide redress for violations, including punishment for violators. The judiciary can only perform this function if the legal system is strong and well-organized. The members of the judiciary should be competent, experienced and have a commitment to human rights, dignity and justice. They should be independent of the legislature and the executive by vesting the power of their appointment in a judicial service commission and by constitutional safeguards of their tenure. Judicial institutions should fairly reflect the character of the different sections of the people by religion, region, gender and social class. This means that there must be a restructuring of the judiciary and the investigative machinery. More women, more under-privileged categories and more of the Pariahs of society must by deliberate State action be lifted out of the mire and instilled in judicial positions with necessary training. Only such a measure will command the confidence of the weaker sector whose human rights are ordinarily ignored in the traditional societies of Asia.

15.4.b The legal profession should be independent. Legal aid should be provided for those who are unable to afford the services of lawyers or have access to courts, for the protection of their rights. Rules which unduly restrict access to courts should be reformed to provide a broad access. Social and welfare organizations should be authorised to bring legal action on behalf of individuals and groups who are unable to utilize the courts.

15.4.c All states should establish Human Rights Commissions and specialized institutions for the protection of rights, particularly of vulnerable members of society. They can provide easy, friendly and inexpensive access to justice for victims of human rights violations. These bodies can supplement the role of the judiciary. They enjoy special advantages: they can help establish standards for the implementation of human rights norms; they can disseminate information about human rights; they can investigate allegations of violation of rights; they can promote conciliation and mediation; and they can seek to enforce human rights through administrative or judicial means. They can act on their own initiative as well on complaints from members of the public.

15.4.d Civil society institutions can help to enforce rights through the organization of People's Tribunals, which can touch the conscience of the government and the public. The establishment of People's Tribunals emphasizes that the responsibility for the protection of rights is wide, and not a preserve of the state. They are not confined to legal rules in their adjudication and can consequently help to uncover the moral and spiritual foundations of human rights.

In this issue of *article 2*

Focus: An x-ray of the Sri Lankan policing system & torture of the poor

Asian Human Rights Commission, Hong Kong

- An x-ray of the Sri Lankan policing system and torture of the poor

Samith de Silva, Senior Legal Advisor, Asian Legal Resource Centre, Hong Kong

- The superior probability of guilt and its application by the Sri Lankan police

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

- The tussle between the executive president and public authorities of Sri Lanka

Janasansadaya, Sri Lanka

- Response to the UN Committee against Torture on torture in Sri Lanka

Danish Rehabilitation & Research Centre for Torture Victims

- Statement to the UN Committee against Torture on torture in Sri Lanka

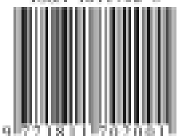
And

Asian Human Rights Commission, Hong Kong

- Launch of discussions on drafting Asian Charter on the Rule of Law

Asian Legal Resource Centre, Hong Kong

- Persistent systemic torture by the security forces and total impunity in Nepal



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

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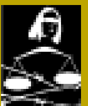

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