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ALTERNATIVE REPORT TO THE COMMITTEE AGAINST TORTURE IN CONNECTION WITH THE 5TH PERIODIC REPORT OF SRI LANKA

The necessity for a new approach for Elimination of Torture, in developing countries.

This report is submitted by Asian Legal Resource Centre, Hong Kong*; Janasansadaya*, Sri Lanka; Human Rights Office, Sri Lanka; Right to Life, Sri Lanka; Gampaha Citizen's Committee, Sri Lanka; and Rule of Law Forum, Sri Lanka.

Hong Kong/Sri Lanka
October 10, 2016

Question:

How to investigate without investigating capability?
How to prosecute without prosecuting capacity?
How to adjudicate without capacity to do without undue delay?

Answer:

Torture the prisoner.
When tortured, almost everyone admits guilt!

Introduction

The 5th Periodic Report by Sri Lanka as a state party was due in 2012.

It has been submitted on 16th October 2015.

The Report of the GOSL shows that it is in a denial mode. It rejects all the allegations of Sri Lanka being a country where widespread use of torture and ill-treatment exist.

The fact is that regarding the complaints against torture and ill-treatment, no credible complaint mechanisms exists. Though there is a law criminalising torture, by way of the CAT Act, No. 22 of 1994, no one is being prosecuted under this Act during the period relevant to this Report and thus impunity prevails. The remedy under the fundamental rights provisions of the Constitution is not an effective remedy, in terms of Article 2 of the ICCPR, in that the declarations made by the Supreme Court under these provisions have no impact at all, and the process of litigation takes enormously long time. Even after this inordinate time, compensation, if at all offered, is just modicum in most cases.

Further, under this constitutional provision, the Supreme Court has no powers to release a person from custody, even if holding of such a person is found to be illegal. A large section of the Sri Lankan police force consists of officers who lack educational and professional qualifications to be policemen, and to conduct investigations into serious crimes. Such incompetence often leads to torture and ill-treatment as a method of investigation into crime. The judicial process is beset with prolonged delays, which frustrates all attempts to seek an effective remedy. There is no effective legal aid system to assist victims. Despite there being a law on witness protection, such protection is envisaged to be carried out through the police themselves, who often are accused of engaging in acts of torture. The prisons are overwhelmingly overcrowded and the conditions of prisons themselves have created a situation of cruel and inhuman punishment on victims. And, due to incompetence of the police and poor supervision by the hierarchy of the police, illegal arrests take place all the time, and the Magistrates have a practice of remanding anyone, purely on the request of the police.

In short, structurally, the police, the prosecution, the Judiciary, and the armed forces, suffer very serious defects, without the correction of which the eradication of torture is impossible. And yet this list of defects is flatly denied by the GOSL in their Report.

The UN Special Rapporteurs – Juan E. Mendez, Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, and Ms Monica Pinto, Special Rapporteur on the independence of judges and lawyers – have visited Sri Lanka recently and have made their preliminary findings public, on 7th May 2016.

In the preliminary report of the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, (dated 7th May 2016), Mr. Mendez categorically states that

> "*... I am persuaded that torture is a common practice carried out in relation to regular criminal investigations in large majority by the Criminal Investigation Department (CID) of the police….*"

In fact, the Rapporteur, during his visit met many victims and also subjected some of them who claimed to have suffered torture and ill treatment to examination by forensic experts who have confirmed the fact of these persons were being tortured. The UN Rapporteur also visited places of detention and prisons and was able to see that these were places which are highly overcrowded and which do not provide basic ventilation and health facilities. He has arrived at the finding that conditions in these places amounts to cruel and inhuman treatment for those detained here. He has also observed the judicial process, which is beset with long years of delays, causing enormous inconveniences to the victims. He has also come to the finding that no case has been filed under the CAT Act No. 22 of 1994 in recent times and that constitutional provisions under fundamental rights

are inadequate and ineffective remedies. Impunity prevails, and there are many other findings which completely contradicts the denials by the GOSL.

The findings of the UN Rapporteur for the independence of judges and lawyers confirms that the judicial system, including the prosecutorial system and the investigative system, are all seriously flawed. They are agreed on the findings by the UN Rapporteur on torture and ill-treatment, that **judicial oversight of police action is superficial** and that

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

If this exercise before the CAT Committee, on examination of the 5th Periodic Report, is to be of any meaning and use, the GOSL must abandon its false position, of being in a state of denial about serious violations regarding torture and ill-treatment and the related matters mentioned above. The present Government that was elected through a Presidential election held on 8th January 2015 and a Parliamentary Election held on 17th August 2015 should have no difficulty at all in abandoning this mode of denial, as their election promises and the discussions were completely based on the allegation that under the previous regime, Sri Lanka has reached a state of lawlessness. The collapse of the policing system, the prosecutors system, and the judicial system, were all matters that were made a prominent part of the discourse prior to the elections. The GOSL would not want the country to believe or the world to believe that it has changed all that within the last one and half years. The government has not claimed that in Parliament or elsewhere. Therefore, the GOSL does not have any basis to maintain the denials on which it has based its Report. Instead, the wiser course of action for the GOSL, is to admit the obvious and begin a genuine dialogue with the CAT Committee on what corrective measures can be taken before the next periodic report in order that the abysmal lawlessness that prevails in the country can begin to be addressed and the defects of the police, the prosecution, the judiciary, and the armed forces, could be dealt with, to avoid the practice of torture in Sri Lanka.

If the GOSL would agree to begin this dialogue with the CAT Committee with that open and genuine spirit, this exercise can bring improvement of the situation within Sri Lanka. However, if the GOSL is unwilling and incapable of working outside its denial mode, then, the discourse during this Session will bear as little result as the previous discourses in the earlier Periodic Review Sessions.

The Asian Human Rights Commission's submissions are made on the basis of completely justifiable findings of the two UN Special Rapporteurs mentioned above and we suggest that these findings should be treated as the common basis on which an effective discourse could be carried out for making improvements for the prevention of torture and ill-treatment, which would also contribute to the resurrection of the fallen legal system and rule of law.

Methodology followed in this submission:

The Asian Human Rights Commission uses the following methodology **in order to place before the CAT Committee, the responsibilities of the GOSL in implementing the CAT in Sri Lanka, in terms of the findings of the two UN Special Rapporteurs (mentioned above) have arrived at after their recent visit to Sri Lanka in May 2016.**

Findings

Torture is a common practice carried out in relation to regular criminal investigations [Page 12. of the preliminary report of the UN SR, on torture]

Implication

The existence of a common practice of torture in criminal investigations suggests that without undertaking basic reforms in the justice processes in Sri Lanka, this practice will continue.

The said UN SR, on torture and ill-treatment, states as follows,

> *"...The current legal framework and the lack of reform within the structures of the armed forces, police, Attorney-General's Office and judiciary perpetuate the real risk that the practice of torture will continue. Sri Lanka needs urgent measures adopted in a comprehensive manner to ensure structural reform in the country's key institutions. A piecemeal approach will not be compatible with the soon-to-be-launched transitional justice process and could undermine it before it really begins...."* [p. 12]

From the observations of the Asian Human Rights Commission, the following facts emerge about the overall legal framework:

1. **The policing system**

1.1. By and large, most of the police officers are incompetent and lack educational, and professional qualifications necessary to engage in criminal investigations in a responsible manner. The total number of police officers of various ranks is around 84,000. Of this, 29,000 were recruited as reserve police officers in 2006 by the former government of Mr. Mahinda Rajapaksa, purely for the political reasons of needing to provide employment to its supporters. The regular recruitment process was not followed in the recruitment of these 29,000 persons; even the basic educational qualifications were not checked. They did not go through the normal one-year training programme, which is part of the regular process, after police officers are recruited. Though in 2006 they were recruited to the lowest rank, now they have been assimilated into various higher ranks such as Sub-Inspectors, Inspectors, and even Officers-in-Charge of police stations, and some may have even reached higher positions. Lacking any kind of experience and knowledge required to face the responsibilities of criminal investigations, these officers are now conducting arrests, preparing criminal investigations, engaging as interrogators, and submitting reports for prosecutions. As they are incompetent in carrying out their duties, naturally they resort to the use of force by way of torture and ill-treatment to gather information. So long as these officers are allowed to engage in criminal investigations, torture and ill-treatment will be the only method used in investigations.

1.2. Even the rest of the police force, outside this 29,000, was subjected to, what is popularly known in Sri Lanka as, politicisation. Most of these recruitments were made on the basis of political requirements, particularly of local politicians in the different electorates, and conducted under the directions given by politicians. Such politicisation has been a subject of severe criticism inside the country and even the present government, when in the opposition, made this allegation about politicisation of the police against the former government. The politicisation is not recent. It goes back decades. There is no controversy about immense degeneration of quality within the police force, due to direct political interference into the police

organisation by various governments in power, for nearly 40 years. While the present government acknowledged this position, it has not taken any serious steps so far, to ensure that the problems caused by such quality degeneration of the police force is addressed. Thus, the legal system suffers from not having a law enforcement agency that can meet the quality required for performing functions of law enforcement with responsibility.

1.3. Due to the same process of politicisation, the system of command responsibility within the police force has suffered greatly. On this same issue, there is common public consensus about the existence of this problem of serious lapse in command responsibility. This was aggravated by the fact that serious levels of corruption also spread during the period of politicisation of the police. As a result, the capacity to command the lower ranks rapidly deteriorated. Many of the roles of higher ranking officers regarding the control of the lower ranks at the level of police stations, which are envisaged in the "Ceylon Police Departmental Orders[1]" are now being virtually ignored.

The direct result of ignoring police departmental orders is the breakdown of the disciplinary processes within the police system. In namesake, disciplinary processes exist, in actuality no significant disciplinary measures are being taken on the basis of violation of the departmental orders. This is particularly so regarding the use of torture and ill-treatment by police officers. Even the Supreme Court of Sri Lanka has commented on the lack of police response to the increasing numbers of complaints of torture and ill-treatment[2].

1.4. The severe lack of discipline at the top level of the police rank is reflected by a number of criminal cases in which senior police officers of the rank, such as Deputy Inspector General of Police (DIGs) down to Assistant Superintendents of Police (ASPs), and Officers in Charge (OICs), have been charged in the Courts and some have already been found guilty and sentenced, on serious charges, even extortion and murder[3]. Some others are being investigated on charges of murder and deliberate subversion of the judicial process by tampering with investigation reports[4]. Besides such Senior Officers, many officers of other ranks have been charged on other serious crimes.

1.5. Kindly see attached a list of cases submitted by the Asian Human Rights Commission and its partners, to the GOSL, relating to torture and ill-treatment that has taken place between January 2012 and May 2016 (**Annex I)**

All these factors point to an serious problem of degeneration in the quality of the police force in Sri Lanka.

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[1] http://www.ruleoflawsrilanka.org/resources/CEYLON%20POLICE.doc/view

[2] Gerald Perera; Supreme Court case; Supreme Court SC/SPL/LA/No: 259/2012

[3] Vaas Gunawardana; http://www.sundaytimes.lk/151129/news/ex-dig-and-five-others-to-hang-for-the-murder-of-businessman-173284.html; ASP Cooray was found guilty and convicted in relation to the murder of a Senior Minister http://newsfirst.lk/english/2014/07/murder-trial-minister-jeyaraj-fernandopulle-taken/45309

[4] The famous case of murder of Wasim Thajudeen is illustrative. Former DIG Anura Senanayake has been arrested and remanded by an order of the Magistrate's Court relating to the murder case of Wasim Thajudeen. Besides, a traffic DIG Amarasiri Senaratne, and former Director General of Military Intelligence (DGMI) Major General Kapila Hendawitharane have also been questioned by the CID. Two HQIs on duty in Narahenpita and Kirulapone in Colombo have also been arrested. Further, former Crime OIC of the Narahenpita police, Sumith Champika Perera, has also been arrested.

2. The Attorney General's Department

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

2.1. Under the previous Mahinda Rajapaksa government, the entire Department of the Attorney General was brought under the control of the Presidential Secretariat. This was a fundamental violation of the tradition of independence of the Attorney General's Office, as was maintained for a long period. Bringing the Department under the control of the Presidential Secretariat was a blow to its independence and also brought down the image of the institution before the public eye. It also brought severe demoralisation into the institution. Although the new government has acknowledged this problem, it has not done enough to correct the damage done and to raise the status of this department.

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

2.3. During the previous government, the Department also abandoned the earlier held position regarding non-appearance on behalf of public officers, who were respondents in fundamental rights applications before the Supreme Court, relating to torture and ill-treatment. The Department officers not only began to appear for the defence of these officers, but also often prevented issuing of Leave to Proceed in fundamental rights application by providing information that was biased, even before the Leave to Proceed had been issued. The applicants in these cases had no way to contradict the information provided by some of the officers of the Department as the applicants did not have any notice of the information provided by these officers to the courts.

The following observation of the UN SR for independence of judges and lawyers, is relevant in this regard:

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

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

2.5. There are extraordinary delays in filing of indictments in the High Court regarding serious crimes. The UN SR on torture and ill-treatment states that

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

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

For all appearances, on matters of public law, the Attorney General's Department acts not as having a role in the protection of the rights of the people but as representing the State, however repressive the State may be. The Attorney General's Department acts more like a defender of repression rather than one acting for the protection of individual rights. [See p.7]

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

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

2.7. As the Attorney General acts also as a legal advisor, this office should be exercised as it was done in the earlier period, to advise purely on the basis of legal principles and not to justify illegal and unjust actions of the State. In recent decades, there is nothing on record to show that the Attorney General opposed any unjustifiable actions taken by the Executive, particularly in order to suppress dissent, limit media freedoms, and use the legal process to harass individuals. This was so particularly in the cases against the former Army General Sarath Fonseka, immediately after the Presidential elections in which he was the common opposition candidate. There are also other cases like the case of journalist Jayaprakash Sittampalam Tissainayagam[5].

[5] https://en.wikipedia.org/wiki/J._S._Tissainayagam

3. Judicial Oversight of Police Action

3.1. The UN SR against torture and ill-treatment states that in Sri Lanka, "**judicial oversight of police action is superficial**"; [p. 8]

This situation is due partly to lowering of judicial protection of individuals as a result of predominance given to anti-terrorism actions. Since 1971, Sri Lanka has undergone a prolonged period of struggle against what the State terms as terrorism, both in the South as well as in the North and East of the country. During this time, the whole concentration of the State was devoted to the suppression of terrorism through repressive legislation as well as through direct military actions. As the idea of defending military action was portrayed as the most primary patriotic duty through heavy state propaganda, the idea of defending the individual rights suffered greatly in Sri Lanka. This affected also the judicial oversight of arrests, detentions, and even examination of suspects who complain about torture and ill-treatment. Even in cases of *Habeas Corpus* the pursuit of an application became more and more difficult and recent research shows that from about 1,000 applications filed in the latter part of the conflict with the LTTE, hardly any application was accepted. Many of such applications were dismissed purely on technical grounds. All applications took many years before the courts. This indirectly contributed to impunity in Sri Lanka.

3.2. The oversight of the magistrates on arrests and detentions has suffered greatly in the recent decades. The Magistrates tend to accept the reports filed by the police and the applications made for remanding of suspects in issuing orders for detentions almost automatically. The result has been detention of persons who have been implicated in cases purely by way of fabrication of charges. The higher courts have even noticed this practice of Magistrates, uncritically agreeing with the version of the police. In the SC Application No. 488/98, *Maximus Danny vs. IP Sirimal and others* the Supreme Court noted that **"**Unfortunately, the Magistrate has almost mechanically made an order of remand because the police wanted them to be remanded."

Further in the case of *Mahanama Tillakaratne Vs. Bandula Wickramasinghe*, 1999 1 Sri L.R 372; the Supreme Court again noted that Magistrates should not issue remand orders "to satisfy the sardonic pleasure of an opinionated investigator or a prosecutor (at pg.382). Remanding person is a judicial act and as such a Magistrate should bring his judicial mind to bear on that matter before depriving a person of his liberty.[6]"

However despite such instructions by the Supreme Court the general practice in Sri Lankan Magistrates Courts is to accept the version given by the police in their initial report and remand persons at the request of the police. This takes place even when the suspect through their lawyers point out that the charges are fabricated and filed without good faith. It is almost impossible to get a hearing – at the initial stage when the person is brought before the Magistrate itself – into the complaints of the victim of arrest that the charges are completely fabricated and that there is not the slightest evidence against a victim for remanding or arresting him. The usual practice is to postpone the hearing of such applications on behalf of the victims of arrest, to be heard at a later stage and to make orders for remanding of the suspects. This is one of the reasons for overcrowding in the remand prisons. The common

[6] http://www.janasansadaya.org/page.php?id=99&lang=en) http://www.janasansadaya.org/page.php?id=441&lang=en)

law position is that arrest "*is prima facie illegal*[7]. However, the practice in Sri Lankan courts have come to be that all arrests are prima facie legal and that the Magistrates consider it is their obligation to remand every person brought before the Court if the police makes and application to remand.

This almost automatic remanding of arrested persons have undermined the position of the Magistrates as protectors of individual liberties. The impression that has now emerged is that there is a tacit collusion between the police and the Magistrate.

The result is that the lawyers are even reluctant to make an application for release of a suspect at the initial stage itself even though their clients pressed them to make such applications on the basis that there is no evidence of any sort to implicate them in any crime. At the Magistrate courts, the legal profession quite often becomes too timid to defend the liberties of the individual.

3.3. There needs to be a re-education of the magistrates to re-orient them on their role, and on the legitimacy of arrest at the initial stage of arrest itself. If there is such a re-orientation, the very atmosphere of the Magistrate courts will undergo a considerable change and the people will feel free to approach the magistrates for making applications for release on the basis that arrests have been made without adequate examination of evidence, and, not infrequently, even without good faith.

3.4. Where Magistrates find that persons have been arrested without a justifiable reason for arrest, punitive action should be taken against the officers who have conducted such arrest and compensation should be paid for the victims of such arrests. That was clearly the position of the common law. As A V Dicey noted:

> "*… personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law i.e. (speaking again in very general terms indeed) under some legal warrant or authority and, what is of far more consequence, it is secured by the provisions of adequate legal means for the enforcement of this principle. These methods are twofold; namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of habeas corpus*". [8]

3.5. Another factor that has affected the lowering of standards regarding illegal arrests, is confusion about the degree of evidence that is needed to justify an arrest. Prior to 1971, the idea of a reasonable suspicion of someone being linked to a crime, was interpreted differently to the way the same phrase is interpreted now. While in the past, reasonable suspicion of being linked to a crime meant some plausible evidence that creates a prima facie suspicion that the person is likely to have a committed a particular crime. Now no such plausible evidence is required. Study of hundreds of cases show that a person is arrested without any reasonable grounds whatsoever. For example, in one of the famous cases, i.e. the case of Gerald Perera[9], it was discovered when the Supreme Court inquired into the matter that he was arrested solely because his name was Gerald, as it has transpired that a person by

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

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

[9] Supreme Court SC/SPL/LA/No: 259/2012

the name of Gerald may have known something about the particular crime investigated, which was a crime about a triple murder. Gerald Perera was arrested without even asking a single question. He was then taken to a police station, hung from a rope and severely beaten. It was only after some serious beating that the police officers began to ask him about the alleged crime. The Supreme Court noted that had a few questions been asked after the arrest about his whereabouts during the time of the alleged crime, he could have been released a short while after the arrest. The habit of first arresting, and then beating up a person, to find out whether he may know something about a crime is a common practice in Sri Lanka. A large number of cases where this has taken place has been reported in a book, titled "Narrative of Justice in Sri Lanka told through stories of torture victims[10]", that analyses 402 cases of torture and ill-treatment.

3.6. Often in the report of a crime submitted to the court it is stated that the source of initial information implicating a particular suspect was given by a "source that cannot be revealed". Often, no such source exists, and the police merely create a fiction about the first information given to them. While the persons who give information to the police, need to be protected, this should not go to the extent of being able to create a fiction about an informer that does not really exist. At least the Magistrate should be able to know the details about the information even though some such information may be withheld from outsiders for security reasons. At least part of the reason for such a loose interpretation given to "reasonable suspicion" was the feature of a few decades where there was the threat of some organisations deemed as terrorists by the State. Investigations into terrorism are always difficult and also pose some security problems to the investigators. However, the frequency of such a practice over a long period created a situation now that even regarding crimes that are unrelated to terrorism, the same standards are being used, and the same excuses are being utilised. Even higher courts have given a rather loose interpretation to the idea of reasonable suspicion. All that has created an easy excuse for unscrupulous security officers to make arrests without any prior investigation and without really having adequate grounds to suspect a person for commission of crimes.

4. Impunity

UN SR against torture and ill-treatment comments on the impunity and the lack of accountability prevailing in Sri Lanka in his report. [p.10]

The observations and recommendations by the CAT Committee to the GOSL, in their previous reports, have repeatedly raised the issue of impunity prevailing in Sri Lanka. However there has been no improvement relating to this. The following can instead be noted:

4.1. There have been no prosecutions under the CAT Act No 22 of 1994, despite a large body of complaints of torture and ill-treatment and despite the existence of substantive evidence, as reported in the investigation reports of judicial medical officers.

Although around 2003–2006, CID's Special Unit of Inquiry (SIU) was mobilised to investigate allegations of torture, this practice seized since then and the decision not to prosecute under CAT Act No. 22 of 1994 was taken as a matter of policy. At the time, it was thought that undertaking prosecutions under the CAT Act would be

[10] http://www.humanrights.asia/resources/books/ALRC-PUB-001-2013

detrimental to the war effort of the GOSL, against the LTTE. Even after the termination of the military conflict with the LTTE, the same policy continues.

Unless there is a deliberate policy change on the part of the GOSL, the CAT Act is unlikely to be implemented in Sri Lanka. Thus, despite of the existence of a legal remedy against acts of torture and ill-treatment, by way of criminalising such acts in actual implementation, this law is not an available remedy in Sri Lanka.

4.2. Another remedy that is available against torture and ill-treatment is the constitutional remedy under Article 126 of Sri Lanka's Constitution. However, this is also not an effective remedy as a declaration by the Supreme Court on the basis of finding that an act of torture and ill-treatment has been committed, does not lead to any practical result against the officers who have perpetrated such acts. The Supreme Court finding does not even lead to any disciplinary action being taken against such officers. It does not even affect their promotions.

The award of compensation in cases taken under Article 126 is – except in very rare cases – of symbolic value only and the awards of compensation really paltry. Though there is a possibility of pursuing a civil remedy under the civil law and procedure in Sri Lanka practically speaking that remedy is also frustrated by enormous delays in adjudication that prevails in Sri Lanka. UN SR, for independence of judges and lawyers has commented on this matter of delays in adjudication in her report.

The Constitutional remedy under Article 126 is also further frustrated by very long delays in adjudication even in fundamental rights cases. As there does not exist an effective legal aid scheme, the cost of litigation is too much for the victims of torture and ill-treatment to afford, as most of such victims come from poorer backgrounds.

Further factor that militates against an effective remedy is the harassment that often follows every attempt made by victims to complain against their violations and to pursue the matter before courts. There had been instances when such victims have even been murdered. Although there exists a witness protection law now, even this law is of little practical use. UN SR, against torture and ill treatment, has noted:

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

4.3. In her Report, UN SR for the independence of judges and lawyers comments on the need for the justice system to reflect the diversity of society, on strengthening an independent administration of justice, on independent impartial and transparent institutions, on justice accountability, and on constitutional review – an opportunity to strengthen independence and implementation of international human rights law. Serious defects that exist in all these areas have created a breakdown of confidence of the people in the administration of justice.

This problem was recognised by the present government when campaigning against the previous government, prior to the elections in the year 2015. However, after the new government came to power, it has not yet demonstrated any interest in the matter, and it has not even evolved a policy outline, for dealing with these issues.

Above all, the administration of justice suffers in Sri Lanka due to inadequate funding allocated to the institutions related to the administration of justice, i.e. the court system, Attorney General's Department, the policing system, and the prisons. **Till adequate funds are provided for the proper functioning of these institutions, it will not be possible for the GOSL, to guarantee an effective remedy for human rights violations, including violations relating to torture and ill-treatment in terms of Article 2 of the ICCPR.** *[Kindly See **Annex II** – a letter written by the Asian Human Rights Commission to the Minister of Finance, Sri Lanka – on allocating adequate funds to institutions administering justice]*

Thus it is respectfully submitted that the CAT Committee needs to inquire into the institutional capacity of the GOSL, to implement the obligations under the CAT.

While, there is obvious incapacity of the basic institutions of justice for reasons stated above, which are also based on the finding of the two UN Special Rapporteurs, what is more disheartening is the fact that there is a complete absence of willingness to take the necessary steps to overcome these incapacities.

An Annexxure/ a Submission following the Expert Consultation held in Washington, 7-8 July 2016, on interrogations, investigations, and custody practices.

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Hong Kong
21 July 2016

My purpose in making this Submission is to emphasize on the actual practical problems relating to the elimination of torture and ill-treatment in the interrogation, investigations, and custody practices in countries usually described as the Global South, meaning those countries where legal and judicial systems based on liberal democratic principles have not developed to the extent that they are developed in traditional democracies, where the rule of law is accepted as a basic normative framework.

Why these issues about the global south should be addressed specifically in the proposed report of the UN Rapporteur on torture, and other cruel unhuman and degrading treatment or punishment suggesting the development of a new Protocol relating to interrogations, investigations and custody practices?

The simple reason for taking these matters separately is that otherwise whatever suggestions that are being made may not have a direct practical and implementable value in the specific context of these countries. Thus, with the view to cause a change in the existing practices, some attempts must be made to understand the differences and to address these issues to the best extent possible.

Observations on the global south in relation to the implementation of the absolute prohibition against torture and ill-treatment is made on the basis of over 20 years of regular studies on the torture related issues in 11 countries in Asia, as well as comparative studies with other countries.

1. **The assumption that interrogations, and investigations and custodial practices may be directly related to prosecutions relating to crimes is itself questionable in many instances.**

   Here are a few random examples:

   1.1. A victim of a crime, i.e. of rape, maybe subjected to physical or mental torture for the purpose of getting the victim to make a statement in order to exonerate the actual suspect. The victim may be told to name Y, as the culprit when, in fact, the victim has named X as the actual culprit. Why the victim is asked to do this by the law enforcement officer might relate to corruption or a wish to do a favour for someone in return of some benefit. What is important to note is that there is no interrogation and no interview takes place at all in relation to the crime. What in fact takes place is the very opposite of trying to exonerate a suspect by forcing the victim to give a false version of the crime. Here, the law enforcement officer is directly involved in the sabotage of justice. The purpose of using coercive methods against the victim is to sabotage the process of justice.

   What could be a remedy to prevent such a practice?

A few suggestions are:

1.2. That the law enforcement officer engaged in such a practice should be criminally charged for manipulating the process of interrogation or interview for sabotaging justice.

1.3. To ensure that when a complaint of that sort is made by a victim a superior law enforcement officer should immediately investigate into the matter and take corrective action to ensure that a proper investigation is carried out.

1.4. Where superior officers fail to take such corrective action, there should be ways to take criminal and disciplinary action against such superior officers. There should be avenues of access to the prosecutors and the Judiciary in such occasions so that the victim, the prosecutions, and the Judiciary could take appropriate action as well, to ensure that the situation is corrected and that thereby the pursuit of the claim by the victim of the crime is not allowed to be harmed. A situation of this sort may not take place at all within the jurisdiction of a more developed legal system, or even if it were to happen in a rare instance, it may be easy to correct such a wrongdoing. However, this is not the case in other jurisdictions where such things happen frequently and avenues to take corrective action hardly exist.

2. The purpose of interrogation or an interview may be to achieve some end other than lead to a prosecution.

This second situation may happen due to many reasons.

Some examples are as follows:

2.1. The very purpose of interrogation or interview may be not to lead to a prosecution and a trial but to encourage a settlement of some sort. Due to various reasons, complaints of crimes may not necessarily create an obligation to prosecute a crime. Instead practices may have developed to use the criminal investigation process purely to bring about settlements, even relating to very serious crimes, such as rape, sexual abuse, molestation of children, and almost every other area of crime. Torture or ill-treatment can be used in order to coerce the person to agree to such a settlement.

2.2. The purpose of the use of coercive methods may simply be to obtain bribes from the suspects as well as the victims. Thus, suspects and the victims can both be subjected to coercive methods.

2.3. In a situation where there is an overload of work for law enforcement officers, prosecutors, and judges, arriving early at some sort of settlement may be the preferred mode of operation within that particular context. In situations like that the criminal justice process is seriously undermined by various practices, which encourages the reduction of work through abandonment of claims for justice by the victims. Coercive methods, in such instances, can be used, not only by law enforcement officers but also by prosecutors and judges. For example, judges could insist upon the suspects to plead guilty to the charges even when the suspect claims innocence, by offer of various reliefs, such as much lesser sentences than the charges prescribed.

3. Interrogations that begin with torture before any questions are asked from the suspect.

This is a very frequent practice in many of the countries. Reasons for this may be set out as follows;

3.1. Fishing for information: In these instances the interrogators have no idea of any details of the crime or about the suspects. They try to fish out some information by beating up persons who

may be brought to their attention. Expectation is that as a way of avoiding torture, they may say somethings which may help the investigators. An unfortunate aspect of this is that people who have nothing to say at all as they had no link at all to their crimes get more beaten up because the interrogators assume that such persons are more stubborn and are withholding information. Extremely tragic consequences can happen as a result of such beatings and there are instances when suspects have suffered kidney failure due to such interrogations because they were unable to divulge anything.

3.2. There is also an assumption on the part of the interrogators that no suspects will ever tell the truth. Therefore, it is considered a waste of time, to question suspects in a humane manner. The belief is that the fear of further torture may propel victims to divulge some information.

3.3. It also happens that in many instances interrogators are aware of the innocence of the person they have arrested. However, they want to involve him in a fabricated charge. Why they do this has many reasons: one is that the interrogators are under pressure to submit an X number of cases and they are unable to find genuine suspects. So they arrest persons at random. However, to produce them before the courts, it is necessary to have some evidence. Interrogators try to get this evidence by way of forced confessions, and as most innocent persons would not want to confess to a crime they have never committed, torture is used to force them to make a confession. Then the confession is produced as the evidence of the involvement of the person in the crime.

3.4. In cases where persons are produced for terrorism related crimes, often, interrogators have no information about suspects i.e. about what they may have done relating to terrorism. The selection of suspects are very often done on a random basis. The only way to elicit information is use of force with the hope that, as a result, some information may be divulged. In the periods of tension, number of suspects taken in this manner is large. And that itself becomes a reason for the use of force in order to obtain some information or some incriminating evidence.

4. **The use of coercive methods by investigators, prosecutors, and even the Judiciary may be conditioned by the fact that judicial systems do not receive adequate funding to be able to function efficiently**.

The result of inadequate funding may often be selection of interrogators, prosecutors and even judges who are not qualified to do their jobs. These under qualified, may far readily resort to torture, as they may not know any other way of investigating. They may also not have adequate understanding to abhor the use of coercive methods.

Perhaps, more of the torture that happens during interrogations is due to this factor of less qualified persons and therefore also poorly trained personnel. When interrogators, prosecutors, and judges who are poorly qualified for their jobs deal with cases, they may not take any critical view of the actors involved in prosecuting a case. The have developed a psychology of collaboration between persons who are aware of each other's limited knowledge capacity and experience.

It is not only poor qualifications of personnel but inadequacy of resources in every aspect of investigations, prosecutions, and adjudication that leads to the use of coercive methods.

When there are no facilities for forensic and physical evidence, reliance may be entirely on oral evidence and much of the use of coercive methods is due to reliance on oral testimonies.

When persons who are not really capable of conducting such inquiries, oral testimonies are also gathered in a hurry, and that too leads to the use of coercive methods.

5. **Failures in supervision of interviews**

In many of the countries, the system of supervision by higher officers is absent. Higher-ranking officers are aware of the defective nature of information gathering done by the investigators. They do not want to interfere with such interrogations and instead they connive in accepting poor quality investigations as an inevitable result of the kind of situation they are in. Therefore, the superior officers directly or indirectly, openly or tacitly, accept the use of torture and ill-treatment by the interrogators. If asked, they may even reply, "… this is what we can afford in our conditions". Thus, one might even say there is an inbuilt conspiracy, which connives to accept defective and poor quality of investigations and the entire justice process in general.

6. **Ineffectiveness of disciplinary processes against interrogators, prosecutors, and judges.**

As a result of the poor quality of funding for justice, and the awareness of the resulting defectiveness of the process, no attempts are made to develop credible investigations into complaints against interrogators, prosecutors, and judges. In effect, they enjoy functional impunity.

7. **The fear on the part of the State to take any action against wrongdoings that directly or indirectly result in the use of coercive methods during interrogations due to the possible retaliations, not only by the officers directly involved, but also collectively by the entire force or a section of the law enforcement officers.**

Study of instances where the governments have tried to take some action to prevent the use of coercive methods during interrogations shows that such attempts have provoked serious retaliations by collective action on the part of the officers.

For example, there are instances where the State has been threatened by a particular union of officers, for example the Association of Inspectors, who threaten that if all attempted prosecutions are not abandoned they will go on strike or indulge in some other kind of acts of non-cooperation.

Similar situations also occur when the State has tried to enforce a particular law that has criminalised torture. The officers then threaten "if this law is put into effect there will be collective acts of non-cooperation, including stoppage of investigations into crime".

Under the pressure of such threats the governments usually abandon taking any actions. In such instances, arguments by the officers usually is that it has been with the direct or tacit approval of the State that they have engaged in act that amount to the use of coercive methods and that the State cannot later punish them for taking such actions. The officers may take the argument even further stating that in poor conditions of service, in terms of personnel, training, and other facilities, they are, in fact, doing a favour to the State by attempting to curb crime even with the use of coercive methods, and that the responsibility for whatever they do lies with the State, as it has failed to develop the kind of investigative mechanisms available in developed countries.

Thus, even where the State may want to take some action against the use of coercive methods they are not in a position to take such actions.

8. The prosecutors and the Judiciary may be willing to overlook the use of coercive methods by the interrogators because they are aware of the serious limitations within which the officers are carrying out their duties. They would fear to take any actions even when such coercive actions are being pointed out to them due to the fear that the interrogating officers and the law enforcement agencies could seriously sabotage the functioning of the courts or the prosecutor's office, by directly or indirectly withdrawing their cooperation.

Conclusion:

What all this points to is that any suggestions for improvement must take into consideration the improvement of the overall system. For this, there is provision under Article 2 of the ICCPR. Under this Article, the state parties, who are signatories, are under obligation to provide, legislative, judicial, administrative, and other measures to ensure that the people in their countries enjoy the rights that the Convention gives rise to.

What is implied is that the state is under obligation to maintain the interrogation, prosecution, and judicial services in an adequately functional manner. Thus, the state's obligation to provide justice and to maintain an organisational framework for that purpose is a fundamental obligation. The protocol can make suggestions on the manner in which UN agencies like the Rapporteur's office, the CAT Committee, and other treaty bodies like the Human Rights Committee may develop ways to scrutinise weather an adequately functional system does in fact exist. After all, this is the precondition for implementation of any of the recommendations for the protection of rights including the right against torture and ill-treatment.

If there is no provision for these UN agencies to intervene, in order to ensure the availability of such a justice system, then virtually none of the recommendations that may be made would be implemented.

In dealing with the overall justice system, the Protocol may particularly recommend ways by which the above mentioned UN agencies could scrutinise adequacy of the budgetary allocations made, to ensure the availability of a functional justice system.

Again, if such budgetary allocations are not available, no improvement will ever take place, in all practically. In which case, whatever other recommendations are made will be redundant.

Final Comment

What his short note advocates is that issues related to torture and ill-treatment in developing countries requires very specific attention because the gap between the legal systems of the developed democracies and those of developing countries is vast. It is this huge gap that makes the use of torture and ill-treatment quite a normal affair in developing countries. It is not an exaggeration to say that in such countries, interrogation, in fact, means the use of torture.

For a very long time, UN agencies dealing with this issue purely in the same manner as in developed countries, virtually allowed the habitual use of torture and ill-treatment to continue unabated in developing countries. It is to be hoped that some serious attempts should be made, in the least, to suggest an approach to begin to deal with this issue in the future.