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THE DEATH PENALTY AND RISING CRIME

THE ESCALATION OF GRAVE HUMAN RIGHTS VIOLATIONS

LAW & SOCIETY TRUST

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Editor's Note ... ...

This Joint Issue of the LST Review reflects a common preoccupation with the escalation of grave human rights violations in Sri Lanka and the monumental inability of State agencies to effectively meet these concerns.

We publish, in full, a translated version of the judgment of the Negombo High Court regarding the acquittal of the accused in the trial against the torturers of Gerald Perera indicted in terms of the Convention Against Torture and Other Inhuman and Degrading Punishment Act, No.22 of 1994, hereafter referred to as the CAT Act. Perera was arrested, detained and tortured by police officers of the Wattala Police Station on the basis of mistaken identity since he happened to possess the same name as a known criminal in the area. What distinguishes Gerald Perera's fate from many of the other cases of torture that occur, was not only that this man fought his case all the way up to the Supreme Court where he obtained compensation for his torture (*Sanjeewa v Suraweera*, 2003 1 SLR, 317), but also that he became one of the most vocal advocates against police abuse, for which he was later killed by some of the very same police officers who had been his torturers, days before he was due to give evidence at the trial.

The translated judgment of the High Court is published with the intention of spurring a public debate on the efficacy of the CAT Act. Up to date, it is a matter of general public knowledge that there have been only three convictions in prosecutions under the CAT Act during the past fourteen years.

However, it is less publicly known that more than seventeen acquittals have been handed down by the High Courts in this regard. The exact number of these acquittals is not in the public domain due to the absence of a Right to Information regarding such data in the legal/prosecutorial system; in addition, contrasting statistics are published by the government in their periodic reports to the United Nations treaty bodies. Consequently, it has been by the most painstaking if not painful efforts that such information—which ought rightfully to be immediately available to citizens—is obtained.

Notably, a large number of these cases are still pending in the legal system; many of them are likely to fail midway due to police intimidation of the witnesses and/or lackadaisical prosecutions.

Several reasons abound for this failure of a law which was meant to give effect to Sri Lanka's international obligations under the Convention Against Torture and Other Inhuman and Degrading Punishment. The absence of witness protection is high on this list. Currently, the Victims and Witness Protection law has been pending for many months in Parliament with no apparent legislative will to enact the same. In many cases, as in the case of the torture and subsequent murder of Gerald Perera, the perpetrators were serving in their positions even after the Supreme Court declared them responsible for the torture, giving them ample opportunity to threaten, intimidate and even kill.

Deficiencies in the prosecutorial process have also resulted in trials under the CAT Act being to no avail. In the judgment that we publish for example, the High Court reprimands the Attorney General for the failure to call several key witnesses as well as for the failure to indict the Officer-in-Charge (OIC) of the Wattala Police Station who had been initially indicted and then his name withdrawn from the indictment.

The consistent failure of the Attorney General to indict Officers-in-Charge of police stations is contrary to both the letter as well as the spirit of the CAT Act. The CAT Act includes torture as being an act which is done *inter alia* "with the consent or acquiescence" of a public officer or other person acting in an official capacity (vide Section 12). Read together with Section 2 of this Act, which states that "any person who tortures any other person shall be guilty of an offence under this Act", there is no doubt that the definition catches up in its ambit, an Officer-in-Charge of a police station who 'consents and acquiesces' in torture perpetrated by his subordinate officers.

This interpretation is supported by the fact that the definition of torture contained in the CAT Act, insofar as the element of *mens rea* (criminal intention) is concerned, is indeed framed in broader terms than in the Convention. The Convention refers to acts "intentionally inflicted" in Article 1, whereas the CAT Act omits this term when defining torture in Section 12. Further, the view that the CAT Act stipulates a broader definition of 'torture' has been advanced by none other than the Government of Sri Lanka itself, before the CAT Committee in its Periodic Reports and discussions thereto. In this context, the failure to indict the relevant OIC is regrettable.

Equally regrettable is the failure by the Attorney General to appeal against many of these acquittals under the CAT Act. In the judgment of the High Court that this Issue publishes, the Court finds the fact that the deceased was subjected to torture inside the Wattala Police Station to be established on the

evidence but bases the acquittal solely on the ground that there was no direct eye-witness of the torture. However, the decision appears to be singularly bereft of reasoning, dealing with manifold aspects of the prosecution case as well as in its evaluation of the legal principles applicable therein. In particular, the High Court fails to direct itself to the applicability of what is commonly referred to as the Ellenborough dictum to the facts of the instant case, despite the same having formed a substantial part of the prosecution case. The said dictum is as follows:

> *No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but nevertheless, if he refused to do so where a strong prima facie case has been made out and when it is in his power to offer evidence, if such exist in explanation of such suspicious appearances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.*
> Lord Ellenborough in *Rex v. Cochrane* (1814 Gurneys Report 499)

The end result of these failures in the legal/judicial/prosecutorial system is that Sri Lanka's obligations in terms of the Convention are disregarded.

The Joint Issue focuses next on other aspects of grave human rights violations and the impact that this has on our society. We publish two articles advancing contrasting views on the implementation of the death penalty as a possible solution to the increase in crime. These two papers, written respectively by ***Justice P.H.K. Kulatileke*** and by researcher ***Seuwandi Wickremesinghe,*** present views for and against this contentious proposal. The question posed is deceptively simple; will the implementation of the death penalty as a possible deterrent against crime, achieve anything in a society where the entire political and law enforcement order is criminalised and corrupt?

The Review also publishes two recent reports of Special Rapporteurs that are of considerable importance to Sri Lanka but which appear not to be that well known publicly. The Reports generally focus on the continuing question of impunity for perpetrators. Of special note is the observation by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, regarding the total lack of implementation of his previous recommendations. These recommendations have been published in *LST Review*, Volume 16, Issue 221, March 2006.

Further, the Review publishes a succinct analysis by ***Ingrid Massage*** on the problem of enforced disappearances in South Asia and the demonstrated failure of governments across the region to effectively tackle this question, with a view to ending impunity. Buttressing this analysis, we also publish a Communication of Views handed down by the United Nations Human Rights Committee against Nepal, in the exercise of the Individual Communications procedure under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). This Communication of Views relates to an ICCPR violation in respect of the enforced disappearance of Surya Prasad Sharma and the failure of the Nepali government to investigate the disappearance.

Interestingly, a similar ICCPR violation was dealt with by the Committee in respect of Sri Lanka in *Sarma v. Sri Lanka* (CCPR/C/78/D/950/2000, adoption of views on 16.07.2003; published in *LST Review*, Volume 15, Issue 202, August 2004). The Views of the Committee in *Sarma* is, in fact, referred to in the Communication handed down against Nepal, in reflecting the jurisprudential position that the act of enforced disappearance and the State's failure to investigate, violates not only the right against torture and cruel, inhuman and degrading treatment and punishment of the victim, but also of the victim's family members.

Both Sri Lanka and Nepal are the only two countries in South Asia who have signed on to the Optional Protocol. In Sri Lanka, this remedy is rendered nugatory as a result of the Singarasa judgment of the Supreme Court (*Nallaratnam Sinharasa v. Attorney General and others*, S.C. Spl. (LA) No.182/99, S.C.M. 15.09.2006), which declared retrogressively that the Optional Protocol procedure was of no force or effect within Sri Lanka. The question as to whether the Nepali government and the Nepali Supreme Court will allow a considered and conscientious implementation of the Views of the Committee in accordance with Nepal's international obligations is moot.

In the interests of accountability for grave human rights violations, it is hoped that such implementation will indeed take place.

Kishali Pinto-Jayawardena

REPUBLIC OF SRI LANKA v. SURESH GUNASENA AND OTHERS[*]

Negombo High Court
Case No. HC 326/2003

The Democratic Socialist Republic of Sri Lanka

Complainant

v.

1. Makavitage Suresh Gunasena
2. Jayasinghe Arachchige Nalin Chandhimal Jayasinghe
3. Herath Adikarilage Prasad Dilhara Perera
4. Herath Mudiyanselage Asela Kumara Herath
5. Edirisinghe Arachchige Amila Thushantha
6. Adikari Mudiyanselage Vinitha Bandara.

Accused

Before the High Court Judge of Negombo, Mrs. J.M.T.M.P.U. Tennakoon
Negombo High Court Case No. HC 326/2003

Date: 02.04.2008

The Judgement

In this case, the Hon Attorney General has indicted 1st to 6th Accused regarding the following charge.

The said Indictment is:

That you the 1st, 2nd, 3rd, 4th, 5th and 6th Accused together with persons unknown to the prosecution, on or about 03 June 2002, within the jurisdiction of this Court at the Wattala Police Station tortured the person named Waragoda Mudalige Gerard Mervyn Perera to obtain from him or to instill fear and thereby committed an offence punishable under Section 32 of the Penal Code read with Section 2(4) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No.22 of 1994.

Accordingly, Section 2(4) of Act No.22 of 1994 has to be looked in to initially. The said section is as set out below.

Section 2(4)

A person guilty of an offence under this Act shall, on conviction after trial by the High Court be punishable with imprisonment or either description for a term not less than seven years and

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[*] ED. Note: This is an English translation of the original judgment in Sinhala.

not exceeding ten years and a fine not less than ten thousand rupees and not exceeding fifty thousand rupees.

Section 2(1) of the said Act sets out as to what is understood by cruel, inhuman and degrading treatment. The said section states that it is an offence for a person to torture or treat cruelly or inhumanly or in a degrading manner another person or to aid and abet or conspire to do such an act.

Accordingly, the following facts have to be considered.

What is torture? What is other cruel, inhuman or degrading treatment?

These facts must be considered next. Assistance could be sought from Section 12 which is the interpretation section for this purpose.

According to Section 12, "Convention" has been interpreted as follows: "Convention" means the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, signed in New York on 10 December 1984; "public officer" means a person who holds any paid office under the Republic.

"Torture" means any act which causes severe pain, whether physical or mental, to any other person, being an act done with the intention of achieving any of the following objectives.

(a) Obtaining from such other person or a third person, any information; or,
(b) Punishing such other person for any act which he or a third person has committed or is suspected of having committed; or
(c) Intimidating or coercing such other person or a third person; or
(d) An act done by a public officer or other person acting in an official capacity, with the consent or without the opposition of that person or officer; or
(e) Done for any reason based on discrimination, and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

The indictment against these Accused is that they tortured Waragoda Mudalige Gerard Mervyn Perera forcing him or instilling fear in him to obtain some information or confession, thus committing an offence under Section 32 of the Penal Code read with Section 2(4) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No.22 of 1994.

It is stated that Gerard Mervyn Perera was taken in to custody on 03 June 2002 as a suspect in a triple murder committed in Alwis Town. The date the suspect was taken in to custody is stated as 03 June 2002. The question to be decided by court at the inception is who took this person in to custody.

Who took the person named Waragoda Mudalige Gerard Mervyn Perera into custody on 03 June 2002?

Gerard Mervyn Perera was not alive at the time this case was taken up for trial. Therefore the prosecution did not have an opportunity to call him to give evidence. The wife of Gerard Mervyn Perera was a witness for the prosecution. In her evidence she has clearly identified

the 1st Accused as a person who came to take her husband Gerard Mervyn Perera in to custody. She has also identified the 2nd, 5th, 6th Accused as the persons who went and put their arms round his shoulders at the time he got down from the vehicle which stopped at the bus stand on his return from work at Dockyard Company where he was employed.

Further, this witness has given evidence and stated that the 2nd to 6th Accused were seated in the vehicle they came in and the 1st Accused was near an empty house near the bus halt at which buses coming from Colombo stopped. She disclosed in her evidence that at that time 2nd to 6th Accused were inside the vehicle. Further in evidence she said that the 1st Accused who was near the empty house talked on his telephone. The rest of the witnesses called by the prosecution are not witnesses who had seen this incident with their eyes. All Accused made dock statements from the dock. By his dock statement the 1st Accused has admitted that he took Gerard Mervyn Perera in to custody. The 2nd Accused in his dock statement has accepted that the wife of Gerard Mervyn pointed him out to the 1st Accused as he was getting down and coming from the bus and at that time the 1st Accused read the charge to Gerard Mervyn Perera and took him in to custody. It is clear that the 2nd Accused has been in the police team at that time. The statement of the 3rd Accused, the statement of the 4th Accused and the statements of the 5th, 6th Accused also admit that they have gone to take the suspect of the triple murder in to custody. Therefore it is a clear fact that a police team consisting of the 1st to 6th Accused took Gerard Mervyn Perera in to custody on 03 June 2002.

Was Gerard Mervyn Perera in a good state of health at the time he was taken in to custody?

When considering this it has been disclosed in evidence that Gerard Mervyn Perera was working as a cook on 03 June 2002 at the Dockyard Company where he was employed and that he was on his way home after work when the 1st Accused had taken Gerard Mervyn Perera in to custody at the bus halt. There is evidence to the effect that at that time he had walked forward from the Colombo bus stop and he did not show any sign of ill health. The wife of Gerard Mervyn Perera giving evidence in Court has stated that her husband was a person of good health and up to that date he did not have any illness or physical disability.

Francis Ranjith Perera who is the brother of Gerard Mervyn Perera has given evidence in this Court, and this evidence has also disclosed that he was not a person who had any illness before this incident. This fact has been confirmed by the evidence of the brother in law of Gerard Mervyn Perera. The executive officer in charge of the kitchen of Dockyard Company with whom Mervyn Gerard Perera worked gave evidence in Court. In his evidence he has stated that the last time Gerard Mervyn Perera came to work at Dockyard Company was on 03 June 2002. He has given evidence that on that day he had finished the morning shift and left and the morning shift finished at 12 noon. Therefore it is a clear fact that Gerard Mervyn Perera was in good health when he was taken in to custody on 03 June 2002.

What happened after being taken in to custody?

There was no eye-witness evidence presented before me as to the manner in which the police conducted the investigations after Gerard Mervyn Perera was taken in to custody. Gerard Mervyn Perera's wife giving evidence in Court stated that she along with her brother and her uncle's son (father's elder brother's son) had gone to the Wattala police the day after Gerard Mervyn Perera was taken in to custody. She has given evidence that she went to the police station at about 9AM and at that time all the young people of Alwis Town had been at the Wattala Police Station. She has given evidence that when she saw her husband at the Wattala Police Station his hands were hanging and his cheeks were swollen and his eyes were red.

Further, she has stated in her evidence, he was about four times the size he was on the previous day. She has stated in her evidence that she had spoken with her husband and he had stated his lower abdomen was painful and he could not raise his two hands. The brother of Gerard Mervyn Perera's wife, who had gone to the police station with her, had given evidence in Court. This witness has stated that his sister was married to Gerard Mervyn Perera and after getting to know from her about this incident he had gone to the Wattala Police Station with her. He has stated that in the first instance that he had gone to the Gampaha Police Station and made a complaint, but the Gampaha Police Station had not accepted the complaint and told him to go to the police station in Colombo and make the complaint. Giving further evidence he has stated that they looked for Gerard Mervyn Perera everywhere.

Later at about six in the evening, a telephone message informed that Gerard Mervyn Perera was at the Wattala Police Station and he went to see him. At that time this witness had seen the brother of Gerard Mervyn Perera bringing him with his arm around his shoulders. He has given evidence that at that time when he saw Gerard Mervyn Perera his arms were lowered and it appeared like his arms were broken. He has given evidence that oil had been applied on the body, the body was swollen and the face and eyes were red. He has given evidence that he had seen a fatness which he had not seen previously in Gerard Mervyn Perera; there was no shirt on his upper body and no slippers on his feet.

Gerard Mervyn Perera's own brother, Francis Ranjith Perera, has given evidence. He had come to know from a friend at about 5PM on 03 June 2002 regarding the problem faced by Gerard. He has stated in his evidence that, he had gone to the Wattala Police Station and looked in both cells to see whether Gerard was there. However Gerard was not to be seen. After that he had gone to the upper floor of the Wattala Police Station and examined there. He has given evidence stating that as Gerard Mervyn Perera was not in any of the cells he had thought that at least he should be in the crimes division and had sat on a bench at the reserve. He has given evidence that at that time Sub-Inspector Renuka and another Police Constable held Gerard Mervyn and took him in to the room of the Police Officer-in-Charge (OIC). This is the first time that this witness had seen Gerard Mervyn Perera at the police station. He has given evidence that Gerard had become so dark to the extent that he was unrecognizable and two people held him and took him and he could see that he was in great discomfort. He had been in the Police OIC's room for about an hour. He has given evidence that the same two people who took him brought Gerard back and holding him took him upstairs to a rear room and this witness had also gone upstairs at the time. Gerard Mervyn's brother has given further evidence that later he brought and gave a *Kottu-roti* for Gerard Mervyn's dinner and that was about half an hour after coming to the police station. He has given evidence that on the second instance when he went to the police station a Police Constable and another person was applying *siddalepa* on him and his hands were hanging down lifelessly and he walked with great difficulty.

Giving further evidence in Court, Gerard Mervyn's brother has stated that before seeing him at the police station, on previous occasions Gerard Mervyn did not show a discomfort in walking in this manner and there were no disability in his arms. Accordingly it is seen that Gerard Mervyn had come to this disabled state at the police station.

The brother-in-law of Gerard Mervyn Perera giving evidence in Court has further stated that after Gerard Mervyn Perera was released from the Wattala Police Station, he had been initially taken to an *ayurveda* centre in Yakkala area and thereafter to the Nawaloka Hospital. This witness has clearly given evidence and stated that when Gerard Mervyn was taken to the *ayurveda* centre in Yakkala he could not talk and they were advised at the *ayurweda* centre to take him immediately to hospital. At the time he was taken to hospital Gerard Mervyn was in a condition where he found it difficult to sit on the vehicle seat. This fact has been confirmed

by Gerard's brother's evidence in Court. There is evidence before Court that Gerard Mervyn was warded at the Nawaloka Hospital for about a month.

What was Gerard Mervyn Perera's state of health at the time he was released by the Wattala Police?

The most important evidence regarding his health condition is the evidence given to Court by the Assistant Judicial Medical Officer Wijewardena. This doctor has not examined Gerard Mervyn Perera on the same day he was entered in to hospital. It is being revealed to us that in many of these cases the Judicial Medical Officer examines the patient a week or more after the patient has been admitted to hospital. In this case too, this has happened. It is not necessary to specially state that if the Judicial Medical Officer examines the patient on the same day or the following day and submits the report, it will be very useful. However in this case this Doctor has examined Gerard Mervyn Perera at about 12.30PM on 16 July 2002 at Ward 45 of the Colombo National Hospital. The said report has been tendered marked P1. There is evidence to show that the patient had been hospitalized under Judicial Medical Form Number 72/02. It is disclosed by evidence that this patient had been entered in to the National Hospital at 12.20PM on 13 July 2002. There is clear evidence that this is one month and 10 days after the incident.

Dr. Wijewardena giving evidence in Court stated that the patient was examined in the normal manner of examining patients and all his organs were examined. At that time the Doctor had not observed any weakness or ill-health in any of his organs. The Doctor giving further evidence in Court has stated that he had observed a disability in the muscles connected to the shoulder region of Gerard Mervyn Perera. He has further stated that he showed a difficulty in moving both hands in the manner of a normal person and he could only move his fingers. Observing further regarding this condition the Doctor has said that when he gave the patient to hold two of his fingers he could not grasp the same. Therefore the Doctor's conclusion has been that there is a sensory loss around the patient's elbow joint.

The Doctor has further observed six healed injuries in a weak condition:

i. The 1st and 2nd injuries are stated together on the back of the right hand.
ii. Two injury marks have been observed 1x1cm and 5x5mm at the base of the middle finger which were dark in colour.
iii. The 3rd injury, a white colour injury mark 5x2.5cm, has been observed a little below the wrist on the back of the right hand.
iv. The 4th injury, a white colour injury mark 2x1cm in extent on the middle area of the left wrist.
v. The 5th injury, a blackened brown colour skin mark 3x1cm, on the front portion of the left foot.
vi. The 6th injury, injuries to two limbs.

The witness has stated in evidence that as a result of these injuries the patient found it difficult to raise his hands.

Further giving evidence before Court the Doctor has stated that a lot of investigations had been done at the Nawaloka Hospital. The spinal column had been examined by an M.R.I. scan and it had been normal. However, it has been observed that the nerves on his hands were weak. It was observed that the area in-between the cervical vertebra at the end of the neck meeting the lumber vertebra of the spine was found to be less sensitive. Therefore this witness giving further evidence has stated that the 1st and 2nd injuries observed on the patient

have been caused by burning with match sticks. The patient has also stated this. The witness has concluded that, taking in to account the shape and the features of the injury, that they are healed burn injuries. The patient has told the Doctor that the 3rd and the 4th injuries observed on the patient has been caused by hanging by a rope. The Doctor has expressed his opinion that the injuries to the right and left wrist could be because of such hanging. The patient has stated that the injury stated as number 5 that is the injury on the left foot has been caused by an assault with an iron rod. The Doctor expressing his opinion stated that a contusion when healing can turn black and the brown mark on the skin could be the result of an assault with an iron rod. Giving evidence regarding the injury described under number 6 the witness stated that, this is a "*mandumisis*" condition caused by the tearing of muscles, and the crushing and destroying of muscles causes a substance called "*dienlopises*" to be generated which hinders the filtration of the kidneys. Further giving evidence the Doctor stated that the patient had told him that as a result of him being hung with his hand tied at the back by the wrists, his hands had become lifeless. Evidence was given that in such an instance there is a tearing, twisting and tensing of the muscles resulting in the breaking of the muscles in the nerve fibers and blood vessels. The Doctor has stated that in the same manner because of the hanging there can be a facture of the bone marrow and the muscles of the nerves would weaken and loose their function. Therefore the Doctor who gave evidence has stated that these injuries are consistent with the medical history of the patient.

Further giving evidence in court the Doctor has stated that when this Accused was examined he was in a good psychological state. Observation was made that there are healed injuries on the body from numerous assaults. Observation was made that the lower limbs of the body were in a weak state. It has been observed that the kidneys have been completely cured. Therefore another fact that is clear is that the Doctor has observed many injuries on the body of Gerard Mervyn Perera which were the result of assault.

In this case, Professor Ravindra Fernando gave evidence before Court. His professional knowledge, experience and competency were not questioned. It is stated as an admission under Section 420 of the Criminal Procedure Code. There is evidence to show that he examined Gerard Mervyn at the Nawaloka Hospital at about 5.30PM on 04 June 2002. There is evidence presented that the patient was hospitalized because of the pain in his shoulders, neck and chest. It is stated that the cause of such pain was that he was kept hung by the arms. It has been observed that there was a lessening of the passing of urine. Gerard Mervyn Perera was warded and given treatment from 04 June 2002 to 13 July 2002. This person has been given pain killers.

There is evidence presented that he has been given the drug called *dolobid* and this drug is given to people who are in severe pain. Evidence has been given that according to the observation by the Doctor that these symptoms were caused by assault and by hanging from the arms. Questions were posed with regard to these symptoms and questions posed as to whether these symptoms are consistent with the police using minimum force on a person in custody trying to escape. The evidence has been that these symptoms are not consistent with such an instance. Professor Fernando has given evidence that this patient has been admitted to Nawaloka Hospital under the care of neuro specialist Dr. Samarasinghe and he examined the patient at the request of the said Doctor. Professor Fernando after examining the patient has recommended that an E.M.G. test should be done regarding the lifelessness of the hands of the patient. What was disclosed by this specialist doctor's evidence is that Gerard Mervyn Perera has been subject to severe torture.

Who inflicted this severe torture on Gerard Mervyn Perera?

Gerard Mervyn Perera has been taken into custody during the day time on 03 June 2002. The paragraph 6 of the information book has been marked as P2 wherein it is stated that Sub-Inspector Suresh who was at the Wattala police at that time had with the permission of the Officer-in-Charge of the station and with his instructions and orders had gone out with officers for crime prevention duty. There is evidence that this is recorded at page 27 of the police book. Police Officer Senarath Bandara who examined page 27 and gave evidence stated that Police Constables 38239, 9197, 3899, 2697, had gone together in a private vehicle and that Sub-Inspector Suresh had taken a revolver and five bullets, Police Constable 3938 had taken a T56 weapon and bullets, Police Constable 3957 had taken a weapon and bullets. There is evidence to show that at 13.10 hours Sub-Inspector Suresh has noted the following at page 34. That is on 03 June 2002, as stated in the above paragraph the officers who left the police station Sub-Inspector Suresh, Sub-Inspector Herath and other officers named came back to the station with the suspect who had been taken into custody.

Further it is stated that the weapons and the bullets taken have been duly brought back and a suspect in the 02 June 2002 triple murder at Alwis Town a person named Gerard had been duly handed over to Reserve Police Constable 29245. As stated earlier there is no doubt that Sub-Inspector Suresh and his team has taken Gerard Mervyn Perera in to custody. The fact that the said team who took Gerard Mervyn in to custody at 13.10 hours on 03 June 2002 handed him over to the Reserve Police Constable is also confirmed. It is stated that on 03 June 2002 at 22.30 Gerard Mervyn's statement was recorded. This section is marked P5.

Accordingly, what has to be considered next is the condition that Gerard Mervyn Perera was in when the team that took him in to custody handed him over to Reserve Police Constable 29245 at 13.25 hours on 03 June 2002. According to the evidence presented by the prosecution, at that time, that is when Gerard Mervyn Perera was handed over to the Reserve Police Constable there is no evidence regarding a physical or psychological condition. The prosecution has not called Reserve Police Constable 29245 Ratnayake, to whom Gerard Mervyn Perera had been handed over. However the defense has called this Police Sergeant as a witness. This witness giving evidence has accepted that Gerard Mervyn was handed over by Sub-Inspector Suresh who took him in to custody. He stated that at that time relevant notes were made when accepting, and if there was anything special regarding the suspect handed over it would have been noted in the relevant book. Giving further evidence he has stated that if there is any injury visible from the outside on the person handed over, it is noted in the book. If the Accused made any statement, it would be recorded; if he stated that he was assaulted, this would also be recorded.

However there is no evidence that such a note was made. Police Sergeant 29245 Ratnayaka who gave lengthy evidence stated that when he took over Mervyn Gerard Perera on 03 June 2002 there was no injury visible from the outside. He has further stated that if there was he would have recorded it and that it is not recorded that he had any disability. There is evidence that Gerard Mervyn Perera was accepted by the Reserve at 13.25 hours. Thereafter in about 20 minutes the Reserve has again handed him over to another officer. As to who this officer was, there is no evidence. In this case, this is a great hindrance in arriving at a definite and correct judgment. Police Sergeant 29245 Ratnayake has stated definitely that he did not receive any complaint that during the 25 minutes approximately he was on Reserve duty; Gerard Mervyn Perera was subject to any assault or torture. The defense has also not called the officer who took over the Reserve duty from Police Sergeant 29245 as a witness. Therefore there is a doubt created as to whether the assault on Gerard Mervyn Perera was made after Police Sergeant Ratnayake handed him over to another officer and after Gerard Mervyn Perera was taken back from the Reserve. This benefit of the doubt goes to the

Accused. The defense has called the then-OIC Wattala Police Station Sena Suraweera. It was accepted that Sub-Inspector Gunasekara and his police team who took Gerard Mervyn Perera in to custody as a suspect in connection with the triple murder handed him over to the reserve at 13.20 hours on 03 June 2002. It was revealed by the evidence of this witness that he was kept in a cell at the Wattala Police Station. The Officer-in-Charge stated that on 04 June 2002 when he came to the station he saw Gerard Mervyn Perera in the cell and as customary he questioned the prisoners and nobody complained to him about harassment from anyone. He stated that Gerard Mervyn Perera did not make any complaint that he was subject to any torture in the Wattala Police Station. If that is so, it is unresolved as to how Gerard Mervyn Perera as soon as he was released from the police station became ill in this manner and as to why he had to be warded for treatment for a long time in hospital is also unsolved. Police OIC Suraweera has stated that he examined the cell on 04 June 2002 and the notes he made in the daily information book are noted under paragraph 376 and 480. According to this also, the fact apparent is that Gerard Mervyn Perera was not subject to any torture in the police station.

There is evidence presented to the effect that there was a Fundamental Rights application before the Supreme Court regarding the torture and cruel inhuman and degrading treatment of Gerard Mervyn Perera. When the prosecution was presenting its case, the learned Counsel has presented evidence regarding the said breach of the Fundamental Rights case. Facts have been presented in the said Case Number 328/02, of which the Respondents were Sena Suraweera, Kosala Nawaratne, Suresh Gunasena, Weerasinghe, Renuka, Nalin Jayasinghe, Perera, the IGP and the Attorney General. Out of these people the Respondent Sena Suraweera was indicted as the 7th Accused in this case, but the indictment was amended and the case against the 7th Accused was withdrawn. The Respondents in the Fundamental Rights case Suresh Gunaratne has been indicted as the 1st Accused, Nalin Jayasinghe as the 2nd Accused and Dilhara Perera as the 3rd Accused in this case. The judgment delivered by the Supreme Court in the Fundamental Rights case is marked X4.

The then-Wattala Police Officer-in-Charge Sena Suraweera was subject to long cross examination when he was giving evidence in Court. He has been specially questioned regarding the affidavit he had submitted to the Supreme Court and the affidavit he had given later to the Attorney General stating that the facts contained in his aforesaid affidavit were not correct. In his cross examination he has stated that after the Supreme Court decision he saw that there were shortcomings in the affidavit submitted to Supreme Court and accordingly he submitted another affidavit to the Attorney General. The conclusion of the Supreme Court was that Section 11, 13(1) and 13(2) of the Constitution had been breached and the 1st, 3rd, 6th and 7th Respondents were responsible for same.

That is, 1st Respondent Sena Suraweera, 3rd Respondent Suresh Gunasena alias Suraj Gunasena, 6th Respondent Nalin Jayasinghe and 7th Respondent Perera were responsible. In these circumstances, the question arises in my mind as to why the 1st Respondent in the Fundamental Rights case who was an Accused in this case was discharged in the amended indictment. The prosecution when leading evidence has not marked the affidavit filed in the Supreme Court by Sena Suraweera who was the 1st Respondent in the Fundamental Rights case. However in lengthy cross examination, questions have been asked regarding the contents of the affidavit. The affidavit said to be given to the Attorney General by the 1st Respondent Sena Suraweera was also not marked and tendered. Therefore, this Court has no opportunity to consider the facts stated in the said affidavit.

From the evidence given in Court by Gerard Mervyn Perera's wife, his brother and brother in law, it is clear that the day he was taken in to custody they had come with a Provincial Council Member to the Police Officer-in-Charge's office and asked that Mervyn Perera be

released. This fact is corroborated by the evidence given in this Court by Inspector of Police Navaratna. He stated in his evidence that when the then-Officer-in-Charge Inspector of Police Suraweera was ready to go to the Negombo High Court for a case in the morning of 04 June 2002, an order was made to him to accept Thiagi Alwis the then-Wattala Provincial Council Chairman as a surety and to enlarge Gerard on bale. At the time the said order was made to him, Gerard Mervyn Perera and another female had been present at the Police Officer-in-Charge's office. He has stated in his evidence that at that time the suspect was not in a position of not being able to walk. However it is suspect as to how to this suspect who was taken into custody regarding a triple murder was released in this manner without even being produced in the Magistrates Court. However, Inspector of Police Suraweera giving evidence in this regard has stated that he did not order so. But he admits that the Wattala Provincial Council Chairman came with Mervyn Perera's wife and spoke to him on 04 June 2002. He also admits that at that time, Gerard Mervyn Perera was brought to the office.

At that time, he got down the Officer-in-Charge of the crimes investigation branch and the 1st Accused Gunasena who had acted to take this suspect in to custody and Sub-Inspector Navaratne to his office and told them that if Gerard Mervyn Perera had no connection with the triple murder, to inform the Assistant Superintendent of Police in charge of the investigation and to take suitable steps. The question that arises at this point is that, if the Police Officer-in-Charge Suraweera did not supervise the taking in to custody and if the 1st Defendant and the police party were conducting investigations under a separate Assistant Superintend of Police, then as to why this Inspector of Police Suraweera acted in this manner? In this regard, Gerard Mervyn Perera's brother and wife giving evidence in this Court has stated that their brother Gerard was handed over to them to be taken away after the Officer-in-Charge Suraweera and the Officer-in-Charge of the crimes branch said that it was a mistake on their part. However this fact is not corroborated by independent evidence. If the Provincial Council Member went to the police station at this time to obtain bail for Gerard Mervyn Perera, he would have been a good witness in this case. Further, he would have been an independent witness. But Thyagi Alwis is not a witness in this case.

The brother of Gerard Mervyn giving evidence in this Court has stated that Sub-Inspector of Police Renuka and another constable went in to the Officer-in-Charge's room holding Gerard Mervyn. The said Sub-Inspector Renuka or the Police Constable has not been called as witness in this case. My view is that if they gave evidence there was a possibility that the true incident and the blank spaces in this case would have been disclosed. Therefore a fact that is clear is that after Gerard Mervyn Perera was handed over to the Reserve at the Wattala Police Station at 13.25 hours on 03 June 2002, he was subject to physical torture. However no evidence has been led to prove beyond reasonable doubt that the 1st to 7th Accused in this case are responsible for same. In addition to them there is evidence presented that other police officers came in to contact with Gerard Mervyn Perera, and as to whether Gerard Mervyn Perera was subjected to this tragedy as a result of an act by these persons, continuously comes up. The benefit of the doubt goes to the Accused. There is no eye-witness evidence regarding torture or cruel and inhuman and degrading treatment of Gerard Mervyn Perera. The entire case has to be proved by way of circumstantial evidence.

Finally, Court must consider how a case on circumstantial evidence should be proved. The golden rule in criminal law that a Court must have in mind is that until the case is proved beyond reasonable doubt, an Accused is a totally innocent person. Therefore the onus of proving a charge against the Accused lies with the prosecution. This presumption is accepted in Article 13(5) of our Constitution. As to what the onus of proving a case on circumstantial evidence, this is clearly set out in *Podisingho v. the State* (53 NLR, page 49). Here, Dias J. stated that in a trial before a jury where a charge is to be proved entirely on circumstantial evidence, all evidence against the Accused must be contrary to his innocence and the

evidence should be consistent regarding the guilt of the Accused and it is the duty of the judge to explain so to the jury. In the case of *The State v. Abeywickrama* (44 NLR, page 254), Soertz J. stated that in the case of finding an Accused guilty on circumstantial evidence, the jury must be satisfied that the evidence against the Accused denotes the Accused's guilt and is consistent with the guilt of the Accused. Further, the evidence presented must be evidence against the innocence of the Accused. In the case of *The State v. Appuhamy* (46 NLR, page 128) Kneuman J. stated when the guilt of the Accused is dependant entirely on circumstantial evidence, the evidence and the facts adduced must be against the innocence of the Accused and the only conclusion to be arrived at is that the guilt of the Accused has been proved.

Therefore, it is clear that in this case that when all the evidence adduced is carefully considered the only conclusion to be arrived is not that the 1st to 6th Accused are guilty. Further, considering the facts in the Indian Supreme Court case of *Gambir v. State of Maharashtra* (GIR 1982 (SE) 1157), the Indian Supreme Court has drawn attention to three ingredients which are essential in proving a case on circumstantial evidence.

i. The evidence adduced to prove guilt must be of an unbroken nature and definite.
ii. The only conclusion on the evidence adduced must be the guilt of the Accused.
iii. The evidence adduced must, like the links of the chain conclude the guilt of the Accused.

The evidence must confirm that the person who committed the crime is no other but the Accused himself. The evidence must not show any other conclusion that can be arrived at other than the Accused's guilt. Further, the only conclusion on the said evidence must be the Accused's guilt which must be inconsistent with the conclusion that the Accused is an innocent person.

The principle of this case was accepted by the Court of Appeal of Sri Lanka in the case of *M.M.C. Bandara Digahawathura v. the Attorney General* (Court of Appeal Number 61/2001). This judgment was delivered on 02 August 2005 and the Hon. Justices Sisira Abrew and Jagath Balapatabendi included the following rules. The Court stated that the jury or the judge must be satisfied regarding the following in a case that has to be concluded on circumstantial evidence.

1. The facts proved must confirm the guilt of the Accused.
2. According to the facts proved the only person to whom the finger of guilt could be leveled should be the Accused.
3. The facts adduced must not be consistent with the evidence against the innocence of the Accused.
4. According to proved evidence the only conclusion must be the guilt of the Accused. No other conclusion must be possible. If from the facts proved there are two possible conclusions, the conclusion favorable to the Accused must be arrived at.

Therefore when all the evidence adduced is considered as a whole, it is clear that from the evidence against the Accused, that the only conclusion to be arrived at is not the guilt of the Accused. As I see it, there are certain facts which have not been disclosed. The witnesses of the prosecution have stated in their evidence that on the day after Gerard Mervyn Perera was taken into custody at mid day, his wife and Provincial Council member Thiagi Alwis were at the room of the Officer-in-Charge of the Wattala police when a person named Sub-Inspector Renuka and another police officer held Mervyn Perera and brought him to the Officer-in-

Charge's room. However these two officers are not prosecution witnesses. If Gerard Mervyn Perera was in a position that he could not walk, the question arises as to why he would be held and brought. Therefore, the prosecution should have made Police Inspector Renuka and the other police officer witnesses. In that event, there was a possibility that some facts which are now buried would have come to light.

Further, Inspector of Police Suraweera who was the Officer-in-Charge of the Wattala Police Station then was not made a prosecution witness. He had been an Accused once and later on by an amendment of the indictment he had been discharged. This fact also surprises me.

It is apparent that the Criminal Investigation Department has not conducted inquiries as to what happened to Gerard Mervyn Perera after he was handed over to the Reserve. There is a vacuum regarding what has happened between the periods he was handed over to the Reserve and he was set free. The 1st Accused and his police team have handed over Gerard to the Reserve after taking him in to custody on 03 June 2002 at about 13.25 hours. Thereafter till he was released the following day, evidence is silent as to in whose custody Gerard Mervyn Perera was in? Which police officer questioned him? What happened? For these reasons, from the evidence adduced the only conclusion that can be arrived at is not that these Accused committed this crime on Gerard Mervyn Perera. This is a situation where it is difficult to come to such a conclusion. The doubt that is created as to whether any other persons tortured Gerard Mervyn Perera and subjected him to the cruel and inhuman acts is in favor of the Accused.

Accordingly, these Accused cannot be found guilty of the charge against them. Therefore I conclude that the charge against these Accused suspects have not been proved beyond doubt. The suspect Accused are acquitted and discharged.

High Court Judge
Negombo

LIVING WITH FEAR – RAMPANT CRIME AND THE DEATH PENALTY

Justice P.H.K. Kulatileke[*]

In today's context, the control of rampant crime is a cause of constant worry to the peace loving citizens of the country. Deeply ingrained in their minds is the question as to when crime will hit them or their families. There is no doubt that to live in such constant fear of crime debases the quality of life.

According to the Inspector General of Police's (IGP) report for the year 2005, 59,075 true cases of grave crime were recorded. That amounts to an increase of 4.2 percent compared with that of the previous year. In 19,061 cases the accused were unknown. According to Part II, Sri Lanka Police Gazette No.1500 of 06 June 2007, the number of true cases of grave crimes for the year 2006 were 60,932. The number of cases in which the accused was not known was 18,310. For all intents and purposes therefore, these crime-doers are still operating in our society. During the year 2005, the number of minor offences recorded was 2,025,086. In terms of the aforesaid Police Gazette, the police identify Nugegoda, Kelaniya and Mt. Lavinia Police Divisions as recording the highest number of grave crimes in the country, with figures of 5,610, 3,736 and 3,160 respectively.

A survey carried out by South Asia Watch has estimated that there are over 2.3 million small arms in Sri Lanka which are owned and used illegally. An editorial comment on this report was as follows:

> *We have one firearm for every 10 citizens. No wonder we have a crime rate that is spiraling out of control.*[1]

The available recorded number of cases enables the reader to assess the gravity of the situation. Until 1970, Sri Lankan society (both at the family level and community level) was closely knit and living in one's own neighbourhood gave a person much needed security. The upward trend of crime that the country has experienced since then has however, undermined the social order itself by destroying the assumptions on which it was based. One cannot now say that one's own familiar environment or neighbourhood is safe. A sense of vulnerability and fear has crept in to each and every person's mind. He/she can no longer view the world as rational and favourable. Crime and violence transforms his/her society in to a society based on fear and consequently, in to a repulsive caricature of a society based on reason and love. Fear is an unpleasant emotion leading to stress and derangement. If such a state of affairs continues too long without being resolved or treated, it would result in illness, depression and pathological behaviour on the part of the affected persons. The end result would be an unhealthy society with a poor quality of life.

Chances of Being a Victim of Theft

The IGP's Administration Report for the year 2005 gives the total number of true cases of theft of less than rupees 5,000/- as 10,978. Apparently this figure does not give the correct picture. It refers to reported cases of theft. This type of offence is sometimes referred to as 'street crimes'. This category of crime is mostly committed by people at low socioeconomic levels and by drug addicts.

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[1] Editorial of *The Daily News* of 30 October 2007.

Every time a person takes a walk, a ride in a bus or train, shops in a super-market, walks along a crowded street, enters an elevator in a garment factory or shops where strangers are around, the potential to be subjected to theft is great. Recently, a medical student while seated in a bus received a call to her mobile phone, which was in her bag. It was an expensive phone which had been a birthday present. She had answered the call and put it back in her bag. Quite unexpectedly a young fellow who was a bystander, had grabbed her handbag, taken out the phone and hurried out of the moving bus. Even though many passengers witnessed the incident, no one dared to come to her aid, possibly for fear of consequences. The victim's parents are doctors. They did not make a complaint to the police because it would be a waste of time. People understandably despair that anything could be done. An article published in the *LST REVIEW*, June 2007 issue, made the following observation:

> *Today, the lodging and pursuing of complaints against criminals has become a perilous activity for Sri Lankan citizens or for foreigners*[2].

If victims try to outsmart hoodlums, they are often injured and traumatized. The people believe that the police will not or cannot do anything to help them. Sadly in Sri Lanka, the police for the most part only react to crimes already committed and reported to them.

In most of these cases, the criminals are not apprehended or the crime doer is reported as 'unknown'. Even in those cases where the police succeed in arresting the criminals, convictions are difficult to obtain for want of evidence. Only less than 10 percent of the cases prosecuted end up in convictions. In cases of theft, very few would get jail terms.

Chances of Being Robbed

Robbery simply means taking over money or property from another person by force or threat of force. Robbery is a nightmare crime because it is filled with potential, not only for material loss but also violence, injury and sometimes even death. This may be residential burglary committed during the night when the occupants are asleep or during the day where there are easy opportunities to enter. Once the burglar is inside the house, he or she would look for money and other valuable items that could be carried away easily and converted into cash. Most of the robbers are not professionals. They act very quickly for they are intent on escaping before being caught or identified. Nevertheless, such robbers could be irrational or dangerous when confronted. According to police reports, many robbers of this type are drug addicts.

Recently, one such burglar had entered the house of a former Judicial Officer during the night while the inmates were asleep and had got away with his mobile phone. Apparently no complaint has been made to the Police. In these crimes, the question of prosecution hardly arises because the crime doer is seldom caught. For the year 2005, the aforesaid IGP's report documents 18,609 true cases of house break-in and theft. Of these, the accused was unknown in 9,235 cases. Only 869 cases resulted in convictions. According to the Police Gazette of 06 June 2007, there had been 19,008 true cases of house break-in and theft for the year 2006. In 8,879 cases, the accused was unknown. Robert G. Culbertson and Mark R. Tezak in their book, *Order Under Law*, quite appropriately remarked that:

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[2] Fernando, Basil. "Law's Delays: Some Further Perspectives" in *LST REVIEW*, v.17, issue 236, June 2007, page 28. Issue title: Laws Delays as Abuse of Process; Fresh Perspectives and Critical Analysis.

...forced entry in to ones house is an invasion of the self, for our homes are part of the personal space in which we live[3].

In Sri Lanka most of the robberies, which are grave crimes, are committed by gangs. They are professionals in the trade. Their prison acquaintances, (who have been, in most cases, convicted in previous crimes), encourage them to join the prison gangs. The police find it extremely difficult to trace them. It is quite dangerous to confront them because they are always armed, sometimes with sophisticated weapons. They are irrational and an encounter can be fatal. The present state of affairs is therefore that:

Armed robbery is almost a daily occurrence and the recent spectacular gem heist by an armed gang wielding T56 weapons is but one instance of the daring escapades by criminal gangs[4].

Incidentally, people who live in villages feel more secure in their own neighbourhood. But things are different with the city dwellers. To them, even the next door man is a stranger. Most of them live in houses behind high walls. They live with 'fatalistic' speculation that sooner or later their house will be burgled or robbed.

The IGP's Report for the year 2005 has cited 1,655 cases of car robbery. Of these, in 760 cases the accused was unknown. At one point, most of these robbed vehicles found their way to 'uncleared' areas in the conflict zones in the North and East of the country. With so many 'car sales' around, robbed vehicles find a lucrative market. It is a known fact that at Panchikawatta in the Colombo District, any motor vehicle part is available at 'reasonable' prices. A striking feature in car hijacking is that the underworld has taken over the business and it is well organized. Victims are utterly helpless because they have no escape. To a person whose car was robbed at gun-point, the episode will remain a terrifying, bewildering and fear evoking experience. According to the police, most of the vehicles had been stolen due to carelessness of the driver, such as having left the car unlocked. There have been many instances where cars were hijacked whilst being parked at 'car parks'.

Child Abuse

According to the IGP's Report for the year 2005, there were complaints of 187 cases of child labour, 104 cases of torture, 44 cases of child rape, 92 cases of sexual offences, 30 cases of trafficking for prostitution and 78 cases of other offences. The Sri Lanka Police Gazette No.1500 of 06 June 2007 reveals that, for the year 2006 there were 342 cases of sexual exploitation and cruelty to children. This number does not include cases of incest, procuration, trafficking and child abduction. These crime statistics, although most revealing, is like the iceberg phenomenon, where only a small sample portion is seen above the surface, of a reality that is readily not seen.

In order to combat the crime situation, a number of Acts were enacted by Parliament. The Penal Code [Amendment] Act, No.22 of 1995, introduced a number of new offences with heavy punishments, including mandatory sentences to wit, cruelty to children, sexual harassment, procuration, trafficking, rape on children, incest etc. The nature of these offences relating to children speaks to the gravity of the situation. In some reported cases, parents themselves are involved.

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[3] Culbertson, Robert G. and Mark R. Tezak. *Order Under Law* (Third Edition), page 19.

[4] Editorial of *The Daily News* of 30 October 2007.

In some cases, parents are to be blamed for crimes against children, for the reason that they are not sufficiently diligent in ascertaining as to where the children are, who they are with or what they are doing. Reported cases show instances of inflicting harm such as bruises, injuries often caused by blunt weapons, burns, bite marks etc. There are cases of committing rape on children, sometimes within the family by a drunken father or brother, specially in instances where the mother has migrated for employment. Child trafficking for prostitution or child labour is on the increase. Most of these children suffer traumatic mental and psychological harm. Some suffer from behavioural problems including withdrawal, difficulty at school and aggressive behaviour. Some repeatedly run away from home. In some cases, even without the parents' knowledge, children have turned out to be drug addicts. The fears that parents experience in respect of their children are founded on hard reality.

Rape – The Need to Feel Safe

The emotional impact of being attacked sexually transcends the incident itself. Being a victim of rape results in a woman's sense of self confidence being shattered, leaving her with a feeling of having defiled, of being stained and different; in many cases, the sense of shame is so great that rape victims wish that they would have been killed by their rapists. Even though rape is a vicious crime, some fail to report it to the police; the reason for this failure to report is embarrassment, fear of facing long drawn court procedures, reprisals by the crime doer, and possible reaction by the husband in the case of married women.

The Sri Lanka Police Gazette No.1500 of 06 June 2007, in its grave crimes report for the year 2006, records 1,453 rape and incest cases. Recently at Wilewatte in Mirigama a young girl returning home after work was raped and brutally murdered by severing her limbs. In August 2007, a young Advanced Level student was raped and done to death. There are reported cases where students were raped by their teachers at school premises. Most rape victims are young women between the ages 16 and 25 years.

When a person is threatened with rape, the question as to whether one should scream, flee, resist or submit depends on the circumstances. The police are of the view that when there is a likelihood that you will be heard, the best defence may be to scream.

Chances of being Killed or Injured in a Road Accident

According to the said IGPs Report relevant to the year 2005, the total number of reported road accidents was 43,171, of which 2,141 were fatal and 4,868 were grievous. The IGP's report goes on to say that, an average of 6.3 persons are killed and 13.6 persons grievously injured per day. The number of persons killed in road accidents was 21.4 per 100 vehicles. The worst time of occurrence is between 4PM and 6PM. According to the Police Gazette No.1500 of 06 June 2007, the total number of road accidents including motor cycle accidents was 174,000. This report includes the reasons attributed to the accidents; namely, driving after consuming alcohol or drugs, speeding, driving without a Drivers' License, driving without protective helmets, and driving vehicles that are unroadworthy.

Newspaper reports, radio and television newscasts are full of road accident related deaths. The aforesaid statistics speak of the harsh reality in which we live; our society is in the grip of an upward wave of death or grievous hurt owing to road accidents. In fact chances of being killed in a road accident are greater than of being murdered.

Chances of becoming a Murder Victim

The IGP's Crime Report for the year 2005 gives the number of murder cases for that year as 1,219. This figure excludes those killed due to terrorist incidents. Unfortunately, crime statistics for the year 2006 published in the Police Gazette does not specify the murder statistics. The media however highlights in its reports, certain gruesome murders in recent times, such as the rape and murder of a young girl at Negombo Hospital, etc. At the time the Penal Code was enacted, premeditated murders were few and rare. Most killings were the result of excesses of violence; namely, murder committed under grave and sudden provocation, by exceeding the right of private defence, in a sudden fight, or where a Police Officer acting in good faith causes death in the course of executing his duty exceeding the powers given to him. In these categories of killings, the offence was reduced to one of culpable homicide not amounting to murder. Those who formulated the Penal Code would not have envisaged the gruesome and multifaceted murders that are being committed today.

Civilians Targeted by the Terrorists

Life has become difficult and unpredictable especially in the light of increasing terrorist attacks on innocent people. Whether you are traveling in your own car or go by bus or train specially in the metropolis or its suburbs, the chances are that you could get caught in a terrorist bomb explosion. A person interviewed on the TNL channel on 11 June 2008 speaking about terrorist attacks said as follows:

> *Even with all the security measures it is happening and it shows how helpless people are. One might say it is happening all over the world and that targeting of civilians has been used as a weapon of war throughout the history of mankind. No doubt that is a good answer, if you can live with it!*

Is the Fear of being a Victim of Crime Exaggerated?

The answer unfortunately to the above question, is in the negative. Radio, television, newspaper, and other media reports are filled with startling news of crime. Feeling that the danger is somewhere near you or your family and the likelihood that you will become a crime victim make you utterly helpless, more so when a war situation is on. Crime not only exposes the weakness in social relationships but also undermines the social order itself by destroying the assumptions on which it is based.

Is the Death Penalty an Answer to Tackling Crime?

One of the arguments against enforcing the death penalty is based on the often misconceived maxim of English Law that, "it is better that ten guilty men should escape than one innocent man should suffer." However, we must also be conscious of the danger of exaggerated devotion to the principle relating to the 'benefit of the doubt' being given to an accused. We must also refrain from the belief that all acquittals are always good regardless of justice to the victim and the community.

Currently, the drive behind the movement to restore the death penalty is motivated by public opinion as public support. Advocates of capital punishment argue that the State must deal with the crime doer in such a way as to serve notice of the consequences on the potential offenders. They point to the fact that fear of death may well be the strongest deterrent to humans and they claim that the death penalty to be a uniquely powerful means of protecting

civil society. A person who willingly takes away the life of another person forfeits his own right to life.

The Applicable Substantive Law

Sri Lanka's criminal justice system is imbibed with devotion to the rule, 'proof beyond reasonable doubt', in the matter of testing the guilt of the accused. A criminal trial is not like a fairy tale where one is free to give flight to one's imagination and fantasy. The trial court has to deal with the question whether the accused arraigned at the trial is guilty of the crime charged with. The law expects that the prosecution should discharge the burden to a greater degree in proof beyond reasonable doubt. Experience shows that in today's circumstances, this rule often operates to the benefit of the accused.

Section 296 of the Penal Code decrees that, "a person who commits murder shall be punished with death". However this penal provision is subject to the provisions of Section 294 of the Penal Code. It provides for attendant circumstances that would convert an offence, which is otherwise murder, in to the lesser offence of culpable homicide not amounting to murder irrespective of the fact that the crime doer had entertained a murderous intention at the time of committing the offence. Then there are the cases where the doer did not have the murderous intention but had the knowledge that he is likely, by such act, to cause the death of the victim. In such circumstances too the accused will be guilty of culpable homicide not amounting to murder. No sentence of death would be passed against these convicts.

Section 89 lays down that nothing is an offence, which is done in the exercise of the right of private defence. It absolves a person voluntarily causing death in the exercise of the right to private defence of his own body, or the body of another person in the circumstances enumerated in Section 93 of the Penal Code; and also of voluntarily causing death in the exercise of the right of private defence of property, in the instances enumerated in Section 96 of the Penal Code. Thus the legislature in its wisdom has decreed that all homicides are not murders.

The Code of Criminal Procedure Act, No.15 of 1979 provides ample opportunities to a person accused of murder to obtain a discharge at the investigation stage (inquest), preliminary inquiry stage, trial stage or appeal stage. At the inquest in a case where the police produce a person accused of committing a murder, the Magistrate will proceed to a preliminary inquiry against him/her only if the report or other material discloses that a crime has been committed by him/her.

In terms of Section 153 of the Code of Criminal Procedure Act, No.15 of 1979 read with Section 6[14] of the Code of Criminal Procedure [Special Provision] Act, No.15 of 2005, if the Magistrate considers that the evidence against the accused is not sufficient to put him on trial, then the Magistrate after giving reasons may order him to be discharged. Even if the Magistrate considers the evidence to be sufficient to put the accused on trial before the High Court, the Attorney General has power under Section 396 of the Code of Criminal Procedure Act, if he is of the opinion that there is not sufficient evidence to warrant a committal and that the accused should be discharged, then he may by order in writing quash the commitment made by the Magistrate and direct him to discharge the accused.

The Trial Before the High Court

Where an accused is brought to trial before the High Court, in terms of Section 194 of the Code of Criminal Procedure Act, No.15 of 1979, the Attorney General can any time before the verdict, if he thinks fit, inform the Court that he will not further prosecute the accused upon the indictment or any charge therein, in which event the Judge shall stay all the proceedings against the accused and discharge him/her. Further, in a non-Jury trial, at the closure of the prosecution case, if the Judge wholly discredits the prosecution evidence or is of the opinion that the prosecution has failed to establish the commission of the offence by the accused without calling the defence in terms of Section 200 of the said Act, the Judge shall acquit the accused. In a Jury trial, in similar circumstances, acting under Section 220 of the Act, he will direct the Jury to acquit the accused.

In a non-Jury case where the Judge calls for the defence at the end of the case, considering the totality of evidence, if the prosecution has failed to prove the case against the accused, he will make order acquitting the accused. In a Jury trial, the Jury will (after considering the evidence in the case, the addresses of counsel and the summing up of the Judge), bring a verdict of guilty or not guilty and in the latter case the accused will be acquitted. In both cases where the verdict of guilty of murder is brought, sentence of death shall be pronounced.

In the case of an accused tried by a Trial at Bar, the Court will find the accused as charged only if the prosecution proves the charge against him beyond reasonable doubt. Otherwise the accused will be acquitted or a lesser sentence will be passed on him.

Right of Appeal

In the event that an accused is convicted of murder, he/she has a right of appeal against the conviction to the Court of Appeal. After the hearing, counsel for the appellant (convict) and counsel for the State, the Court of Appeal will either allow the appeal, in which case it may quash the conviction for murder and acquit him, but if the evidence warrants, find him guilty of a lesser offence. In appropriate cases a re-trial will be ordered. On the other hand if the High Court verdict is correct, the conviction for murder may be affirmed and the sentence of death will stand.

The convict, if aggrieved by the Court of Appeal order, can prefer an appeal to the Supreme Court. If the Supreme Court grants leave his appeal will be heard and if the appellant succeeds the Court will quash the conviction, if not sentence of death will stand. The convict in a Trial at Bar case has to appeal to the Supreme Court in terms of Section 451(3) of the Code of Criminal Procedure Act as amended by Act No.21 of 1988.

As we can see therefore, the law has provided for numerous stages at which the possibility of error in the imposition of culpability may be identified and rectified.

Statutory Provisions where Sentence of Death will not be Passed

Where a woman who is charged with murder, is convicted of committing the offence and is found to be pregnant in terms of Section 462(4) of the aforesaid Act read with Section 54 of the Penal Code, sentence of death will not be passed on her and in lieu she will be sentenced to imprisonment of either description as follows: Where, at the time of conviction, the convict is under 18 years, under Section 462(4) of the said Act read with Section 53 of the Penal Code, sentence of death will not be passed on him. In the first case the legislature has

recognized the right to life of an unborn child and in the latter case, the fact that he/she is a minor has been taken into account.

The above discussion will show that the substantive law relating to the burden of proof and procedural fairness stand to benefit the crime doer even at the expense of justice to the victim of crime.

Aftermath of Passing the Death Sentence

Once the death sentence is passed in terms of Section 286 of the aforesaid Act, the High Court Judge has to forward to the President his notes of evidence taken at the trial, together with a written report signed by him, setting out his opinion, as to whether there are any reasons why the sentence of death should or should not be carried out. Such report will be forwarded to the Attorney General for his advice. That advice along with the High Court Judge's report will be sent to the Minister of Justice who will forward it with his recommendation to the President. The President after considering the Judge's report, advice of the Attorney General and the Minister's recommendation, acting in terms of Article 34(1) of the Constitution read with Section 286(d) of the Code of Criminal Procedure Act, No.15 of 1979, may order respite of the execution of the warrant or appoint a date and time and place for its execution in accordance with the procedure established by law. Hence, it may be argued that there is careful assessment of the sentence of death and as such, the process does not contravene Article 13(4) of the Constitution which decrees that, 'No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law'. There is therefore a filtering process whereby the law provides that only those deserving will face the death penalty.

President's Circular No. CPA/J/1/3 of 04 March 1999

The question whether the sentence of death should be restored in Sri Lanka became a public issue during former President Chandrika Bandaranaike Kumaratunga's tenure of office. It is interesting to note that by circular No. CPA/J/1/3 of March 4 1999, having considered the Report of the Committee on Grant of General Amnesties, the Presidential view was as follows.

1) That a sentence of death imposed by Court will be carried out when the Judge who tried the case in his report (submitted in terms of the provision to Article 34(1) of the Constitution and Section 286 of the Code of Criminal Procedure Act No. 15 of 1979) states that such a sentence should be carried out and his report is endorsed by the Attorney General and the Minister in their advice and recommendation respectively submitted in terms of Section 34(1) of the Constitution. In the same circular Her Excellency had dealt with the other two situations in the following terms.

2) Where the Judge who tried the case, the Attorney General and the Minister do not unanimously recommend that a sentence of death that has been imposed should be carried out, the sentence will be commuted to a term of life imprisonment.

3) Where a sentence of life imprisonment has been imposed by Court, and where a sentence of death is commuted to one of life imprisonment as stated above, the prisoner should undergo imprisonment for a period of at least 20 years before the term of imprisonment is commuted to imprisonment for a specific period of time. It would be only

then that such a person would qualify for remissions that are according to the scheme that has been recommended.

In the same circular the President had directed the then Minister to give effect to her policy decision, which reads as follows: "I shall be thankful if the policy as outlined above is implemented in future".

Conclusion

The debate as to whether the implementation of the death penalty provides an answer to rising crime in the country is an emotionally charged debate and many letters have been written to the newspapers by advocates arguing for and against the imposition of capital punishment.

In December 2006, the Judicial Officers Association passed a resolution calling for the restoration of the death penalty. It is a relevant question as to whether, (given that Recommendations (2) and (3) of the aforesaid Presidential Circular are already in operation), the time is now ripe for the authorities to implement Recommendation (1) of the Presidential Circular No. CPA/J/1/3 of 04 March 1999.

THE DEATH PENALTY: THE LEGACY OF THE HANGMAN'S NOOSE

Seuwandi Wickremesinghe[*]

> *Shortly before seven in the morning and after the offer of a tot of Brandy to the condemned man, the hangman and his assistant would enter the cell and take him the few yards to the execution shed. Clinging to his dear life, he takes his last steps in a solitary walk, distraught with fear, the end of a neglected and empty life, leaving a lingering bitterness behind.*[1]

This may be an experience of one human being; the loss of one neglected and condemned life in one country. But how many lives are lost as a result of the hangman's noose each passing day? Statistics by Amnesty International show that 3,347 people were sentenced to death in 51 countries in 2007 and there are 25,000 people in death row.[2] While 91 countries have generously abolished the death penalty completely, 60 countries retain it in law and practice, 11 countries retain it only for crimes in exceptional circumstances and 35 countries maintain capital punishment for ordinary crimes but it has been in disuse for at least 10 years. The USA, Pakistan, India, China, Iran, Saudi Arabia, Iraq, Yemen are all countries that retain the death penalty and those executed in the USA and Pakistan make up to half of the total figure of executions done in 2007. Iran, Yemen and Saudi Arabia have extended the death penalty to those who committed crimes when juveniles, which is contrary to International Law. In Sri Lanka, former President Kumaratunga attempted to reinstate the death penalty after the murder of the High Court Judge Sarath Ambepitiya. However, this effort failed eventually due to public protests and thus the death penalty has been unimplemented since 1976.

Worldwide the death penalty has been applied to various crimes such as premeditated murder, espionage and treason, while in some Islamic countries, for sexual crimes such as rape, adultery, incest and sodomy, and for religious crimes such as apostasy. China uses the death penalty for human trafficking and for serious cases of corruption.

The death penalty has been a subject of debate among human rights activists, religious groups, politicians, lobbyists and legal representatives. The discussions have been characterized by subjective viewpoints on both sides. However, there is no doubt that the question regarding the implementation of the death penalty should be evaluated through objective analysis. Countervailing arguments should be supporting by precise reasoning and logic before arriving at a judgment or conclusion.

The Purpose of a Legal System

Proponents of the death penalty claim that the death penalty serves as a form of retribution against the violator of another life or liberty and instills a sense of justice among the society. First and foremost however, it is vital to comprehend the purpose of the existence of a legal code in a society. A court of law exists to protect the society from violence, thus providing security to its members from crimes. In other words, the judiciary acts or performs the role of a deterrent. Therefore deterrence rather than retribution should be a primary objective in the criminal justice system.

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[*] Junior Researcher, Civil and Political Rights Programme, Law & Society Trust.

[1] Murder Casebook.

[2] Amnesty International. 15 April 2008. "Death Sentences and Executions in 2007". *AI Index:* ACT 50/001/2008. Pp. 4 and 6.

Proceeding from this argument, it may be said that substituting the death penalty with life imprisonment could be offered as a practical, more effective alternative at both the level of individual rights as well as in the social context. If the purpose of the death penalty is to prevent the convict from endangering the lives of people, the same can be done through keeping him under lock and key. Incarceration therefore serves the same deterrent purpose as the death penalty without taking away the life of the convict.

However, supporters of the death penalty oppose life imprisonment as a possible substitute for various reasons. One such reason offered is that incarceration is a violation of the right to liberty; they claim therefore that nothing can be gained by substituting one type of right with another. However, it may be argued that this argument lacks a solid basis as the right to liberty cannot be enjoyed without the right to life and in any event, both rights cannot be placed on an equal footing given the preeminence of the right to life.

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) states that:

> *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Article 3 and 5 of the Universal Declaration of Human Rights (UDHR) states that, the right to life is universal. Yet, supporters of the death penalty might point to Article 6(2) to (5) of the ICCPR which allows capital punishment only "for the most serious crimes", by those countries which have not abolished it. However, Article 6(6) states that:

> *nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present Covenant.*

This demonstrates the fact that though the Covenant tolerates the death penalty, it does not justify its use by any means. Undoubtedly, depriving the life of even a criminal is attendant by a measure of severity that in no way, can be equated to the deprivation of loss of liberty.

On the other hand, those who believe that the death penalty is the rightful punishment to those who commit heinous crimes also state that replacing the death penalty with life imprisonment will not measure up to the gravity of the crime which requires the death of the convict as punishment.

Understanding the Nature of Crime

It is important to note that crime takes place due to various, indefinite reasons. Some commit murder due to psychological or financial reasons. On the other hand it could be a crime of passion.

Consequently, it is vital to first understand the nature of the crime. The liaison between the accused and the victim, the bearing that this relationship has on the crime and the circumstantial factors that led to the committal of the crime, are essential aspects that need to be looked at, to understand the background. It is this kind of practical thinking that can help to determine that the death penalty may not be the best option available for all criminals, as crime takes place due to various reasons and in a variety of environments.

Wrongful Conviction

The extreme ruthlessness of the death penalty is further intensified by the fact that it is irreversible. Once a life is put to death, there is no turning back. An innocent being sentenced to death due to unavoidable circumstances is definitely intolerable and outrageous. Once a wrongful conviction is carried out, there is no remedy if the executed is claimed or proved innocent at a latter date. Good examples of such misguided justice are the cases of Roger Coleman, Rolando Cruz and Alejandro Hernandez, who were proved innocent only after being executed.[3] In the U.S., at least 23 innocent people were executed in the nineteenth century prior to 1984.[4] 48 individuals were released from death row in the United States in the 1990s on grounds of actual innocence.[5] Verneal Jimerson and Dennis Williams were released from Illinois death row in 1996. Curtis Kyles, whose capital conviction was overturned by the U.S. Supreme Court after 11 years, confronted three more trials (all of which resulted in hung juries) before the District Attorney of New Orleans finally dropped the charges against him. Kyles was subjected to five trials over 14 years for a crime he did not commit.[6]

Though opponents of the death penalty have unfairly claimed that the same injustice could happen to a convict in incarceration, this argument is poor justification for the implementation of the death penalty. A convict could die in a prison due to natural causes. Death could be due to disease or mental degradation but unlike in the death penalty there is no hangman to brutally seize the life of a perfectly healthy human being through artificial means ordered through a collective decision by a panel of judicial officers. Moreover, there is a fairly good possibility of releasing a convict in incarceration if proved innocent.

Article 6, Part III of the ICCPR states that if the death penalty should be used, then:

> *this penalty can only be carried out pursuant to a final judgment rendered by a competent court.*

The question then that undoubtedly arises is whether a *Competent Court* exists in all situations or, how *competent* a court of law could become? Human fallibility is an undeniable quality that leads to wrongful convictions. Other factors that lead to miscarriage of justice are:

- Convictions that rely solely on witness statements that are vulnerable to being countered by forensic evidence leading to revealed errors in many old convictions.

- Poor legal representation for suspects. For example, in the U.S., it is said that even before the case is heard, it is possible to presuppose the judgment depending on the name of the lawyer who is supposed to appear in court for the accused.

- Improper procedure. For instance, Amnesty International states that in Singapore 'The Misuse of Drugs Act' consists of a series of presumptions which shift the burden

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3 Amnesty International. 12 November 1998. "Fatal flaws: Innocence and the Death Penalty in the USA". AI Index: AMR 51/069/1998. Pp.6 and 31.

4 *Ibid,* p.5.

5 *Ibid,* p.5; and the concluding remarks of the report issued by the Subcommittee on Civil & Constitutional Rights of the US Congress in 1993 on the 48 individuals who were declared innocent.

6 *Ibid,* p.11.

of proof from the prosecution to the accused. This contradicts the universally guaranteed 'right to be presumed innocent until proven guilty.'[7]

Rehabilitation

It is a view put forward in this discussion that rehabilitation of the convict is a more humane, accepted way of deterring future crimes from occurring. The purpose of a legal system should be that of prevention and redemption rather than retribution. Rehabilitation through educational and vocational programs within the prison system provides a chance for repentance and restores the value of life and resurrects human values in all those who engaged in crime of passion and those who experience psychological problems. Through rehabilitation, the goal of prevention of the occurrence of further crimes could be achieved. Good examples of such cases are the books written by Wesley Cook[8] and Stanley Williams[9] while in death row, showing that redemption is possible when self-realization dawns upon the convicts on the fatal crimes they have committed. In such cases, inmates like Wesley Cook believe that the death penalty snatches away, every opportunity of human development for those who deserve it. Therefore, resorting to the death penalty negates the opportunity and the possibility of rehabilitation and redemption in a most fundamental manner.

Live from Death Row, published in May 1995, is a memoir by American death-row inmate Mumia Abu-Jamal alias Wesley Cook, giving an elaborate picture of the prison system, especially in the chapter titled "Musings, Memoirs and Prophecies." In this chapter, Cook points out that he finds it hard to believe that the purpose of a prison system is "deterrence" and "correction" that restrict the inmates from education. He also points out to the psychological problems caused by isolation and 'non-contact visits', which he presents as factors to support his argument of a hidden motive of the prison system, which according to him is "to erode one's humanity."

Stanley Tookie Williams III meanwhile, born in Louisiana, was a convicted murderer and a leader of an American street gang known as Crips. He was executed in December 2005. While in prison he was nominated for the Nobel Prize for writing books to help troubled youth.

The Brutalizing Effect

The death penalty has an inhuman, brutal effect on the society, and on officials and jurors involved in the criminal justice system. In other words, it sends the message to society that it is acceptable to kill in some circumstances and demonstrates social disregard for the sanctity of life. It also dehumanizes participants of the judicial process. Methods used for execution are decapitation, hanging, firing squad, gas chamber, lethal injection and electrocution, all of which inflict pain upon the convict and instill a fear for the loss of one's life.

The death sentence has been considered as a cruel and an unusual punishment and therefore is declared unconstitutional according to the constitutions of the two states of Massachusetts and California, in the U.S.

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[7] Amnesty International. January 2004. "Singapore – The Death Penalty: A Hidden toll of executions." AI Index: ASA 36/001/2004.

[8] Wesley Cook alias Mumia Abu-Jamal. May 1995. *Live from Death Row.*

[9] Stanley Tookie Williams. 2005. *Blue Rage, Black Redemption: A Memoire.* And: 2004. Redemption: From Original gangster to Nobel Prize nominee – The extraordinary life story of Stanley Tookie Williams".

Article 7 of the ICCPR states that:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or **punishment.*** (author's emphasis)

Supporters of the death penalty conveniently claim that if a certain method inflicts pain upon the convict at the time of execution, it does not prove that execution is unconstitutional and that the solution to such a problem should be through replacing another method of execution rather than disregarding the death penalty as unconstitutional. However, it should be mentioned here that every method used to artificially terminate the lives of convicts is without doubt inhuman and therefore violates the rights of the convict while subjecting him to inhuman treatment through physical and mental suffering.

The death penalty also creates secondary victims who experience the trauma of loosing a loved one. The execution of the convict will have a traumatizing effect on the family for the rest of their lives, especially on the children of the convict, thus extending the punishment and its impact to the family of the executed.

Deterrence

Supporters of the death penalty claim that abolishing capital punishment will eventually reduce the role of the justice system from functioning as a deterrent. Studies have been done on the useful 'deterrent impact' that the death penalty may have on potential crime doers. However, Professor Jeffery Fagan has noted as follows:

> *In testimony before the Massachusetts Joint Committee on the Judiciary regarding proposed legislation to initiate a 'foolproof' death penalty, it has been found that these Deterrence Studies are full of technical and conceptual errors, including inappropriate methods of statistical analysis, failures to consider all relevant factors that drive murder rates, missing data on key variables in key states, weak non-existent tests of concurrent effects of incarceration and other deficiencies. A close reading of the new Deterrence Studies shows quite clearly that they fail to touch this scientific bar, let alone cross it.*[10]

It may be stated that implementation of the death penalty does not necessarily act as a deterrent to decrease the crime rates and discourage grave crimes from occurring in society.

Conventions Prohibiting the Death Penalty

The United Nations 62nd General Assembly in 2007 called for a universal ban on the death penalty. The approval of a draft resolution by the Assembly's 3rd Committee which deals with Human Rights voted 99 to 52, with 33 abstentions in favour of the resolution on 15 November 2007 and was put to vote in the General Assembly on December 18. It passed a non-binding resolution by asking member states for a moratorium on executions with a view to abolish the death penalty. It is worthwhile to note the following perspectives promoted in some Conventions vis-à-vis the death penalty.

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[10] Fagan, Jeffery. 14 July 2005. "Deterrence and the Death Penalty: A Critical Review of New Evidence". Testimony before the Joint Committee on the Judiciary of the Massachusetts Legislation on the House Bill 3934. Columbia Law School Press.

- The Sixth Protocol to the European Convention on Human Rights calls for the abolition of the death penalty in times of peace.

- The Thirteenth Protocol to the European Convention on Human Rights calls for the abolition of the death penalty in all circumstances.

- The Second Protocol in the American Convention on Human Rights also calls upon the abolition of the death penalty.

The Death Penalty Can Be Used as a Tool Against Political Dissidents and 'Enemies of the State'

As we have seen in some countries, the death penalty could be used as a *modus operandi* by authoritarian and dictatorial states against those who act against a self-appointed dictator or government. In such cases, the death penalty is used for political gains against its citizens, converting the State into a state of terror.

Sri Lanka and the Death Penalty – Current Debates in Sri Lanka on the Death Penalty

The Constitution of Sri Lanka

Though the death penalty has not been abolished in Sri Lanka, there has been a *de facto* ban since 1976. It is pertinent to refer to some of the relevant articles in the Constitution relating to rights granted by the State to its citizens and its relevance to the death penalty. Sri Lanka's Constitution heavily emphasizes the importance of the right to be free from inhumane treatment in Article 11. It could be said that the State cannot use a convict as a tool of crime prevention and deprive his/her right to human dignity by subjecting him/her to inhuman and degrading punishment. This would result in a loss of his constitutionally protected right to social worth and respect.

The essential 'right to life' that underpins all our constitutional rights leads us to the question as to whether the death penalty is cruel and inhumane with relevance to Section 11 of the Constitution. Capital punishment imposes a limitation on the essential fundamental rights of life and human dignity.

Some Historical Background to the debates regarding the Death Penalty in Sri Lanka[11]

Though the death penalty had been in use in Sri Lanka from the 1st century A.D. to the 13th century, during this period there were many instances when there was a shift towards the abolition of the death penalty. In the 13th century and the beginning of the 20th century, the death penalty remained and functioned without much public debate or protests. However, there were four attempts later between 1928 and 1958 which called for an end to the death penalty, but all of these efforts failed. These were:

- Motion in the Legislative Council in 1928.
- Motion in the State Council in 1938.

[11] The writing of this section of the paper benefitted greatly from discussions with Dr. J. de Almeida Guneratne, PC.

- Resolution in the House of Representatives in 1955 which though approved by the House could not be enforced because of a change in the government.
- Bill presented in Parliament in 1956, passed in the House of Representatives but rejected in the Senate.

Once again in April 1958, the Houses of Parliament passed the Suspension of Capital Punishment Act, No. 20 of 1958, which was imposed for three years according to the provisions of the Act. Yet in May 1958, Sri Lanka decided that the death penalty should be in use because of the communal violence and civil disturbances that took place in the country. The government proclaimed a 'state of emergency' under which offences such as looting and arson, could result in a death sentence. This declaration remained unaffected until March 1959. On 15 October the Governor-General appointed a Commission of Inquiry on Capital Punishment under the provisions of Section 2 of the Commissions of Inquiry Act, No.17 of 1948.

Though in 1956, former Prime Minister S.W.R.D. Bandaranaike abolished the death penalty, Sri Lanka had to face the crucial decision of reinstating the death penalty due to the assassination of the Premier himself in September 1959. It should be noted that during the period from 1958 to 1976 there had been a total of 89 executions out of 1,292 cases where the death sentence was imposed, thus transforming Sri Lanka into an active user of the capital punishment. Opposition to the death penalty started becoming increasingly widespread and the United National Party government of the then-President J.R. Jayewardene modified the use of the capital punishment in its 1978 rewrite of the Constitution. In the 1980s, executions became rare and Article 34 of the Constitution which has vested powers in the President to grant pardons, respites and remissions, became a reason for the disuse of the death penalty, which was replaced by life imprisonment instead.

Nevertheless on 13 March 1999, the government announced that there will be a change in the policy in regard to the death penalty. This decision reflected the issue of the President's right to grant remissions to offenders facing the death sentence. The government intended to carry out the death sentence for offences such as murder and drug trafficking. It was determined that the death sentence would not be substituted by life imprisonment if the Judge, the Attorney-General and the Minister of Justice unanimously recommended it after being present at the court hearing. If all three reports are unfavourable, then the President would sign the death warrant and he/she will be hanged by the neck until he/she is dead.

On 19 November 2005, High Court judge Sarath Ambepitiya was assassinated. This incident caused President Kumaratunga to evoke the death penalty despite public protests. The government decided to re-establish capital punishment for cases of drug trafficking and murder but due to public opposition, no executions have so far being carried out. Sri Lankan state policy is therefore yet indecisive on the question of implementation of the death penalty. There have been no executions in Sri Lanka since 1976.

As discussed earlier in this article, reinstating the death penalty in Sri Lanka in hope of discouraging violence may not be a practical solution to the problem. The real causes for rising crime rates are due to policies pursued by successive governments that have resulted in social inequality, growing unemployment, and the dismantling of the country's limited social services. All of these factors have been further aggravated by the country's long-drawn-out civil war. It is an open secret that many politicians hire persons with a criminal record or background to act as their bodyguards or to terrorize and intimidate political opponents. This has led to a nexus between politicians, criminal gangsters and some agencies of the government. Recent acts of violence by a particular minister from the Kelaniya area testifies

as ample evidence of the aforementioned nexus, wherein politicians who dwell and breed a world of crime are unfortunately not subjected to the law due to their privileged status in the government.

The Island newspaper for instance, goes on record in one of its editorials as follows:

> *Our leading politicians—and this is no secret—have precipitated this near anarchic state. If the Executive President tolerates ministers and deputy ministers associating with criminals and acting as their patron saints, then a process begins that is virtually unstoppable. It results in high ministry officials, heads of departments, heads of services, middle ranking officials right down to the peons being associated with corruption and criminal activity."*[12]

Therefore, this writer is of the view that Sri Lanka should concentrate on changing the culture of violence in politics and corruption among officials rather than engage in the implementation of the death penalty as an automatic solution for all these ills. This would undoubtedly be a better solution towards crime prevention. Reinstating capital punishment in Sri Lanka where the entire system of society and bureaucracy is corrupt, is like cutting off the arm when the cancer has already spread to the rest of the body. It may be looked upon as an absurd act of sheer bigotry and prejudice.

Public Opinion

Public opinion could be characterized as the collective perspectives of a vocal majority of citizens. However, public opinion cannot influence the operation of the Constitution and statutory provisions that should be upheld by a court of law. A court of law cannot use public opinion as a decisive factor in that regard and judges are specifically enjoined to remove themselves from the excitability of public debate. Justice Powell stated in *Furman v. Georgia*[13] that:

> *This court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.*

Conclusion

We may assert that the implementation of the death penalty cannot serve the cause of justice in any way. It needs to be recalled that the very idea of the death penalty originated during the Roman Empire, based on the concept of 'an eye for an eye, a life for a life.' However, with the establishment of human rights and the development of civilizations, the death penalty can no longer be accepted by a civilized society. As we all know, two wrongs cannot make a right. In a world where the protection of human rights is a priority, no society can use the death penalty even in regard to punishing the worst convict since it goes against the law of nature and our accepted morals, ethics and values. Barbarism even in the name of law cannot be accepted nor tolerated under any circumstances in a civilized society.

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[12] Dias, Wije. "President moves to reinstate the death penalty" in *The Island,* 26 November 2004.
[13] *Furman v. Georgia,* 408 US 238 (1972).

REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, MANFRED NOWAK, ON MISSION TO SRI LANKA*

1-8 October 2007

Introduction

1. The Special Rapporteur was invited by the Government of Sri Lanka to undertake a visit to the country from 1 to 8 October 2007.

2. The purpose of the mission was to assess the situation of torture and ill-treatment in the country, and to strengthen a process of sustained cooperation with the Government to assist it in its efforts to improve the administration of justice. The Special Rapporteur expresses his appreciation to the Government for the full cooperation it extended to him.

3. The Special Rapporteur held meetings with government officials, including the Secretary of Foreign Affairs, the Minister of Disaster Management and Human Rights, the Minister of Justice, the Chief Justice, the Attorney General, the Inspector General of Police, the Commissioner General of Prisons, the National Human Rights Commission (NHRC), the army's legal adviser on human rights, and the Secretary-General for the Secretariat for Coordinating the Peace Process.

4. A primary focus of the visit was the inspection of detention facilities in the country, and in this regard, the Special Rapporteur expresses his appreciation to the Government for the respect of the terms of reference for the visit. In particular, he wishes to thank the Inspector General of Police and the Commissioner General of Prisons for opening up the prisons and police detention facilities without restrictions, including the carrying out of unannounced visits, and enabling him to conduct private interviews with detainees. In Colombo and vicinity, the Special Rapporteur visited Welikada Prison, Colombo Remand Prison, the New Magazine Prison (Female Ward), the Criminal Investigation Department (CID), the Terrorist Investigation Department (TID), Mount Lavinia Police Station, Ratmalana Police Post, Panadura South Police Station, and Payagala North Police Station. In Galle, he visited the TID detention facility at Boosa. In Trincomalee and vicinity, he visited Trincomalee Prison, Trincomalee Police Headquarters (including CID), China Bay Police Station, Kantale Police Station, Polonnaruwa Police Station, and Polonnaruwa Prison. In and around Kandy, the Special Rapporteur visited Bogambara Prison, Katugastota Police Station, and Wattegama Police Station. In Trincomalee, the Special Rapporteur also visited a representative of the Tamileela Makkal Viduthalai Pulikal (TMVP), the group which broke away from the Liberation Tigers of Tamil Eelam (LTTE) in 2004 under the leadership of Vinayagamoorthi Muralitharan, also known as Colonel Karuna Amman.

5. During the mission the Special Rapporteur met with a broad range of civil society organizations, lawyers, medical professionals, and representatives of international organizations (e.g. the United Nations country team, including the Office of the High Commissioner for Human Rights, the United Nations Development Programme, the United Nations Children's Fund, the United Nations Population Fund, the World Health

* A/HRC/7/3/Add.6, 26 February 2008.

Organization), the Sri Lankan Monitoring Mission (SLMM), the International Committee of the Red Cross (ICRC), and the diplomatic corps.

6. The Special Rapporteur shared his preliminary findings with the Government at the close of his mission, to which the Government responded with constructive comments. He is pleased to report that the Government at that time already indicated that it will appoint a high-level task force to study his recommendations, consisting of public sector stakeholders and members representing judicial and civil society sectors. On 16 January 2008, a preliminary version of this report was sent to the Government. On 20 February, the Government provided comments.

7. The Special Rapporteur wishes to acknowledge with appreciation the excellent support provided by the United Nations Resident Coordinator, Neil Buhne, and his staff in the United Nations country team; the Office of the High Commissioner for Human Rights (OHCHR); Dr. Derrick Pounder, University of Dundee, United Kingdom; and Julia Kozma and Isabelle Tschan of the Ludwig Boltzmann Institute of Human Rights.

A. Particular circumstances of fact-finding in Sri Lanka

8. It was the intention of the Special Rapporteur to assess the situation of torture and ill-treatment in the entire territory of the country, and to examine not only torture and ill-treatment allegedly committed by the police and other security forces of the Government of Sri Lanka, but also those allegedly committed by or on behalf of other parties to the present conflict, including the LTTE. Indeed the most serious allegations of human rights violations that come to light, including those related to torture and ill-treatment, are in relation to the conflict and are alleged to be committed by both government and non-State forces, including the LTTE and the TMVP-Karuna group.

9. The Special Rapporteur established contact with the LTTE in preparation of the mission and was in fact provided with an invitation to all areas under LTTE control. From the very start of preparations, the Government was supportive of the Special Rapporteur's objective to probe allegations of torture and ill-treatment attributed to the LTTE. However, prior to the commencement of the visit, the Government denied him permission to travel to LTTE-controlled areas on the basis that the Special Rapporteur's visit there would be used by the LTTE for purposes of propaganda. Thus, the Special Rapporteur was not able to speak to detainees under the direct control of the LTTE and can therefore not draw any conclusions of the situation regarding torture and ill-treatment in these areas.

10. The Special Rapporteur also requested the Government to provide him with a letter of authorization for detention facilities of the Ministry of Defense. The Government, however, maintained the position before and throughout the mission that the Sri Lankan armed forces no longer had the authority to detain persons but were obliged to immediately hand over any arrested person to the police. As a consequence, the Special Rapporteur was not provided with a letter of authorization to visit any facilities of the armed forces. The primary focus of the findings of the Special Rapporteur therefore relate to torture, ill-treatment and conditions of detention in the ordinary context of the criminal justice system as well as to the treatment of suspected members of the LTTE held by the Sri Lankan civilian authorities (police and prison administration), including persons held under the Emergency Regulations.

11. The conditions for independent fact-finding were further impeded by certain instances, where detainees were hidden or brought away shortly before the Special Rapporteur arrived.[1] For example, 59 persons out of 110 had been transferred from the Boosa detention facilities on order of the director of the Terrorist Investigation Department in the days leading up to the Special Rapporteur's visit. The situation was aggravated by the fact that the Special Rapporteur received the information from the remaining detainees that the transferred persons were those who had been most seriously tortured before and still bore marks of the ill-treatment. After the Special Rapporteur protested against such obvious attempts to prevent him from talking to persons previously detained in Boosa, he was provided with a list of the detainees concerned with details of their whereabouts and, in fact, could trace many of these detainees later at TID headquarters and the Colombo Remand Prison. At the first visit in TID, the Special Rapporteur was informed by detainees that one male detainee had been brought away in order to hide him. At his second visit, the Special Rapporteur could meet this detainee, who told him that he was forced to lie under a bench in an office until the Special Rapporteur had left the facility.

Other detainees told him that they were kept in a bus outside the facilities during the first visit. Also, in Mount Lavinia Police Station four detainees were brought away on the morning of the visit of the Special Rapporteur and were later brought back when he had left. In Bogambara prison, detainees reported that two prisoners with serious injuries resulting from corporal punishment they had been subjected to had been transferred to other prisons. The Special Rapporteur was able to find one of these prisoners later in Welikada prison and could satisfy himself of the accuracy of the allegations.

12. After having received many allegations of serious human rights violations, among them torture and ill-treatment, by the TMVP-Karuna group, in particular in the East of the country, the Special Rapporteur visited an office of the TMVP in Trincomalee. There, a representative told him that until six months ago the group had indeed taken persons into custody for questioning for approximately two days. At the time of the visit of the Special Rapporteur the

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[1] By letter dated 20 February 2008, the Government stated: [T]he allegations made are of a potentially serious nature and confirmation of the facts on which the allegations are based are yet to be conclusively clarified. The [Special Rapporteur] states that some detainees were "hidden" or "brought away" from Boosa detention facility to presumably avoid exposure to him and then, in the same paragraph, states that he "in fact, could trace many of these detainees later at TID headquarters and the Colombo Remand Prison". The fact that the [Special Rapporteur] could trace the whereabouts of these detainees (albeit at a later time - see paragraph 72) is sufficiently indicative that they were being processed by the criminal justice system and were not being deliberately prevented from meeting the [Special Rapporteur]. The [Special Rapporteur] goes on to cite only one case at the Terrorist Investigation Division where a detainee was supposedly concealed during an initial visit and, on the second visit of the [Special Rapporteur], met the [Special Rapporteur] and said that he was instructed to hide "under a bench" until the [Special Rapporteur]'s initial visit was concluded. Even this detainee therefore was not permanently "hidden" from the [Special Rapporteur]. The other comments of the [Special Rapporteur] relating to detainees in Mount Lavinia being kept in a bus until his visit was over is questionable, since the police officers of individual police stations were unaware of the [Special Rapporteur]'s movements and would be unable to predict with certainty when (or if) the [Special Rapporteur] would visit their stations. A comment is made to the effect that the detainees in question were taken to an "unknown place believed to be Ratmalana Police Post shortly upon arrival of the Special Rapporteur" and returned to the place of detention after the [Special Rapporteur]'s visit. No interview with these four detainees at any time is indicated and no source for the information is identified. No assertion is made as to these detainees showing any signs of ill-treatment or complaining of such treatment. The reported incidents at Bogambara Prison have resulted in a preliminary disciplinary inquiry being conducted against the officer concerned and formal charges are to be proffered against that officer by the Prisons Department. Further clarification is being sought from TID as to the reasons for the movement of detainees during the period of the [Special Rapporteur]'s visit.

representative assured that the TMVP was only conducting political activities and did not detain persons anymore. The representative showed the Special Rapporteur an identity card issued by the TMVP, which was officially recognized by the police and armed forces. He explained that, in the case of any problem arising between the authorities and a member of the TMVP, the member concerned only had to show this identity card to solve the problem.[2] In particular, according to the representative, TMVP personnel were immune from arrest and searches.

B. Context and challenges in the promotion and protection of human rights: the conflict

13. At the outset, the Special Rapporteur states that he has full appreciation for the challenges that the Government faces from the violent and long-lasting conflict with the LTTE. Notwithstanding the difficult security situation the Government is faced with, Sri Lanka in principle is still able to uphold its democratic values, ensure activities of civil society organizations and media, and maintain an independent judiciary. At the same time, it remains true that humanitarian and human rights law absolutely prohibit the use of torture or other forms of ill-treatment.

14. The LTTE began fighting the Government of Sri Lanka with the aim of establishing an independent State of Tamil Eelam in the north and east of the country in the late 1970s. From 1983 on, an intense armed conflict between the separatist group and governmental forces has taken place. In February 2002, under Norwegian mediation, the Government entered into a ceasefire agreement (CFA) with the LTTE. Despite the CFA, fighting carried on, and after resuming control over the Jaffna Peninsula, government forces in 2007 also regained control over the eastern provinces, which had been under LTTE control. The Vanni area in the north of the country is, however, still under the overall control of the LTTE.

15. On 2 November 2007, S.P. Thamilselvan, the head of the LTTE's political wing and representative in negotiations for the LTTE, was killed in an air raid. A few weeks later, a bomb attack in Colombo attributed to the LTTE cost the lives of 21 civilians. In the aftermath of this attack, government forces arrested more than 2,200 Tamils, of which 2,000 were released in the following days. Another blast carried out in Colombo killed four members of the Sri Lankan army.

16. It is widely reported that, during the battles over control of the east, government forces made tactical use of the TMVP-Karuna group. Consisting of approximately one quarter of the former LTTE cadres, the Karuna group has conducted many ambushes and killings of LTTE cadres, political representatives and supporters. It is also considered responsible for abductions, torture and killings of civilians and has established a reign of terror over a large part of the civilian population living in the eastern provinces. Reliable sources told the Special Rapporteur that no police action was taken against members of the TMVP-Karuna group, which was later confirmed by a TMVP representative. Meanwhile, Colonel Karuna was arrested in London and sentenced on 25 January 2008 to nine months' imprisonment for

[2] The Government reported that, in relation to the TMVP representative's alleged statements, the Government reiterates that it is not responsible for exaggerated claims by members of political groups relating to their supposed or assumed status and emphasizes that no persons carrying arms are accorded special privileges nor granted any special facilities by lawfully constituted authorities.

possession of a false passport. There are calls for his prosecution under universal jurisdiction for war crimes, including recruitment of child soldiers, summary executions, and torture.[3]

17. In January 2008, the Government formally withdrew from the CFA following a number of recent bomb attacks, part of a series of incidents causing numerous civilian and military casualties attributed to the LTTE. Even before this withdrawal, with the CFA still in force, the monitoring mechanism established under it, SLMM, reported numerous violations of the agreement on both sides.[4] The SLMM subsequently terminated its monitoring operations on 16 January 2008.

I. LEGAL FRAMEWORK

A. International level

18. Sri Lanka is party to the major United Nations human rights treaties prohibiting torture and ill-treatment: the International Covenant on Civil and Political Rights (ICCPR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the Convention on the Rights of the Child (CRC).

19. Sri Lanka has acceded to the first Optional Protocol to the International Covenant on Civil and Political Rights[5] and it ratified the Optional Protocol on the involvement of children in armed conflict. However, Sri Lanka has not signed the Optional Protocol to the Convention against Torture, nor has it recognized the competence of the Committee against Torture to receive communications from other States parties as well as from or on behalf of individuals under the respective Articles 21 and 22 of the Convention against Torture.

20. Sri Lanka is a party to the Geneva Conventions of 1949. It has, however, not ratified the Additional Protocols to the Conventions, nor has it signed the Rome Statute of the International Criminal Court.

21. Sri Lanka was the subject of a confidential inquiry by the Committee against Torture under Article 20 of the Convention against Torture from April 1999 to May 2002. The Committee concluded on the basis of a visit of two Committee members to Sri Lanka in August 2000 that, although torture is frequently resorted to by the police, the army and paramilitaries, the practice of torture in Sri Lanka was not of a systematic nature. Following the recommendations, the Government of Sri Lanka appointed a permanent Inter-Ministerial

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[3] The Government invited the Special Rapporteur to direct his attention to the conditions of detention in the British maximum-security facility in which Colonel Karuna is currently detained. It reported that the presence of several LTTE suspects in close proximity to this individual have, according to news reports, given rise to allegations of mistreatment and torture there. The Government invited the Special Rapporteur to consider inquiring into the circumstances of his detention in such a hazardous environment.

[4] The Government reported that the SLMM (during its mandated term of office) reported a number of violations of the CFA by members of the LTTE which was several times the number of violations said to have been committed by the Government or its armed services.

[5] However, in its judgement in *Nallaratnam Singarasa v. Attorney General* (SC (Spl) L.A. No. 182/99) of 15 September 2006, the Supreme Court ruled that accession to the ICCPR Optional Protocol was unconstitutional. This seems to have posed direct obstacles to the campaign for the ratification of OPCAT.

Standing Committee and Inter-Ministerial Working Group on Human Rights Issues mandated to monitor action taken by government agencies relating to incidents/allegations of human rights violations.

B. National level

1. Constitutional protection of human rights, including the prohibition of torture and other cruel, inhuman or degrading treatment or punishment

22. Chapter III of the Constitution contains a set of fundamental rights and freedoms such as freedom of thought, conscience and religion, freedom from arbitrary arrest, detention, punishment, freedom of speech, assembly, association, movement as well as the right to equality.

23. The prohibition of torture or cruel, inhuman or degrading treatment is provided in Article 11: "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 15 prohibits any limitation of this right in times of public emergency.

2. Provisions in legislation criminalizing torture

24. Sri Lanka applies a dualist legal system and has implemented the criminal law provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Act No. 22 of 1994. Torture is defined under its Article 12 as:

> ...any act which causes severe pain, whether physical or mental, to any other person, being an act, which is:
>
> (a) Done for any of the following purposes that is to say:
>
> (i) Obtaining from such other person or a third person, any information or confession; or
>
> (ii) Punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or
>
> (iii) Intimidating or coercing such other person or a third person;
>
> or done for any reason based on discrimination,
>
> and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

25. The Special Rapporteur notes that the definition in Article 12 is in conformity with definition of Article 1 of CAT; however, it does not expressly include "suffering". Acts of torture, as well as participation, complicity, aid and abetment, incitement and the attempt to

torture are punishable under the Anti-Torture Act.[6] Penalties range from mandatory 7 to 10 years' imprisonment and a fine of 10,000 to 50,000 rupees (US$ 100-500).[7]

26. Article 2, paragraph 5, states that any offence under the Act shall be a "cognizable and non-bailable offence".

27. Article 3 of the Act specifically denies the defence of exceptional circumstances such as the state or threat of war, internal political instability, public emergency as well as the order of a superior officer or a public authority against charges of torture.

28. Articles 7 to 10 of the Act contain provisions regarding universal jurisdiction in conformity with the Convention against Torture.

29. In addition, the Sri Lankan Penal Code, in Articles 321 and 322, criminalizes acts which may fall within the scope of the Convention against Torture, such as intentionally causing harm or grievous harm with the aim to extort confessions or information leading to the detection of an offence or misconduct or to compel restoration of the property. These offences are punishable with a maximum of 10 years' imprisonment and a fine. Explanatory so-called "illustrations" to Article 321 describe torture cases. For example: "(a) A, a police officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section. (b) A, a police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section".

30. Further, Article 364 (2) of the Penal Code outlaws rape of a woman in custody (including in a remand home and a women's and children's institution) and foresees punishment of 10 to 20 years' imprisonment and a fine. In addition, the perpetrator shall be ordered to pay compensation to the victim for injuries caused.

3. Safeguards against torture and ill-treatment during arrest and detention

31. Article 13 of the Constitution foresees a number of fundamental safeguards, such as freedom from arbitrary arrest (Art.13(1)) and the right to be informed of the reasons for arrest. Article 13(2) stipulates that "every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to the procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with the procedure established by law".

32. Article 15 of the Constitution provides for the possibility of restriction of the safeguards and rights granted by the above-mentioned provisions in the interest of national security, public order and the protection of public health or morality.

33. There are a number of provisions in the Code of Criminal Procedure (CCP) which potentially safeguard the integrity of a person arrested or detained: the legal time limit of police custody of 24 hours, excluding the time necessary for the journey from the place of arrest to the Magistrate (Article 37 of CCP and Article 65 of the Police Ordinance); the requirement to maintain an "Information Book", including the file, by the Criminal Investigation Department and any bureau of investigation for the purpose of recording

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[6] Article 2 of Act No.22.
[7] Article 2(4) of Act No.22.

statements; the obligation of the Officer-in-Charge of the police station who is responsible for the Information Book to furnish three certified copies of all notes resulting from the investigation and of all statements recorded in the course of the investigation to the Magistrate (Art.147, CCP).

34. Other potential safeguards are: the notification of the Magistrate's Court of arrests of persons without warrant by any police officer (including information whether persons have been admitted bail or otherwise, Art.38, CCP); informing the arrested persons of the reason for arrest (with a right for the arrested person to see the arrest warrant if so requested, Art.53, CCP). 35. Where an Officer-in-Charge of a police station "considers that the examination of any person by a medical practitioner is necessary for the conduct of an investigation", he can order such examination by a governmental medical officer (Art.122(1), CCP).

35. Where an Officer-in-Charge of a police station "considers that the examination of any person by a medical practitioner is necessary for the conduct of an investigation", he can order such examination by a governmental medical officer (Art.122(1), CCP).

36. However, the Code lacks fundamental safeguards[8] such as the right to inform a family member of the arrest or the access to a lawyer and/or a doctor of his or her choice for a person arrested and held in custody. The code does not specify the interrogation conditions and is silent about the possibility of the presence of a lawyer and an interpreter during the interrogation.

37. With respect to arrest and detention by the armed forces, the Special Rapporteur notes the six-clause Presidential Directive of 7 July 2006, on Protecting Fundamental Rights of Persons Arrested and/or Detained, which was re-circulated by the Secretary of Defence on 12 April 2007 to the commanders of the army, navy and air force as well as the Inspector General of Police. Among the provisions included are: no person shall be arrested or detained under any Emergency Regulation or the Prevention of Terrorism Act No. 48 of 1979, except in accordance with the law and proper procedure and by a person who is authorized by law to make such an arrest or order such detention; the person making the arrest or detention should identify himself by name and rank, to the person or relative or friend of the person to be arrested; the person to be arrested should be informed of the reason for the arrest; all details of the arrest should be documented in the manner specified by the Ministry of Defence; the person being arrested should be allowed to make contact with family or friends to inform them of his whereabouts; when a child under 18 years or a woman is being arrested or detained, a person of their choice should be allowed to accompany them to the place of questioning; as far as possible, any such child or woman arrested or detained should be placed in the custody of a Women's Unit of the Armed Forces or Police or in the custody of another woman military or police officer; the person arrested or detained should be allowed to make a statement in the language of his choice and then asked to sign the statement; if he wishes to make a statement in his own handwriting it should be permitted; members of the NHRC or anyone authorized by it must be given access to the arrested or detained person and should be permitted to enter at any time, any place of detention, police station or any other place in which such a person is confined; and the NHRC must be informed within 48 hours of any arrest or detention and the place the person is being detained.

[8] For a comprehensive outline of such safeguards against torture see the general recommendations of the Special Rapporteur on torture, E/CN.4/2003/68, para. 26.

Forensic examination

38. The CCP provides for the possibility for a Magistrate or an investigator empowered by the Minister to order a post-mortem examination (also in the case the body is already buried, Art.373, CCP). Further, a person in police detention can complain to the Magistrate and ask for a medical examination by a Judicial Medical Officer (JMO), a specially trained medical doctor of the Department of Forensic Medicine. The Magistrate may subsequently order the police to take the victim to the JMO. However, the Special Rapporteur found a serious shortcoming in this procedure: since in most cases the victim is accompanied to the JMO by exactly the same police officer who is responsible for the alleged crime of torture or ill-treatment, the independence of the examination is jeopardized.[9] Also, the access to a JMO is not guaranteed and in many instances the alleged victim is brought before an ordinary medical doctor not trained in forensic medicine.

39. The medical personnel in various prisons acknowledged that they received on a regular basis allegations of torture and other forms of ill-treatment by persons who are transferred from police stations to the prisons. In many cases, these complaints are corroborated by physical evidence, such as scars and haematomas. However, the medical personnel only feels responsible for treating obvious wounds and does not take any further action, like reporting the alleged abuse to the authorities or sending the victim to a JMO. The Special Rapporteur notes that the Government will take steps to initiate a process through the Secretary to the Ministry of Justice to inform medical officers to report to the special unit of police and the NHRC instances where probable cases of torture are discovered.

Confessions

40. Articles 24 to 27 of the Evidence Ordinance (EO) do not allow confessions in court that were extracted through torture. In addition, ordinary law provides that a confession made to a police officer or to another person while in police custody is inadmissible before the courts. This rule, however, is not applicable to persons detained under Emergency Regulations.

Emergency Regulations

41. Article 155 of the Constitution and the Public Security Ordinance (PSO No. 25 of 1947) allow the President to declare a state of emergency.

42. For three decades, emergency rule has continued between intervals in Sri Lanka. The Prevention of Terrorism Act (PTA) of 1979 was suspended in 2002 after the CFA was agreed upon. However, the law is still in force and its Section 9 (1), allowing to detain a person under detention order (DO) for a period of "three months in the first instance, in such place and subject to such conditions as may be determined by the Minister", renewable to a maximum of 18 months, still applies. Although the CFA provided for the temporary suspension of the PTA, throughout this time many provisions of the PTA were reintroduced under the Emergency Regulations and now that the CFA has been abrogated, the temporary suspension of the PTA has been repealed.

43. New Emergency Regulations (ER, or Emergency Miscellaneous Provisions and Powers Regulations, EMPPR) were imposed on 14 August 2005 by then President Kumaratunga after

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[9] The Government reported that it is generally the practice of JMOs to request that accompanying police officers remain outside the examination area/room.

the assassination of Foreign Minister Kardirgamar.[10] They are drawn from the PTA and allow detention without charge for 90 days. This term is renewable for up to one year. Suspects can also be held by security forces for up to a year under "preventive detention" orders issued by the defence secretary (Section 17). A suspect detained under the ER must not be produced before a magistrate for up to 30 days. Not only police officers and soldiers, but also so-called "public officers" and those specifically authorized by the President may make arrests under the ER. In addition, the ER allow joint operations of arrest between the army and the police without clarifying the respective responsibilities of these two forces (Section 19).

44. Under the Regulations, the authorities may dispose of bodies without public notification (Section 56). The deputy inspector-general of the police has the authority to cremate bodies and thereby destroy potential evidence of torture or CIDT.

45. Contrary to Sections 24 to 26 of the Evidence Ordinance, under the ER, confessions to senior police officers may also be used as evidence in court.

46. On 6 December 2006, President Rajapaksa promulgated an additional set of ER,[11] reinstating certain provisions of the Prevention of Terrorism Act, which had been suspended as part of the 2002 ceasefire accord. Regulation 19 contains an immunity clause for any government official[12] for any action under the regulations, provided that such a person has acted in good faith and in the discharge of his official duties.

Safeguards under the Emergency Regulations

47. Persons arrested by the army must be turned over to the police within 24 hours (Section 19) and their family must be provided with an arrest notification acknowledging custody. The NHRC must be informed of all detentions under the ER within 48 hours and has legal authority to visit detainees wherever they are held. This rule was confirmed by the Presidential Directives on Protecting Fundamental Rights of Persons Arrested and/or Detained, issued in July 2006 and recirculated in April 2007, providing for access to the NHRC to arrested and detained persons and therefore to any place of detention (see also safeguards, paragraph 37 above).

48. During his mission the Special Rapporteur was informed that the NHRC is keeping a confidential database registering the arrests under the Emergency Regulations.

4. Complaints and investigations of acts of torture

(a) Complaints

49. There are several avenues to seek justice for victims of torture and ill-treatment.

50. Jurisdiction for offences under the Anti-Torture Act No. 22 lies with the High Court. In this regard complaints have to be addressed to the Attorney General's (AG) Department. Upon instruction of the AG the Special Investigation Unit (SIU) under the supervision of the Inspector General of Police (IGP) conducts the investigations. The Prosecution of Torture

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[10] The ER must be approved by the parliament within 14 days and extension requires parliamentary clearance every month.

[11] The Prevention and Prohibition of Terrorism and Specified Terrorism Activities, No. 7 of 2006.

[12] Public servant or any other person specifically authorized by the Government of Sri Lanka.

Perpetrators Unit (PTP), established pursuant to the recommendations of the United Nations Committee against Torture, monitors the work of the SIU and the Criminal Investigation Department (CID), and is also in charge of investigation of torture cases. The Attorney General's Department decides on the indictment of alleged offenders on the basis of files submitted by the SIU and PTP.

51. The Special Rapporteur is encouraged by the significant number of indictments, 34, made by the Attorney General. While appreciating that the conviction of offenders is entirely a matter for the courts, before which evidence must be led and prosecutions carried out according to law, he regrets that the indictments by the Attorney General have lead so far only to three convictions.

He notes that eight cases were concluded with acquittals. Further, the Special Rapporteur is concerned about the long duration of investigation with regard to these cases of often more than two years and allegations of threats against complainants and torture victims.

52. The Attorney General's powers have so far not been used to prosecute any officer for torture above the rank of Inspector of Police and no indictment was filed on the basis of command responsibility.[13]

53. Victims of torture or ill-treatment may also file a criminal action before a Magistrate's Court against an alleged torturer for "voluntarily causing hurt" under Article 136 (1) (a) of CCP, provided that the police have not filed an action under Articles 122(1), (2), 124, and 137 CCP.

54. Torture victims may also submit a complaint to the Supreme Court for a violation of Article 11 of the Constitution within 30 days of the infringement in order to be awarded compensation.

55. In general, the Special Rapporteur notes with concern the absence of an effective ex officio investigation mechanism in accordance with Article 12 of the Convention against Torture.

National Police Commission

56. The National Police Commission, created by the 17th amendment of the Constitution under Article 155 (a) in 2001, then appointed in 2002, is in charge of disciplinary control over all officers except the Inspector General (Art.155, G(1)(a)) and has also the duty to establish a public complaints procedure (Art.155, G(2)[14]). However, this procedure has been established only in January 2007 and therefore no conclusions can be drawn yet with regard to its implementation in practice.[15]

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[13] The Government reported that Sri Lanka's case law clearly indicates that, for criminal liability to attach to someone, there must be criminal intent (*mens rea*) and a clear nexus with the criminal act.

[14] It "shall establish procedures to entertain and investigate public complaints and complaints from any aggrieved person made against a police officer or the police service".

[15] Before this date, the NPC, in practice, delegated the investigations leading to possible disciplinary action against any offending officer to the police.

57. The Special Rapporteur notes that the legitimacy and credibility of the NPC has been questioned because of the 2006 presidential appointments of the Commissioners, in a manner similar to the appointments to the NCHR (see below).

58. The Criminal Investigation Department (CID) was given the mandate by the Inspector General of Police (IGP) to handle all criminal investigations into complaints of alleged torture, other than complaints relating to allegations against CID officers. However, complaints of torture recorded at police stations are first referred to the Assistant Superintendent of Police (ASP) or the Superintendent of Police (SP) of the relevant area. The legal division of the police refers them to the IGP who refers them to the Special Investigations Unit (SIU), under his command. The SIU is also handling allegations of torture referred to the Government by the NHRC, NGOs and the Special Rapporteur on Torture in his communications and regularly provides the Special Rapporteur with clarifications and updates. Apart from the SIU, senior police officers with regional command responsibilities also conduct inquiries into torture allegations.

National Human Rights Commission

59. The NHRC, created in 1997, is empowered to conduct investigations into complaints of violation of fundamental rights, such as violations of Article 11 of the Constitution prohibiting torture (Art.14 of Establishment Act No.21). Subsequently, the NHRC can refer the matter for reconciliation or mediation. In case this procedure fails, the NHRC may recommend initiating a prosecution of the perpetrator. However, lacking the capacity to conduct detailed criminal investigations into complaints of torture, the NHRC can only make recommendations and is not empowered to approach courts directly.

60. According to representatives of the NHRC, the Commission received a total of 405 complaints of torture in the first nine months of 2007.

61. The Special Rapporteur notes a regrettable development related to independent human rights monitoring in Sri Lanka with the downgrading in October 2007 of the NHRC by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). In its report,[16] the ICC's Sub-Committee on Accreditation expressed concern about the independence of the Commissioners, in view of the 2006 presidential appointments, which were done without the recommendation of the Constitutional Council, as prescribed in Sri Lanka law. It further questioned whether the actual practice of the Commission remained balanced, objective and non-political, particularly with regard to the discontinuation of follow-up to 2,000 cases of disappearances in July 2006. The Sub-Committee noted that the NHRC did not take measures to ensure its independent character and political objectivity, and it failed to issue annual reports on human rights, as required by the Paris Principles. The Sub-Committee, also noting the importance for national human rights institutions to maintain consistent relationships with civil society, stated that the appointment process caused civil society in Sri Lanka to question the constitutionality of the NHRC, thereby affecting its credibility.

62. The Government reported that the direct appointment by the President of the Commissioners was compelled by circumstances in which the Constitutional Council was not validly constituted and thus could not make any valid recommendations. The President also holds the residual power of appointment in the event of any such consultative forum not being in existence. The non-establishment of the Constitutional Council was not due to any fault on

[16] Report and recommendations of the Sub-Committee on Accreditation, December 2007.

the part of the President or the Government but, rather, to a weakness in the legal provisions. The issue is now being addressed, reports the Government.

5. Compensation

63. Article 17 of the Constitution entitles every person to a remedy for the infringement of fundamental rights by State action. Furthermore, Article 126(2) states that "any person [who] alleges that any such fundamental right has been infringed may apply to the Supreme Court praying for relief or redress in respect of such infringement". In granting relief, the Supreme Court has construed the relevant constitutional provisions as containing a right to compensation.[17]

64. The Supreme Court has in its jurisprudence interpreted torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by a public official acting in the discharge of his executive or administrative duties or under colour of office for such purposes as obtaining from the victim or a third person a confession or information, imposing a penalty on the victim ... or coercing the victim or third person to do or refrain doing something".[18]

65. The Government reported that Sri Lankan jurisprudence provides that a torture victim may not only claim for the harm suffered but also, according to the Supreme Court, claim for future medical expenses. These expenditures may be charged to the State. In recent years, the Supreme Court has held that both the State and individual perpetrators may be liable to pay compensation to the victim. In awarding and calculating compensation, the Supreme Court has taken into consideration the gravity of the injuries, the methods of torture employed and the harm caused. The Special Rapporteur welcomes the far-reaching jurisprudence of the Supreme Court with regard to violations of Article 11 of the Constitution. Given the high standards of proof applied by the Supreme Court in these torture-related cases it is highly regrettable that the facts established do not trigger more convictions by criminal courts.[19]

66. In Sri Lanka, compensation cannot be claimed as part of criminal proceedings. However, in cases related to Article 321, PC ("intentionally causing harm"), Magistrate

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[17] *Saman v. Leeladasa and another*, S.C. Application No. 4/88, 6 and 7 October 1988: Per Fernando, J.: "An impairment of personality - the violation of those interests which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation, and whether it be a public or private right – committed with wrongful intent established liability in the *actio injuriarum*; patrimonial loss, as well as damages for mental pain, suffering and distress can be recovered. When the Constitution recognized the right set out in Article 11, even if it was a totally new right, these principles of the common law applied, and the wrongdoer who violated that right became liable, and his master too, if the wrong was committed in the course of employment. It was not necessary for a new delict to be created by statute or judicial decision." Per Amerasinghe, J.: "Our Court has preferred to treat a violation of a Fundamental Right as something *sui generis* created by the Constitution and not as a delict."

[18] *De Silva v. Chairman Ceylon Fertilizer Corporation*, (1989) 2 SLR 393.

[19] The Government reported that there are two principal standards of proof that are operational in Sri Lanka: proof as to the balance/preponderance of probabilities (civil standard); and proof beyond a reasonable doubt (criminal standard). According to the Government, in the so-called "Fundamental Rights" cases, the Supreme Court decides on the basis of documentary evidence and oral pleadings and applies the civil standard. However, for a criminal conviction to be upheld, the court must be satisfied that the offence (including torture) is proved beyond a reasonable doubt - a much higher standard of proof. In fundamental rights cases the liability is primarily on the State whereas in criminal cases penal sanctions are imposed against the individual (most often involving deprivation of liberty).

Courts may award compensation to be paid by the offender when the Court refrains from imposing a prison sentence or from a proceeding to conviction (Art.17(4), CCP).

67. A rape victim may obtain compensation from the offender according to the provisions stipulated in the Penal Code Amendment Act, No.22 of 1995.

68. Under Civil Law (Civil Procedure Code) torture victims or relatives of torture victims can also bring a damages claim before the District Court for pecuniary and non-pecuniary losses incurred as a result of torture against an individual.

69. The NHRC may recommend a compensation for a victim of torture or, in case of death, his or her relative to be paid by the police or army officer (Art.15(3)(c) of the Establishment Act).

II. THE SITUATION OF TORTURE AND ILL-TREATMENT

70. In the opinion of the Special Rapporteur, the high number of indictments for torture filed by the Attorney General's Office, the number of successful fundamental rights cases decided by the Supreme Court of Sri Lanka, as well as the high number of complaints that the NHRC continues to receive on an almost daily basis are a clear indication that torture is widely practised in Sri Lanka.[20] During his visits to places of detention in various parts of the country, the Special Rapporteur received only a comparatively low number of allegations of torture from detainees suspected of ordinary crimes. But, in the context of detention orders under the Emergency Regulations and in particular with respect to LTTE suspects, the clear majority of all detainees interviewed by the Special Rapporteur complained about a broad variety of methods of torture, some extremely brutal. In many cases, these allegations were corroborated by forensic evidence. The considerable number of clearly established cases of torture by TID and other security forces, together with various efforts by TID to hide evidence and to obstruct the investigations of the Special Rapporteur, leads him to the conclusion that torture has become a routine practice in the context of counter-terrorism operations, both by the police and the armed forces.

71. Methods of torture reported included beating with various weapons, beating on the soles of the feet (*falaqa*), blows to the ears (*telephono*), positional abuse when handcuffed or bound, suspension in various positions, including *strappado*, "butchery", "reversed butchery" and "parrot's perch" (or *dharma chakara*), burning with metal objects and cigarettes, asphyxiation with plastic bags with chilli pepper or gasoline, and various forms of genital torture.[21] This array of torture finds its fullest manifestation at the TID detention facility in Boosa. The Special Rapporteur is also shocked by the brutality of some of the torture measures applied to persons suspected of being LTTE members, such as burnings with soldering irons and suspension by the thumbs. The latter method was allegedly applied by the army.

72. As reported above, the Special Rapporteur found out that more than half of the detainees of the Boosa detention facility had been either liberated or brought to other places

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[20] The Government notes the clarification made by the Special Rapporteur during the debriefing session with the Government on 8 October 2007, wherein he stated that what he meant by the term "widely practised" was that he encountered instances of probable torture in several diverse locations and not as a systematic practice.

[21] See also de Zoysa, P., and Fernando, R. (2007), "Methods and sequelae of torture: A study in Sri Lanka", *Torture*, 17, pp. 53-56.

of detention, such as TID in Colombo and the Colombo Remand Prison, in the days preceding his visit. In interviews with the remaining detainees, the Special Rapporteur learned that the transferred detainees were those who had been most seriously tortured previously and still bore marks of the ill-treatment. In an effort to trace the persons concerned, the Special Rapporteur received a list from the Director of TID in Colombo, indicating where the transferred detainees could be found. The Special Rapporteur later visited Colombo Remand Prison and TID in Colombo a second time and spoke with a number of the detainees concerned (see appendix).

73. Intimidation of victims by police officers to cause them to refrain from making complaints was commonly reported, as were allegations of threats of further violence, or threatening to fabricate criminal cases of possession of narcotics or dangerous weapons. Detainees regularly reported that habeas corpus hearings before a magistrate either involved no real opportunity to complain about police torture given that they were often escorted to courts by the very same perpetrators, or that the magistrate did not inquire into whether the suspect was mistreated in custody. Medical examinations were frequently alleged to take place in the presence of the perpetrators, or directed to junior doctors with little experience in the documentation of injuries.

Accountability and prevention

74. In general, the Special Rapporteur notes that Sri Lanka already has many of the elements in place necessary both to prevent torture and combat impunity, such as fundamental rights complaints before the Supreme Court in relation to Article 11 of the Constitution, indictments and prosecutions based on the 1994 Convention against Torture Act, bringing suspects before magistrates within the statutory 24-hour period, formal legal medical examinations by trained forensic experts (Judicial Medical Officers), and investigations and visits by the NHRC.

75. The commitment of the Government to fight torture is also demonstrated by the establishment of mechanisms by the Inspector General of Police and the Attorney General's Office specifically to investigate allegations of torture (e.g. the Special Investigations Unit and the Prosecution of Torture Perpetrators Unit). Moreover, with respect to the Special Rapporteur's mandate, the Government regularly continues to provide clarifications and updates with regard to communications related to such violations.

76. However, a number of shortcomings remain and, most significantly, the absence of an independent and effective preventive mechanism mandated to make regular and unannounced visits to all places of detention throughout the country at any time, to conduct private interviews with detainees, and to subject them to thorough independent medical examinations. It is the Special Rapporteur's conviction that this is the most effective way of preventing torture. In the case of Sri Lanka, he is not satisfied that visits undertaken by existing mechanisms, such as the NHRC, are presently fulfilling this role, or carrying out this level of scrutiny. In this regard, the Special Rapporteur welcomes information from the Government that it intends to establish an inter-agency body to study possible modalities and mechanisms to undertake visits to places of detention and also to strengthen the capacities and efficacy of the NHRC in this connection.

77. The Special Rapporteur appreciates that, by enacting the 1994 Torture Act, the Government has implemented its obligation to criminalize torture and bring perpetrators to justice. He is also encouraged by the significant number of indictments, 34, filed by the Attorney General under this Act. However, he regrets that these indictments have led so far

only to three convictions. One of the factors influencing this outcome is reportedly because of the Torture Act's high mandatory minimum sentence of seven years; it is effectively a disincentive to apply against perpetrators. Other factors are the absence of effective ex officio investigation mechanisms in accordance with Article 12 of the Convention against Torture, as well as various obstacles detainees face in filing complaints and gaining access to independent medical examinations while still detained.

78. Furthermore, the Special Rapporteur notes with great concern that many of the legal safeguards contained in the CCP do not apply in cases of detention under the Emergency Regulations. The absence of such safeguards is a logical explanation for the considerably higher risk for suspected LTTE members to become victims of torture.

79. Although many victims of torture in Sri Lanka are provided with compensation in Article 11 cases by the Supreme Court, these cases are not taken up for criminal procedure. According to the Attorney General, the reason for this discrepancy lies in the diversity of standards of proof before the Supreme Court and the criminal courts. However, the Special Rapporteur has found that the Supreme Court applies high standards of proof and he is convinced that many of the cases would have succeeded also in criminal procedures.

Corporal punishment in prisons

80. The Special Rapporteur appreciates the recent abolition of corporal punishment in Sri Lanka under the Corporal Punishment Act No. 23 of 2 August 2005. However, in the course of his visit, he received disturbing complaints of cases of corporal punishment corroborated by medical evidence. In particular, in Bogambara prison the Special Rapporteur heard of a number of instances of corporal punishment and was informed of the names of prison guards who regularly beat prisoners. In the office indicated by the informants, the Special Rapporteur found instruments that could have no other use than for beatings, such as plastic tubes bound together in a bundle.

81. Again, prisoners reported that two detainees recently punished in this manner had been transferred shortly before the Special Rapporteur's visit. Nevertheless, the Special Rapporteur was able to speak to one of the detainees concerned later in Welikada Prison, Colombo. The detainee confirmed that he had been corporally punished by one of the guards at Bogambara Prison. He bore visible marks on his back of recent abuse which medically corroborated his allegations (see appendix, paragraph 92).

82. In the debriefing of the Assistant Superintendent of Police at Bogambara Prison, the chief jailer admitted the use of corporal punishment in cases of detainees who "do something wrong". He also confirmed that they had received many complaints of ill-treatment against the guards mentioned by the Special Rapporteur. The Special Rapporteur is pleased to report that the Government has initiated an inquiry to look into this matter.

III. CONDITIONS OF DETENTION

83. As far as conditions of detention are concerned, the Government provided the Special Rapporteur with statistics indicating severe overcrowding of prisons. While the total capacity of all prisons amounts to 8,200, the actual prison population has reached 28,000. Poor conditions of detention can amount to inhuman and degrading treatment, which is well established in the jurisprudence of several international and regional human rights mechanisms. In Sri Lanka, the combination of severe overcrowding with the antiquated

infrastructure of certain prison facilities places unbearable strains on services and resources, which for detainees in certain prisons, such as the Colombo Remand Prison, where the lack of space was most obvious, amounts to degrading treatment. The lack of adequate facilities also leads to a situation where convicted prisoners are held together with pretrial detainees in violation of Sri Lanka's obligation under Article 10 of the International Covenant on Civil and Political Rights. Although the conditions are definitely better in prisons with more modern facilities, such as Polonnaruwa and the Female Ward of the New Magazine Prison, the prison system as a whole is in need of structural reform.

84. During the Special Rapporteur's visit to various police stations, he observed that detainees are locked up in basic cells, sleep on the concrete floor and are often without natural light and sufficient ventilation. While he is not concerned about such conditions for criminal suspects held in police custody for up to 24 hours, these conditions become inhuman for suspects held in these cells under detention orders pursuant to the Emergency Regulations for periods of several months up to one year. This applies both for smaller police stations, such as at Mount Lavinia, and especially for the headquarters of CID and TID in Colombo, where detainees are kept in rooms used as offices during the daytime, and forced to sleep on desks in some cases.

85. The Special Rapporteur welcomes recent information from the Government that TID has secured a new detention facility, which it will occupy in the second quarter of 2008, and has canvassed the assistance of the ICRC with regard to specifying minimum standards relating to space, ventilation and light for detainees in the new facility.

Women in detention

86. The Special Rapporteur found the detention facilities in the Female Ward of the New Magazine Prison in general to be more adequate than the male detention facilities in Colombo. However, the female detainees are also living in overcrowded conditions and some of the women reported fights between the prisoners without proper intervention by the prison guards. The Special Rapporteur is pleased that the strict division of male and female detainees in prisons is in general observed and that female prisoners are guarded by female prison personnel.

Children in detention

87. In the TID facilities in Colombo the Special Rapporteur met eight children (four girls and four boys) who were being held on account of being child soldiers for the LTTE. He strongly condemns the recruitment of children in the conflict, be it for fighting or other forms of servicing the armed groups. On the other hand, he also deems prolonged detention of minors in counter-terrorism detention facilities deeply worrying.

The death penalty

88. The death penalty is foreseen by Article 52 of the Penal Code. Murder is punishable by death (Art.296). No death sentence has been carried out in Sri Lanka since 1977. However, the High Court has, for example, sentenced five police officers guilty of raping and murdering a Tamil schoolgirl, to death sentences in 1998.

89. While the Special Rapporteur is encouraged by the policy of Sri Lanka not to carry out death sentences over the last 30 years, he observes that courts continue to sentence persons to

death. This leads to a considerable number of condemned prisoners living for many years under the strict conditions of death row.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

90. The Special Rapporteur concludes that the Government of Sri Lanka has set a number of important legal steps in order to prevent and combat torture as well as to hold perpetrators accountable. Most notably, the enactment of the Torture Act No. 22 of 1994 and the Corporal Punishment Act No. 23 of 2005 as well as legal safeguards in the Code of Criminal Procedure constitute positive legal measures in the fight against torture. The Special Rapporteur is further encouraged by the fact that capital punishment has not been executed in Sri Lanka for more than three decades. The fact that a system of JMOs is in place in the country is also a positive sign.

91. However, the system set up by these positive measures cannot be regarded as fully effective. The high number of successful fundamental rights cases decided by the Supreme Court of Sri Lanka, as well as the even higher number of complaints that the NHRC continues to receive on an almost daily basis indicates that torture is still widely practised in Sri Lanka. Obstacles for victims of torture to access the JMOs result in loss of important medical evidence which in turn impedes criminal proceedings against perpetrators. The absence of an obligation on law enforcement officials or judges to investigate cases of torture ex officio further aggravates the situation for victims. In general, the lack of effective witness and victim protection prevents the effective application of the laws in place.

92. Under the Emergency Regulations, most of the safeguards against torture mentioned above either do not apply or are simply disregarded, which leads to a situation in which torture becomes a routine practice in the context of counter-terrorism operations. The non-applicability of important legal safeguards in the context of counter-terrorism measures, as well as excessively prolonged police detention, opens the door for abuse. The Special Rapporteur is also shocked by the brutality of some of the torture measures applied to persons suspected of being LTTE members, such as burnings with soldering irons and suspension by the thumbs.

93. The Special Rapporteur is also concerned about the reported links between the Government and the TMVP-Karuna group, which were confirmed by the representative the Special Rapporteur met in Trincomalee. The TMVP-Karuna group has been accused of particularly brutal human rights abuses.

B. Recommendations

94. The Special Rapporteur recommends that the Government:

(a) End impunity for members of the TMVP-Karuna group;

(b) Ensure that detainees are given access to legal counsel within 24 hours of arrest, including persons arrested under the Emergency Regulations;

(c) All detainees should be granted the ability to challenge the lawfulness of the detention before an independent court, e.g. through habeas corpus proceedings;

(d) Ensure that magistrates routinely ask persons brought from police custody how they have been treated and, even in the absence of a formal complaint from the defendant, order an independent medical examination in accordance with the Istanbul Protocol;

(e) Ensure that all allegations of torture and ill-treatment are promptly and thoroughly investigated by an independent authority with no connection to the authority investigating or prosecuting the case against the alleged victim;

(f) Ensure all public officials, in particular prison doctors, prison officials and magistrates who have reasons to suspect an act of torture or ill-treatment, to report ex officio to the relevant authorities for proper investigation in accordance with Article 12 of the Convention against Torture;

(g) Ensure that confessions made by persons in custody without the presence of a lawyer and that are not confirmed before a judge should not be admissible as evidence against the persons who made the confession;

(h) The burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained under any kind of duress;

(i) Expedite criminal procedures relating to torture cases by, e.g., establishing special courts dealing with torture and ill-treatment by public officials;

(j) Allow judges to be able to exercise more discretion in sentencing perpetrators of torture under the 1994 Torture Act;

(k) Drastically reduce the period of police custody under the Emergency Regulations and repeal other restrictions of human rights under them;

(l) Develop proper mechanisms for the protection of torture victims and witnesses;

(m) Ensure that the constitution and activities of the NHRC comply with the Paris Principles, including with respect to annual reporting on the human rights situation and follow-up on past cases of violations;

(n) Establish appropriate detention facilities for persons kept in prolonged custody under the Emergency Regulations;

(o) Establish an effective and independent complaints system in prisons for torture and abuse leading to criminal investigations;

(p) Investigate corporal punishment cases at Bogambara Prison as well as torture allegations against TID, mainly in Boosa, aimed at bringing the perpetrators and their commanders to justice;

(q) Design and implement a comprehensive structural reform of the prison system, aimed at reducing the number of detainees, increasing prison capacities and modernizing the prison facilities;

(r) Remove non-violent offenders from confinement in pretrial detention facilities, and subject them to non-custodial measures (i.e. guarantees to appear for trial, at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgement);

(s) Ensure separation of remand and convicted prisoners;

(t) Ensure separation of juvenile and adult detainees, and ensure the deprivation of liberty of children to an absolute minimum as required by Article 37(b) of the Convention on the Rights of the Child;

(u) Abolish capital punishment or, at a minimum, commute death sentences into prison sentences;

(v) Establish centres for the rehabilitation of torture victims;

(w) Ratify the Optional Protocol to the Convention against Torture, and establish a truly independent monitoring mechanism to visit all places where persons are deprived of their liberty throughout the country, and carry out private interviews;

(x) Ensure that security personnel undergo extensive and thorough training, using a curriculum that incorporates human rights education throughout and that includes training in effective interrogation techniques and the proper use of policing equipment, and that existing personnel receive continuing education; and

(y) Establish a field presence of the Office of the United Nations High Commissioner for Human Rights with a mandate for both monitoring the human rights situation in the country, including the right of unimpeded access to all places of detention, and providing technical assistance particularly in the field of judicial, police and prison reform.

95. The Special Rapporteur encourages the international community to assist the Government of Sri Lanka in the follow-up to these recommendations.

EXCERPTS FROM THE REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, PHILIP ALSTON, PRESENTED TO THE UNITED NATIONS HUMAN RIGHTS COUNCIL IN MAY 2008

FOLLOW-UP TO COUNTRY RECOMMENDATIONS RELATING TO SRI LANKA*

I. INTRODUCTION

1. This report tracks the implementation of recommendations made be the Special Rapporteur on extrajudicial, summary or arbitrary executions following visits to Sri Lanka (28 November to 6 December 2005) (E/CN.4/2006/53/Add.5) and Nigeria (27 June to 8 July 2006) (E/CN.4/2006/53/Add.4).

2. The primary role of the Special Rapporteur is to examine and respond effectively to credible allegations of extrajudicial executions. One of the principal working methods undertaken to fulfill this purpose is to conduct country visits to investigate allegations of violations of the right to life. Country visits are designed to ascertain the facts on a first-hand basis, to analyse the forms and causes of extrajudicial executions in a particular country, and to engage in constructive dialogue with the Government. They are followed by a detailed report and recommendations to the Government on how it can reduce the occurrence of extrajudicial executions, and promote accountability when they do occur.

3. Country visits can only achieve their full potential if Governments give serious consideration to the recommendations made. In recognition of this fact, the Commission on Human Rights requested States to carefully examine recommendations and to report to the Special Rapporteur on the actions taken on the recommendations (resolution 2004/37). At the seminar on "Enhancing and Strengthening the Effectiveness of the Special Procedures of the Commission on Human Rights" (2005), "[i]t was commonly agreed [by the participating Governments] that it was crucial that the findings of special procedures following a country visit were not merely consigned to a report, but formed the basis of negotiation and constructive open dialogue with States, with a view to working together on overcoming obstacles. It was stressed by many participants that States should cooperate fully with special procedures and that this encompassed incorporating their findings into national policies. Where States did not implement recommendations, they should provide information on why."[1]

4. In order to assess the extent to which States had implemented the recommendations, in 2006, the Special Rapporteur initiated follow-up reports on visits. The first follow-up report (E/CN.4/2006/53/Add.2) concerned the recommendations made by his predecessor, Ms. Asma Jahangir, on her visits to Brazil, Honduras, Jamaica, and Sudan. This follow-up report assesses the progress made on the implementation of the recommendations of the first two missions—to Sri Lanka and Nigeria—conducted by Special Rapporteur Philip Alston.

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* A/HRC/8/3/Add.3, 14 May 2008, Eighth session of the Human Rights Council.

[1] Report of the Seminar on Enhancing and Strengthening the Effectiveness of the Special Procedures of the Commission on Human Rights (E/CN.4/2006/116), para.49, available at <http://portal.ohchr.org/pls/portal/docs/PAGE/SP_MH/E-CN4-2006-116.PDF>.

5. In keeping with past practice,[2] this follow-up report was compiled based on information received from a variety of sources. The Special Rapporteur requested the observations of each Government on the steps taken with a view to implementing the recommendations made, including information regarding recommendations that were not followed. The Special Rapporteur also sought information regarding follow-up measures to each of the recommendations from non-State sources, including non-governmental organizations and civil society groups. (A summary of this information was sent to each Government for its comments prior to this report's submission to the Council.)

6. By way of overview, the recommendations made in the Special Rapporteur's report on Sri Lanka have not been implemented. Recommendations directed to the Government have been all but completely disregarded, and in most areas there has been significant backward movement. The same is true of recommendations directed to the Liberation Tigers of Tamil Eelam (LTTE). The ceasefire monitoring mechanism did make significant efforts to implement the recommendations directed to it, but its mandate has since been terminated. This failure to adopt measures necessary to ensure respect for human rights cannot be attributed simply to the outbreak of large-scale hostilities. Wars may be fought while respecting the provisions of international human rights and humanitarian law. The Government and the LTTE have, however, chosen to conduct this conflict in a manner that treats human rights and human rights defenders as obstacles to effective tactics. It is imperative that the Human Rights Council address this crisis.

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II. SRI LANKA[3]

A. Introduction

8. The Special Rapporteur visited Sri Lanka from 28 November to 6 December 2005 and published his findings and recommendations on 27 March 2006. After conducting extensive interviews in the districts of Ampara, Batticaloa, and Kilinochchi, as well as Colombo, the Special Rapporteur concluded that extrajudicial executions were widespread and included political killings designed to suppress and deter the exercise of civil and political rights as well as killings of suspected criminals by the police. The Special Rapporteur found that both

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[2] E/CN.4/2005/7, para. 30; E/CN.4/2006/53/Add.2, para. 4.

[3] Some of the information received by the Special Rapporteur was provided on a confidential basis, but much of it is reflected in various public reports including: *'Afraid even to say the word': Elections in Batticaloa District: Report of a joint civil society visit to Batticaloa, 16-18 February 2008* (26 February 2008); Center for Policy Alternatives, *Policy Brief on Humanitarian Issues* (December 2007); Civil Monitoring Commission, Free Media Movement, Law and Society Trust, *Second Submission to the Presidential Commission of Inquiry and Public on Human Rights Violations in Sri Lanka: January - August 2007* (31 October 2007); Human Rights Watch, *Recurring Nightmare: State Responsibility for "Disappearances" and Abductions in Sri Lanka* (March 2008); International Crisis Group, *Sri Lanka's Return to War: Limiting the Damage* (20 February 2008); Law and Society Trust, *Under Fire: Persons in Humanitarian Service: A Preliminary Report on Killings and Disappearances of Persons in Humanitarian Service in Sri Lanka, January 2006 - December 2007* (7 March 2008); North East Secretariat on Human Rights (NESOHR), *Annual Report on Human Rights - 2007* (5 January 2008); NESOHR, *Monthly Report - January 2008* (7 February 2008); NESOHR, *Monthly Report - February 2008* (5 March 2008); University Teachers for Human Rights (Jaffna), *Slow Strangulation of Jaffna: Trashing General Larry Wijeratne's Legacy and Enthroning Barbarism* (4 December 2007); University Teachers for Human Rights (Jaffna), *The Second Fascist Front in Sri Lanka: Towards Crushing the Minorities and Disenfranchising the Sinhalese* (21 February 2008).

Government forces and the LTTE were responsible and that the perpetrators enjoyed complete impunity. He found that the investigations carried out by the police were completely inadequate. However, the Special Rapporteur identified the National Police Commission (NPC) as having the potential to effect reforms. The Special Rapporteur also found that other external oversight mechanisms held great potential. The National Human Rights Commission (NHRC) was providing some accountability, and the mechanism established to monitor the ceasefire, the Sri Lanka Monitoring Mission (SLMM), had the capacity if not yet the will to seriously investigate attacks on civilians. The Special Rapporteur's recommendations identified specific measures required to improve the situation in Sri Lanka with respect to these problems. As this follow-up report documents, these recommendations have been all but completely disregarded.

9. According to information received by the Special Rapporteur, extrajudicial executions have increased dramatically since he visited Sri Lanka at the end of 2005. This increase in extrajudicial executions has been accompanied by efforts to dismantle existing mechanisms to ensure the accountability of security forces for human rights violations. It is tempting to ascribe these trends to the failure of the ceasefire and the outbreak of hostilities. But this is, at best, only a partial explanation.

10. It is possible to fight a conflict while complying with human rights and humanitarian law. International humanitarian law is framed by a balance between the demands of humanity and demands of military necessity. Similarly, while international human rights law applies during armed conflict, it permits specified limitations to accommodate national security concerns and derogations during times of public emergency. It was the considered judgement of the States parties to the treaties constituting these legal regimes that there is no legitimate military rationale for committing prohibited acts of violence.

11. Human rights and humanitarian law are applicable even if the conflict may be characterized as a "war on terror" (as the Government suggests) or as a "national liberation struggle" (as the LTTE suggests). Individuals who commit serious violations of these rules continue to run the risk of prosecution.

12. The Government of Sri Lanka and the LTTE, however, appear to believe that the only effective insurgency and counterinsurgency tactics are ones that involve extrajudicial executions and other human rights violations. This view has led them to commit widespread abuses. The Government and the LTTE have both engaged in the targeted killing of individuals suspected of collaborating with the other party. The Government and the LTTE have engaged in shelling (and the Government also in aerial bombardment) that has killed a substantial number of civilians in circumstances that sometimes suggest a failure to respect rules on proportionality and precautions in attack. The LTTE has also stepped up its indiscriminate attacks on civilians for the apparent purpose of terrorizing the population.

13. At another level, the view that human rights violations are necessary has led the Government and the LTTE to see human rights defenders as traitors and enemies and any mechanism for providing accountability as an obstacle to victory.

14. This would appear to explain why the recommendations of the Special Rapporteur to the Government and the LTTE have been almost completely disregarded. It does not, however, explain why there has been no meaningful responses by the Human Rights Council or the General Assembly. Even when the Special Rapporteur stated unambiguously that "[t]oday the alarm is sounding for Sri Lanka" and that "[i]t is on the brink of a crisis of major proportions" and provided recommendations as to how the General Assembly could take

steps to avert this crisis, no action was taken. This follow-up report provides an opportunity for action. The international community, including the Human Rights Council, ought to make clear to both parties to the conflict that impunity is impossible in the long-run and that international support and condemnation are tied to respect for human rights.

B. Compliance with human rights and humanitarian law

1. Overview

15. In his report, the Special Rapporteur observed that extrajudicial executions were proving fundamental to the erosion of the ceasefire. He recommended that the Government take a number of immediate steps to comply with its existing human rights obligations, that the LTTE take concrete steps to demonstrate that it was serious about its professed commitment to human rights, and that all parties to the conflict comply with their legal obligations under common Article 3 of the Geneva Conventions of 12 August 1949 and customary international humanitarian law. In particular, the Special Rapporteur noted, humanitarian law requires respect in the conduct of hostilities for the distinction between civilians and combatants and prohibits the killing of anyone not taking an active part in hostilities.

16. Since that time, the Government and the LTTE have engaged in a new round of hostilities characterized by exceptional brutality and disregard for international human rights and humanitarian law. According to one source, "A conservative estimate for total civilian deaths would be at least 1,500."[4] The number of deaths of combatants has been far higher. A Government official has estimated that between 2006 and 2007, 1,233 Government personnel and 4,800 LTTE cadres were killed.[5]

17. Without effective independent human rights monitoring in many areas, it is difficult to distinguish lawful from unlawful killings and track precisely the number of violations of human rights or humanitarian law, but evidence from numerous sources makes it clear that extrajudicial executions are widespread throughout the country. There is, however, significant regional variation in both the level and pattern of abuse.

2. Government-controlled areas of Jaffna

18. In the Government-controlled areas of Jaffna, Government security forces, supported by the Eelam People's Democratic Party (EPDP), regularly kill civilians suspected of serving as LTTE informants. It appears that persons are suspected of acting as informants based on their record of past collaboration with the LTTE. Such collaboration can range from having attended an LTTE rally to having received its military training. According to some sources, Government forces will attempt to identify such people at checkpoints and during cordon-and-search operations, confiscate their identity cards, and require them to report to a military base. The individuals are then interrogated. If the soldiers conclude that they are LTTE collaborators, they are at risk of being killed. If the soldiers conclude that they are not, they are likely to be threatened with death unless they provide names of actual LTTE collaborators. Given Jaffna's history of LTTE control, nearly everyone has had some - voluntary or involuntary - association with the LTTE, and who survives and who is killed appears to have little relationship to what they have done. The LTTE also commits

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[4] International Crisis Group, *Sri Lanka's Return to War: Limiting the Damage* (20 February 2008), page 9.

[5] *Cited in ibid.*, page 5.

extrajudicial executions against suspected informants; however, in the Government-controlled areas of Jaffna, the number killed by the LTTE is much lower than the number killed by the Government.

19. There are no exact statistics on the number of extrajudicial executions in Jaffna. In part, this is because enforced disappearances are common, and while many of the disappeared are ultimately executed, many others are not. An informed estimate is that from January 2006 through November 2007, the security forces committed a total of 700 extrajudicial executions in Jaffna.[6] The EPDP has also been implicated in a large number of these cases.

20. There is also a high-rate of extrajudicial execution in other Government-controlled areas in the north, including Vavuniya and Mannar. One study documented 27 civilians killed (along with 30 disappeared) in Mannar between January 2007 and August 2007. In Vavuniya, over the same period, it documented 130 civilians killed and 14 disappeared.

3. The Wanni

21. The Wanni comprises the districts of Kilinochchi and Mullaitivu along with some of Mannar and Vavuniya. This area is under LTTE control but is subject to continual Government bombardment and incursions.

22. Presumably there are cases of LTTE killings within this area, whether by its fighters or pursuant to the orders of its judiciary, but the Special Rapporteur is not aware of any reliable statistics on these killings. The NorthEast Secretariat on Human Rights (NESOHR), which is based in the LTTE's administrative centre of Kilinochchi, ignores violations committed by the LTTE.

23. A number of people have been killed in aerial bombardment by the Government. NESOHR records such attacks as having killed 38 civilians during 2007 and 12 in the first two months of 2008.[7] Whether all of these individuals were civilians has been contested by the Government. In the absence of independent human rights monitoring, it is impossible to be certain.

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[6] This estimate derives from the overlapping statistics of a variety of sources and is given in University Teachers of Human Rights (Jaffna), *Slow Strangulation of Jaffna: Trashing General Larry Wijeratne's Legacy and Enthroning Barbarism* (December 2007). A study by the Law and Society Trust and four national non-governmental organizations documented that, from January 2007 through August 2007, 178 civilians were killed and 271 civilians were disappeared in the district of Jaffna. Civil Monitoring Commission, Free Media Movement, Law and Society Trust, *Second Submission to the Presidential Commission of Inquiry and Public on Human Rights Violations in Sri Lanka: January - August 2007* (31 October 2007). Two other organizations involved in producing the report "did not wish to be named". The information on which the report was based was gathered through "direct reporting of incidents by witnesses or family members to organizations with a district presence (ie, offices or individuals)" and "Tamil, Sinhala and English media monitoring". The report notes that "this is not, nor is it intended to be, an exhaustive document and is the result of work done in a difficult, hostile and dangerous environment, with concerns for the physical safety of human rights defenders involved."

[7] North East Secretariat on Human Rights (NESOHR), *Annual Report on Human Rights - 2007* (5 January 2008); NESOHR, *Monthly Report - January 2008* (7 February 2008); NESOHR, *Monthly Report - February 2008* (5 March 2008).

4. The East

24. The East comprises the districts of Ampara, Batticaloa, and Trincomalee. At the time of the Special Rapporteur's visit, all major cities in this area were controlled by the Government, but significant swathes of the countryside were controlled by the LTTE. However, between mid-2006 and mid-2007 the Government succeeded in eliminating nearly all LTTE presence in the East. A large number of civilians also died in the course of military confrontations during this campaign. Estimates place the number of such civilian deaths as between 300 and 500.[8]

25. Today, Government security forces, supported by the (factionalized) Tamileela Makkal Viduthalai Pulikal (TMVP), regularly kill civilians due to their purported links to the LTTE. There are similarities to the situation in Jaffna, but there are also differences: Many areas were under LTTE control until quite recently, and the TMVP paramilitary group only split from the LTTE in 2004.

26. According to one study, from January 2007 through August 2007, 261 civilians were extrajudicially executed and 74 were disappeared.[9]

27. A particularly common scenario appears to be that someone who is believed to have previously supported the LTTE is killed for failing to provide requested assistance to the TMVP. There is also an electoral dimension to this violence as the TMVP attempts to displace other political parties as the representative of Tamils in the East.

5. The South

28. The area is under Government control. Indeed, the state of Tamil Eelam which the LTTE aims to establish does not include the South, so this area is not actively contested.

29. Probably for this reason, individuals are selectively killed in the South with less frequency than in the North and East. According to one study, from January 2007 through August 2007, 24 civilians were extra-judicially executed and 78 were disappeared in the southern districts of Anuradhapura, Colombo, and Polonnaruwa.[10]

30. However, the LTTE has resorted to indiscriminate attacks on civilians apparently designed to terrorize the population. In an extremely worrying trend, such attacks became common in the first months of 2008. In February 2008 alone, there were at least six attacks against civilian objectives using bombs or claymore mines that were most likely committed by the LTTE. More than 70 civilians have died in such attacks so far this year.

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[8] *See* International Crisis Group, *Sri Lanka's Return to War: Limiting the Damage* (20 February 2008), page 9.

[9] Civil Monitoring Commission, Free Media Movement, Law and Society Trust, *Second Submission to the Presidential Commission of Inquiry and Public on Human Rights Violations in Sri Lanka: January-August 2007* (31 October 2007).

[10] Civil Monitoring Commission, Free Media Movement, Law and Society Trust, *Second Submission to the Presidential Commission of Inquiry and Public on Human Rights Violations in Sri Lanka: January - August 2007* (31 October 2007).

C. The ceasefire monitoring mechanism and civilian protection

31. The Sri Lanka Monitoring Mission (SLMM) established to monitor the Ceasefire Agreement (CFA) no longer exists. While it was still operating it made a significant and successful effort to implement the recommendations directed to it by the Special Rapporteur.

32. During his visit, the Special Rapporteur concluded that the SLMM could be strengthened in ways that would permit it to improve respect for human rights. The CFA prohibited not only "offensive military operation[s]" but also "hostile acts against the civilian population". However, the SLMM had placed a low priority on this aspect of its mandate. The Special Rapporteur recommended that the SLMM be made more independent of the peace process, issue public reports, and prioritize civilian protection.

33. Following the Special Rapporteur's visit, the Government of Norway and SLMM took various actions that represented a real attempt to play a more effective role in responding to human rights violations. In March 2006, Major General Ulf Henricsson of Sweden was appointed Head of Mission of SLMM, reducing Norway's conflict of interest between providing accountability for violations and advancing the peace process. In April 2006, SLMM began to exhibit a greater concern with violence directed against civilians, referring for the first time to the "extrajudicial killings of civilians".[11] In a number of subsequent reports, the SLMM attempted to clarify responsibility for attacks on civilians.

34. Unfortunately, within six months of making these reforms, the SLMM was severely weakened by the decision of LTTE to insist on the withdrawal of monitors who were nationals of EU member States. The SLMM ended its work when the CFA was formally terminated on 16 January 2008 following a declaration by the Government.

D. International human rights monitoring

35. In the Special Rapporteur's report on his visit to Sri Lanka, he recommended the establishment of an international human rights monitoring mission.[12] In a subsequent report to the General Assembly, following the expulsion of EU nationals from the SLMM, he emphasized the urgency of this need and elaborated on why international human rights monitoring could play an important role in Sri Lanka.[13] He observed that the conflict between the Government and LTTE is ultimately a struggle for legitimacy, not territory. In other words, the conflict has no military solution, and mere adjustment of the facts on the ground will not fundamentally change either party's position in future negotiations. Thus, precisely because the struggle for legitimacy, including international legitimacy, is so central to this conflict, the international community is exceptionally well positioned to contribute to its amelioration and, ultimately, to its resolution. Thus the critical need is for international human rights monitoring that would definitively identify those responsible for abuses. Effective monitoring would stand a real chance of inducing genuine rather than simulated respect for human rights. Such respect - worthwhile in its own right - would, in turn, also create an environment in which the country's communities might be able to envision a future in which they did not fear peace as well as war. These considerations remain valid today as an increase in human rights abuse has been accompanied by a decrease in human rights monitoring of any form.

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[11] SLMM, press release of 29 April 2006.
[12] *See also* A/61/311, paras. 18-23, 67.
[13] A/61/311, para. 21.

36. The Government has made no progress in implementing this recommendation and, since the Special Rapporteur's visit, the need for an international human rights monitoring mission has increased significantly. On the one hand, the level of human rights abuse has increased immensely. On the other hand, national mechanisms for human rights monitoring have been continuously weakened.

37. The National Human Rights Commission (NHRC) is no longer independent of the executive branch of Government since its members are now directly appointed by the President. (See Part II(F).) Since the appointment of new members, the NHRC has not issued any reports on high profile human rights violations. It has, moreover, refused even to regularly release information on the allegations that it has received. The NHRC no longer meets the requirements laid out in the Principles relating to the status and functioning of national institutions for protection and promotion of human rights ("Paris Principles"),[14] and it has been demoted to "observer status" by the international body charged with monitoring compliance with these principles.[15]

38. The Government has cited the establishment of a commission of inquiry into 15 high-profile incidents (a 16th was subsequently added) involving extrajudicial executions as reflecting its seriousness about human rights accountability. Indeed, when the President announced his intention to invite an international commission to inquire into recent killings, disappearances and abductions in Sri Lanka, the Special Rapporteur noted that the establishment of a "truly independent international inquiry" was "a potentially very important initiative".[16]

39. The commission has, however, failed to provide accountability for extrajudicial executions. In the end, instead of inviting an international commission of inquiry, the Government established a national commission of inquiry complemented by an international body charged with, inter alia, "Observ[ing] . . . the investigations and inquiries conducted by the Commission of Inquiry, with the view to satisfying that such inquiries are conducted in a transparent manner and in accordance with basic international norms and standards pertaining investigations and inquiries." The individuals appointed to the International Independent Group of Eminent Persons (IIGEP) were highly respected lawyers with deep commitment to human rights. As an indication of the caliber of individuals involved, the chairman was P.N. Bhagwati, who was formerly Chief Justice of the Supreme Court of India and who currently serves on the UN Human Rights Committee.

40. The conclusion of the IIGEP that the commission of inquiry has been an ineffective mechanism for providing accountability must be given great weight:

> In summary, the IIGEP concludes that the proceedings of inquiry and investigation have fallen far short of the transparency and compliance with basic international norms and standards pertaining to investigations and inquiries. The IIGEP has time and again pointed out the major flaws of the process: first and foremost, the conflict of interest at all levels, in particular with regard to the role of the Attorney General's Department.

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[14] GA Res. 48/134 (20 December 1993).

[15] International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, "Report and Recommendations of the Sub-Committee on Accreditation" (22 to 26 October 2007).

[16] Press Statement, 5 September 2006.

Additional flaws include the restrictions on the operation of the Commission through lack of proper funding and independent support staff; poor organization of the hearings and lines of questioning; refusal of the State authorities at the highest level to fully cooperate with the investigations and inquiries; and the absence of an effective and comprehensive system of witness protection.

The Eminent Persons are fully aware of the overall context in which the Commission is operating, which makes its activities, however diligent, incapable of eliciting the kind of facts that would be necessary to ensure that justice is seen to be done. Underlying it all was the impunity that had led to the prior fruitless investigations that, in turn, led to the setting up of the Commission. There is a climate of threat, direct and indirect, to the lives of anyone who might identify persons responsible for human rights violations, including those who are likely to have been committed by the security forces. Civilian eye witnesses have not come forward to the Commission. Security forces' witnesses preferred to make themselves look incompetent rather than just telling what they know. Accordingly, it is evident that the Commission is unlikely to be in a position to pursue its mandate effectively.

These inherent and fundamental impediments inevitably lead to the conclusion that there has been and continues to be a lack of political and institutional will to investigate and inquire into the cases before the Commission.[17]

41. The IIGEP explained that it was, thus, "terminating its role in the process not only because of the shortcomings in the Commission's work but primarily because the IIGEP identifies an institutional lack of support for the work of the Commission".[18]

42. There are number of other actors that potentially play ad hoc but vital roles in ensuring some measure of human rights monitoring in conflict-affected areas. These include humanitarian organizations, individual and organized human rights defenders, and journalists. Unfortunately, the Government has placed severe restrictions on access to the areas of conflict, especially for those involved in protection. Moreover, such individuals have been targeted with impunity, greatly impeding the role they can play in providing protection.

43. According to a study by the Law and Society Trust, from January 2006 through December 2007, 44 humanitarian workers were killed, and 23 were disappeared.[19] The worst affected organizations were Action Contre la Faim (17 dead), the Tamils Rehabilitation Organization (9 dead), the Danish Demining Group (6 dead), Halo Trust (6 dead), and the Sri Lanka Red Cross Society (4 dead), but a total of more than 18 organizations have been affected. While most of these individuals were involved in the provision of humanitarian aid rather than human rights monitoring or protection activities, their deaths demonstrate the enormous challenge facing any private initiative to reduce the brutality of the conflict.

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[17] IIGEP, Public Statement, 6 March 2008.

[18] IIGEP, Public Statement, 6 March 2008.

[19] Law and Society Trust, *Under Fire: Persons in Humanitarian Service: A Preliminary Report on Killings and Disappearances of Persons in Humanitarian Service in Sri Lanka, January 2006-December 2007* (7 March 2008). The list of humanitarian workers killed was compiled "based on information available to us via staff of humanitarian agencies, other civil society groups and media, as well as information gathered through frequent visits to the North and East". While all of those listed had been involved in humanitarian service, the report notes that, "It is often not clear whether the incidents are the result of the person's involvement with a particular organization or project, or the nature of their work, or whether it is due to reasons that have nothing to do with these involvements."

44. Human rights defenders run enormous risks in tracking violations and advocating for justice. The attacks on the Civil Monitoring Commission (CMC), which tracks disappearances and extrajudicial executions, provides one prominent example. In November 2006, Nadaraja Raviraj, co-founder of the Civil Monitoring Commission was killed in broad daylight in Colombo. Mano Ganesan, also a co-founder of that organization, has expressed serious and well-founded fears for his own safety.

45. The significant number of journalists killed—depending on the criteria used, between 6 and 10 have been killed since 2006[20]—has also prevented and deterred the press from closely scrutinizing conflict-related violence.

46. The Government has permitted the resident UN Senior Human Rights Advisor to expand the UN mission's capacity for providing technical assistance to Government institutions. However, there is still no OHCHR office with a monitoring and reporting mandate.

47. While the need to establish an international human rights monitoring mission has grown, no such mission can be established without the consent of the Government and the cooperation of all parties. The Government has steadfastly and actively opposed any such initiative.

E. The Government's reliance on paramilitary groups

48. The Government has relied extensively on paramilitary groups to maintain control in the East and, to a lesser extent, in Jaffna. There is evidence that these groups conduct operations with the Government forces and are responsible for extrajudicial executions.

49. In March 2004 the LTTE commander of the Eastern Province, Vinayamurthy Muralitharan, who is better known by his alias, "Karuna", split with the LTTE leadership in the Northern Province, initially taking with him perhaps one fourth of the LTTE's cadres. At the time of the Special Rapporteur's visit, the relationship between the Government and the Karuna group remained unclear. The Special Rapporteur observed that many of the people he spoke with in the Army and the Police Special Task Force (STF) noted that the split had been beneficial for the Government. However, the Special Rapporteur found "no clear evidence of official collusion" but only "strong circumstantial evidence of (at least) informal cooperation between Government forces and members of the Karuna group".[21] Noting that facilitating the Karuna group's actions would show a dangerous indifference to the many civilians in the East who have been killed as a consequence of the low-intensity conflict, he recommended that the Government should publicly reiterate its renunciation of any form of collaboration with the Karuna group, and should demonstrably take action to discipline military officers who breach this rule.

50. The situation has changed dramatically since the Special Rapporteur's visit took place. In March 2007, the Government claimed to have succeeded in retaking all LTTE-controlled areas in the East. Shortly thereafter, the Karuna group - which has rechristened itself as a political party, the TMVP - broke into factions headed by Karuna and Pillaiyan (the

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[20] Committee to Protect Journalists (www.cpj.org); Reporters sans Frontières (www.rsf.org). The Government provided information on some of these cases in a letter received 21 November 2007 and reproduced in the addendum to the annual report concerning communications.

[21] E/CN.4/2006/53/Add.5, para. 16.

commonly used alias of Sivanesathurai Chanthirakanthan). While Karuna has since been detained in the United Kingdom, accounts indicate that there continue to be multiple factions with distinct chains of military command. There are also strong indications that these factions no longer constitute truly independent armed groups but instead receive direction and assistance from the security forces.

51. In Jaffna, another paramilitary group, the EPDP, also works closely with Government security forces and is dependent on their protection and support. The EPDP dates from an earlier era than the TMVP factions. When the conflict began, there were other Tamil militant groups fighting alongside the LTTE. However, during the 1980s the LTTE repeatedly attacked these groups, killing many of their members. Some of the groups subsequently cooperated with the Indian Peace Keeping Force (1987-1990) or the Government in fighting the LTTE, and many of them also entered into electoral politics. The CFA required the Government to disarm these groups. The Special Rapporteur noted that compliance had not been perfect - for example, a government official had confirmed that armed EPDP cadres continued to operate in the islands off the Jaffna peninsula - but he found that there was little evidence that most members of these groups do other than non-military, political work. As a general observation, this remains true, but there is substantial evidence that today the EPDP is committing extrajudicial executions in support of the Government security forces in Jaffna.

52. The Government has completely failed to comply with the recommendation made by the Special Rapporteur that it renounce all collaboration with the Karuna group. Instead, the Government has intensified its collaboration with a range of paramilitary groups. The Government should recognize that, regardless of the formal relationship between its security forces and these paramilitary groups, it cannot avoid international legal responsibility for their actions.[22] Military commanders and other Government officials should also recognize that acting through a paramilitary group will not suffice to prevent them from having individual criminal responsibility for extrajudicial executions and other abuses.

F. Policing and police accountability

53. During his visit, the Special Rapporteur found that the police failed to respect or ensure the right to life. He noted that the underlying cause was that the police had become a counterinsurgency force. Police officers were accustomed to conducting themselves according to the broad powers provided them under emergency regulations rather than to those provided by the code of criminal procedure. Indeed, most police officers had never received significant training in criminal detection and investigation. The police force also lacked the language skills to effectively police in the Northeast, given that the force was only 1.2 per cent Tamil and 1.5 per cent Muslim with few Sinhala officers speaking Tamil proficiently.

54. The Special Rapporteur observed that these deficiencies in the police force had resulted in failures to respect and ensure the right to life. There were a number of credible reports of police summarily executing suspects, and the widespread use of police torture had resulted in additional deaths. The Government had also failed to effectively investigate most political killings. This was due partly to the police force's general lack of investigative ability and partly to its reluctance to pursue cases that might implicate the ceasefire.

55. The Special Rapporteur found that the Government's response to human rights violations by the police was unsatisfactory. The system for conducting internal police inquiries was structurally flawed and, indeed, inquiries had not been held into the cases the

[22] E/CN.4/2005/7, para. 69.

Special Rapporteur presented to the Government. The one relatively bright spot was the National Police Commission (NPC), which had been established in 2001 by a constitutional amendment with a mandate to conduct independent investigations and effective disciplinary procedures for police misconduct. While many actors had favorable impressions of its early efforts to improve accountability, the Special Rapporteur noted that the NPC's long-term effectiveness was threatened by the lack of a strong constituency supporting its independence.

56. More than two years later, the Government has completely failed to implement the Special Rapporteur's recommendations for improving police respect for human rights, police effectiveness in preventing killings, and police accountability. Indeed, there has been significant backward movement.

57. Rather than improving the investigative and crime prevention capacity of the police, the Government has even more completely subordinated the police to the counterinsurgency effort. Since the Special Rapporteur's visit took place, the Government has required the Inspector General of Police to report to the Minister of Defence.

58. Emergency regulations that erode the distinction between police work and military operations continue in force. The military is not required to have a police officer accompany them when they make arrests. The regulations allow for arrests without warrants or evidence of terrorist involvement and detentions without charge for up to 90 days. They also include an immunity clause for officials who commit wrongful acts in the implementation of the regulations.[23]

59. Since the Special Rapporteur visited, the NPC has failed to improve police accountability in part because it has lost its independence. The constitution attempted to ensure the NPC's independence from the executive branch by requiring that its members be appointed by the Constitutional Council (CC). The CC, in turn, was to comprise persons appointed through a process that involved the President, the Prime Minister, and the parliamentary opposition. At the time of the Special Rapporteur's visit, there was an impasse that had prevented one member of the CC from being appointed. In response, the President subsequently directly appointed individuals to the NPC. The Special Rapporteur noted at the time that there is no worse means by which to ensure an oversight body's independence from the executive than for the executive to directly appoint its members.[24] The subversion of the NPC's independence has, however, grown increasingly indefensible. In December 2007 the impasse was broken when the minority parties agreed on a common nominee for the open position on the CC. The President has, however, refused to formally appoint the nominee, instead proposing that the constitution be amended to change the character of the CC. The President has made a clear decision to ensure that Sri Lanka has no independent police oversight body. The President's actions have also undermined the independence of the NHRC and of the Judicial Services Commission, seriously compromising the very idea that the executive branch should be subject to external oversight.

60. There is only one police-related recommendation in relation to which the Special Rapporteur is aware of any positive action. The Government has informed the Special

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[23] *Regulations made by the President under Section 5 of the Public Security Ordinance (Chapter 40)* (13 August 2005), art. 73: "No action or other legal proceeding, whether civil or criminal, shall be instituted in any court of law in respect of any matter or thing done in good faith, under any provisions of any emergency regulation or of any order or direction made or given thereunder, except by, or with the written consent of, the Attorney-General."

[24] A/61/311, para. 27.

Rapporteur that the government "engaged in a proactive programme of recruitment" and has now trained 200 new Tamil speaking police officers.

G. Dialogue with the Tamil diaspora

61. In his report, the Special Rapporteur noted that Governments as well as armed opposition groups are generally constrained to take account of human rights by the need to retain popular support within their constituencies. He observed that the LTTE has, however, been able to circumvent many of these constraints by relying so heavily for its financial and political support on a constituency that is largely exempted from its violence, the Sri Lankan Tamil diaspora. The Special Rapporteur stated that the diaspora must accept the responsibility that comes with influence and insist on being a positive force for human rights. With this in mind, he recommended that the Governments of the states in which they live should enter into a serious dialogue with them on the findings in this report and the opportunities they might have to promote respect for human rights.

62. Since that time, some of the relevant Governments have made efforts to improve dialogue with members of the Tamil diaspora. Particularly notable has been the inclusion of members of the Tamil diaspora holding a range of political views in hearings held by the Parliament of the United Kingdom and the Congress of the United States of America.

H. Compensation for families victimized by extrajudicial executions

63. The Special Rapporteur noted that arrangements for providing compensation to families of non-combatants subjected to extrajudicial execution were "uneven at best, and non-existent at worst". He recommended that the Government provide an analysis of who gets compensation and under what circumstances and to put in place a revised set of arrangements intended to ensure fair and equitable access to compensation. The Special Rapporteur has not received any information indicating that this has occurred.

I. Rome Statute

64. The Special Rapporteur recommended that the Government should ratify the Rome Statute of the International Criminal Court without reservation or declaration and that members of the Sri Lanka Army and LTTE fighters should be made aware of the rules of individual criminal responsibility and be trained in the provisions of international criminal law. The Government has not ratified the Rome Statute.

J. Recommendations directed at the Liberation Tigers of Tamil Eelam

65. The Special Rapporteur recommended that the LTTE should stop committing extrajudicial executions, including of non-LTTE-affiliated Tamil civilians. The Special Rapporteur had found that the LTTE classified its political opponents within the Tamil community as "traitors" and used to killings to enforce obedience. He found that many people —most notably, Tamil and Muslim civilians—faced a credible threat of death for exercising freedoms of expression, movement, association, and participation in public affairs. The LTTE has not changed its approach to dissenters within the Tamil community, and these killings continue.

66. As a first step toward accepting accountability, the Special Rapporteur also recommended that the LTTE denounce and condemn any killing attributed to it for which it denied responsibility. The Special Rapporteur noted that mere denials were neither adequate nor convincing. In a report to the General Assembly, the Special Rapporteur pointed to the LTTE's response to allegations that it had attacked a bus full of civilians as representing some progress in implementing this recommendation.[25] The LTTE had issued a statement that, "LTTE condemns this attack on the civilian bus. Directly targeting civilians, as the Kebitigollawe claymore attack has, cannot be justified under any circumstances."[26] He noted that while the statement did not clarify the responsibility of any party, it did demonstrate an important evolution in the acceptance by LTTE of its moral responsibility to denounce attacks on civilians. (When the Special Rapporteur spoke with Mr. Thamilchelvan, then chief of the LTTE political wing, during his visit, he had categorically refused to denounce particular attacks as incompatible with the role of LTTE as a people's movement.) However, since that time, the LTTE has ceased to denounce and condemn killings that have been attributed to it. The LTTE has, for example, failed to denounce and condemn the attacks on buses that have killed scores of civilians this year. The Special Rapporteur also recommended that the LTTE should refrain from providing arms, training and encouragement to civilian proxies and self-defence organizations. Reportedly, the LTTE continues to train and deploy a civilian "people's force".

K. Conclusion

67. The Government has almost entirely disregarded the recommendations made by the Special Rapporteur in his report on his mission to Sri Lanka. In most areas, rather than adopting reforms, the Government has taken steps that reverse past reforms. The LTTE has also comprehensively disregarded the recommendations made by the Special Rapporteur.

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[25] A/61/311, note 18.

[26] The Liberation Tigers of Tamil Eelam Peace Secretariat, press release of 15 June 2006.

NO HABEAS CORPUS – THE FRUSTRATION WITH ACTIVISM ON DISAPPEARANCES IN SOUTH ASIA

Ingrid Massage[*]

Apprehending people and then denying any knowledge about them has, in recent decades become an established practice for governments across South Asia, especially during counter-insurgency operations. Indeed, with the 25th annually commemorated International Day of the Disappeared taking place on 30 August 2008, the situation looks almost as bad as any time over the past quarter-century, with disappearances taking place on a regular basis in several parts of the South Asia region. Moreover, there is hardly any accountability, and impunity remains rampant essentially everywhere.

In Sri Lanka, more than 30,000 people (most likely the largest number per-capita in South Asia) are thought to have "disappeared" over the past two decades. In India's Punjab state, thousands of secret cremations of individuals killed while in police custody throughout the 1980s, have been uncovered in just a single district. Numerous others are known to have disappeared in Punjab, as well as in Kashmir, Andhra Pradesh, the Northeast and, most recently, in Chhattisgarh. Since the peak of the insurgency in Kashmir in 1989, some 7,000 people have been made disappeared at the hands of Indian security forces, according to local activists.

In Pakistan, an increase of disappearances has taken place since October 2001, as hundreds have gone missing in the context of counter-insurgency measures in the US-led 'war on terror', including through renditions to US authorities. Unrest in Balochistan and Sindh over the past several years meanwhile, has also resulted in hundreds of disappearances of Baloch and Sindhi nationalists. In Nepal, around 900 people are now estimated to have been disappeared at the hands of the security forces, in addition to around 300 at the hands of Maoist rebels over the course of the decade-long civil war. Even in Bhutan, the UN records that five people were reported as having been disappeared. In Afghanistan meanwhile, possibly tens of thousands are thought to have been disappeared at the hands of different armed entities over the years of conflict, though exact figures are impossible to come by. Finally, in Bangladesh, a few disappearances were reported during the violence in the Chittagong Hill Tracts in the 1980s, besides those who went missing during the 1971 War of Liberation. It is notable however, that disappearances have not been a feature of state repression in Bangladesh.

Constricted activism

Of course, violations are not taking place in a political vacuum. Amid the large number of politically driven insurgencies in South Asia, rebel groups too have not shrunk from utilising disappearance as a tactic. However, many South Asian governments have yet to be made accountable for by far the largest number of persons who have gone missing. State apparatuses across the region continue to fail to address reports of disappearances, and very few perpetrators have ever been brought to justice anywhere—a fact that can be argued as leading directly to the continuation of such abuses. This has left a significant burden on the civil society of each country to respond to and maintain pressure on their government, and

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other violators. At the same time though, the civil-society reaction itself has sometimes been difficult.

The mainstay of activism on disappearances has been led by local human rights organisations. These groups assist affected families in taking legal action, pressuring authorities, providing counselling, and mounting strategic challenges to government when they deny knowledge of the disappeared. These activist organisations also seek out the help of the media, the judiciary, national human rights commissions, international NGOs and United Nations agencies. The most significant actors in leading these campaigns are often the families of the disappeared themselves. In this, one thinks of brave individuals such as Devi Sunuwar, the mother of Maina Sunuwar, a 15-year-old girl who was made disappeared in Nepal in 2004; Manorani Saravanamuttu, the mother of Richard de Soyza, a journalist who was made disappeared in Sri Lanka in 1990; and Jai Kishor Karna, the father of Sanjiv Kumar Karna, a student who was made disappeared in Nepal in 2003. Manorani, who founded the Mothers' Front, died in 2001 without seeing those responsible for her son's disappearance and death, brought to justice. Devi and Jai, meanwhile, continue their fight.

Relatives of the disappeared have indeed garnered significant influence. At the same time though, rarely have the families of those made disappeared at the hands of armed opposition groups, become united with the families of those made disappeared at the hands of state agents. One can certainly see the potential power that such coalitions could wield. But this chasm is a manifestation of the deeper political differences that accompany conflict. In Sri Lanka, the Mothers' Front and others operating in the South of the country have tried to link up with families of the disappeared in Jaffna in the North, as well as with the relatives of security forces personnel gone missing in action. But such coalitions have not gelled. One notable exception has been in Bardia District in the western plains of Nepal, where families of those made disappeared at the hands of both the security forces and the Maoists have joined hands to fight for justice.

Other efforts at broad-basing work on disappearances have likewise had limited success. In general, disappearances related efforts are considered the domain of urban NGOs with a focus on civil and political rights. Thus far, NGOs working on disappearances have largely failed in building bridges with counterparts working on issues of discrimination or on economic, social and cultural rights. But the fact is that the bulk of the disappeared come from disadvantaged communities in the rural areas. For example, though the Bardia District has the highest number of disappearances in Nepal, very few cases were reported until many years later, after the end of the armed conflict. It was only then that the local community of disadvantaged, indigenous people were finally able to link with the largely Kathmandu-based NGOs and international agencies involved in this issue.

This inability to connect the issue of disappearance and impunity to broader concerns could also explain some of the public apathy and lack of mass support for these issues and related campaigns. Indeed, it has been a notable facet of anti-disappearance campaigns in South Asia over the years that they have garnered only very little prominence within the media. By and large, the South Asian media shy away from the issue, especially if the violations are occurring in the context of armed conflict, as can notably be seen in Sri Lanka, Kashmir and the Indian Northeast. There are, however, certain laudable exceptions to this—for instance, intense media coverage has been given to cases of the disappeared over the last three years in Pakistan, with the issue becoming one of the platforms for widespread anti-government protests.

Compensation culture

While the majority of groundwork on disappearances is being done by families of the disappeared and the civil society, national human rights commissions and the judiciary are at times able to bring only a modicum of certainty in to the lives of the relatives of the disappeared. In Afghanistan, in the context of a weak civil society and government, the role played by the Afghan Independent Commission on Human Rights in bringing issues of transitional justice on to the political agenda needs to be applauded. Though so far no one has been held accountable for past human rights abuses, as justice has been sidelined in favour of security considerations and political objectives, the Commission has acted on information about mass graves (with the assistance of the UN mission in Afghanistan, UNAMA), despite a lack of capacity and a very difficult security situation in much of the country.

Much of the time, national human rights commissions are forced to give in to political imperatives when it comes to challenging the security forces, including in relation to investigations in to disappearances. In December 2007, Sri Lanka's Human Rights Commission became the first in South Asia to be downgraded to the 'observer status' by the international body governing national human rights bodies. The reason given was the Colombo government's negative influence on the Commission's independence.

If anything, in lieu of prosecution, compensation has become the norm in cases of disappearance in South Asia. The Indian Supreme Court set the example in 1984 when it ordered the State to pay compensation to the families of C. Daniel, a school headmaster in Manipur, and C. Paul, a pastor, both of whom had been made disappeared following their arrests in 1982. Years later, the Sri Lankan Court of Appeal followed suit, and started to award 'exemplary costs' in *habeas corpus* (Latin term for 'you have the body') court cases. As noted earlier however, beyond such actions of compensation, criminal conviction remains extremely rare. In India, the conviction of six police officers by the Punjab courts in 2005 for the abduction and killing of Jaswant Singh Khalra was a notable exception, but one that only resulted from massive national and international outrage. The Sri Lankan High Courts also have in rare cases convicted those responsible for disappearances—interestingly, twice in cases involving children.

Any exception to the trend of compensation in place of conviction is generally attributed to an individual judge or commissioner, rather than due to any commitment for justice at the institutional level. This underscores the most crucial problem in tackling disappearances: the criminal justice systems in South Asia are not tailored to deal with crimes against humanity. In the countries of the region, violations such as disappearances are still not defined as crimes, nor has 'command responsibility' (that is, a senior who gives an order is held culpable together with the junior who executed the order). In several countries—Bangladesh, Sri Lanka and India, and currently under discussion in Nepal—amnesty for security forces acting in the line of duty (or for those who have laid down their arms, and are abiding by the Constitution, as in Afghanistan) has been incorporated in to law.

Amidst such a situation of impunity, the role of the United Nations in relation to disappearances in South Asia has been significant. The UN Working Group on Enforced or Involuntary Disappearances (a special mechanism set up in mid-1980s) has made significant contributions through yearly reporting, urgent actions and country visits. Another useful mechanism has been the filing of individual complaints to the Human Rights Committee in Geneva under the Optional Protocol to the 1966 International Covenant on Civil and Political Rights (ICCPR); unfortunately in South Asia only Nepal and Sri Lanka have ratified the Protocol.

At the moment, it appears that NGOs and activist organisations are most successful when they work in close collaboration with others, including the United Nations (UN) and other international organisations. Under sustained pressure from national and international actors, states have indeed been forced to respond, though almost always half-heartedly. In Sri Lanka, five commissions of inquiry have been set up; but while some compensation has been paid and death certificates issued (making it possible for widows to receive pensions, or to access their husband's bank accounts), few perpetrators have been brought to justice. Even when compensation was paid in Sri Lanka, it has been used as a tool of political patronage: 100 percent has been paid out in the South, while little or no payments have been made in the East, where most of those made disappeared are Tamil unlike those in the South.

To date, the track record of the response of South Asia's governments to issues of disappearances has been one of success; success in thoroughly frustrating the attempts by families and NGOs to obtain justice. While some instances of concerted, broad-based efforts have been able to force some official action, the farthest this action has gone is in compensating relatives of the disappeared with cash. In this 'compensation culture' that is promoted, for an average of USD 2,500, a government in South Asia thinks it can simply make people forget about the disappeared.

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Ninety-fourth session

concerning

Communication No. 1469/2006[*]

Submitted by:	Yasoda Sharma (represented by Advocacy Forum-Nepal)
Alleged victim:	The author and her husband Surya Prasad Sharma
State Party:	Nepal
Date of communication:	26 April 2006 (initial submission)

The Human Rights Committee, established under Article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2008,

Having concluded its consideration of communication No. 1469/2006, submitted to the Human Rights Committee by Yasoda Sharma under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under Article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication submitted on 26 April 2006 is Mrs. Yasoda Sharma, a Nepalese national born on 3 May 1967, on behalf of herself and her missing husband, Surya Prasad Sharma, born on 27 September 1963. She claims that Nepal has violated Article 2(3) in connection with Articles 6, 7, 9 and 10, by not conducting a thorough investigation of her husband's disappearance. She is represented by counsel, Advocacy Forum - Nepal. Nepal has been a State party to the Covenant and its Optional Protocol since 14 May 1991.

1.2 On 12 February 2008, the State party requested that the admissibility of the communication be examined separately from the merits of the communication. On 29

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

February 2008, the Special Rapporteur on New Communications, on behalf of the Committee, determined that the admissibility and the merits of this case should be considered together.

Facts as presented by the author

2.1 On 12 January 2002, the author's husband returned home after living in hiding for five years as a supporter of the Communist Party of Nepal (Maoist). An application was prepared with the support of some mainstream political leaders for him to surrender, and it was suggested that he submit this application to the Office of the Chief District Officer in Baglung on 14 January 2002. On that day at 5 a.m., a group of 10-15 uniformed army personnel came to the author's residence in Srinigar Tole, Baglung district. They woke up the author and her husband. The captain in charge (whose name is unknown) and another soldier entered the house and removed the author's husband from his bed. He was then taken into custody and informed that he would be taken to the army barracks to be interrogated. The soldiers then searched the house for ammunition and Maoist-related documents. They found nothing. When the soldiers left with the author's husband, the author followed them to the Kalidal Gulm army barracks, where she saw her husband being led inside. She was not permitted to enter the barracks, but was informed that her husband would be released after the interrogation.

2.2 On 15 January 2002, the author went to the army barracks with food and warm clothes for her husband. She was not permitted to visit him. Army personnel also informed her that her husband was safe. On 20 January 2002, she was again prevented from visiting her husband at the barracks. On the same day, a soldier visited her at home, stating that her husband had sent him to collect tobacco for him. The soldier did not disclose his identity. However, he was able to ask for Mr Sharma's preferred tobacco by its exact name. He told her that her husband had been beaten and that she should not tell anyone that he had come to visit her on her husband's behalf. On 22 January 2002, the author heard rumours that her husband had been severely tortured in the barracks.

2.3 On 23 January 2002, the author and her mother-in-law asked again to visit her husband. The soldier at the gate went inside the barrack, came back and told them that Mr. Sharma had escaped on 21 January 2002 while being taken to Amalachour village to reveal the whereabouts of a Maoist hide-out. He repeated what Major Chandra Bahadur Pun had told him, i.e. that Mr. Sharma had drowned in the Kaligandaki River during his escape.

2.4 On 2 February 2002, the author came to the barracks to meet with Major Chandra Bahadur Pun. She enquired about the charge under which her husband was held and his state of health. The Major reiterated that Mr. Sharma had patrolled with troops in order to identify other Maoist 'terrorists' during which time he escaped. The author enquired about his body, in the eventuality that he had been killed by the armed forces. The Major denied that any murder had occurred, refused to disclose any further information and asked her to leave.

2.5 On 3 February 2002, the author contacted the Chief District Officer (CDO) and asked under which law her husband was detained. The CDO claimed that, because of the state of emergency, he could not provide detailed information about her husband's situation. On 4 February 2002, the author approached the District Police Office of Baglung for information on her husband, but was told that they had no time to hear her case. She persistently tried to collect news from the relevant authorities.

2.6 On 12 February 2002, Amnesty International released an Urgent Action appeal for Mr Sharma. On 9 September 2002, the author appealed to the National Human Rights Commission (NHRC). On 20 January 2006, the Commission informed the author that it had

communicated with the relevant authorities, but failed to obtain any further information about Mr. Sharma. The author also contacted several other human rights organisations at various dates, but none were able to assist her.

2.7 On 4 February 2003, the author filed in the Supreme Court a writ of habeas corpus against the Home Ministry, the Defence Ministry, the Police Headquarters, the Army Headquarters, the District Administration Office (CDO) of Baglung, the District Police Office of Baglung and the Khadgadal Barracks of Baglung. On 5 February 2003, the Supreme Court ordered the respondents to show cause and provide reasons for the alleged victim's detention. It received responses from all the respondents between February and April 2003. All, with the notable exception of the CDO, denied the arrest and detention of Mr. Sharma. They stated that they had not made any order for his arrest, had not arrested him and were not illegally detaining him. Furthermore, they demanded that the writ of habeas corpus be quashed. As for the CDO, it responded that its records showed that Mr. Sharma had been arrested by the security forces, had escaped while patrolling and jumped into the river from which he did not emerge. The Supreme Court asked for further details from the CDO. In its reply dated 2 April 2003, the CDO stated that on 21 January 2002, troops from the Kalidal barracks were patrolling with Mr. Sharma around 4 p.m. along Dovan Way when they were ambushed by Maoists. At this point, Mr. Sharma tried to escape, jumped into the river and did not reappear. He was assumed drowned. The CDO stated that this incident was verbally reported to the author.

2.8 The Supreme Court asked for further details to be provided by the Office of the Attorney General which upheld the CDO's description of events regarding Mr. Sharma. It also reported that "the Kalidal Gulm barrack had moved to some other place and the Khadgadal Gulm barrack had come to Baglung. Thus, the latter had neither arrested, nor received any information on Surya's case by the prior barracks." On 12 November 2003, the Supreme Court ordered again the CDO to provide some clarification on the law under which the arrest of Mr. Sharma took place. The CDO replied that he had been arrested by the security forces, in particular those stationed at Kalidal Gulm barrack, under no order or act by the CDO, but for the purposes of their own investigation. The CDO stated that a person could be arrested for interrogation and kept in detention and that Mr. Sharma had died during that time.

2.9 On 12 September 2004, the Malego Commission on the investigation of missing persons (set up in 2004 to publicly declare the location of missing persons) published a list of missing persons which included Mr. Sharma's name and quoted the CDO's response. In a letter dated 2 February 2005, the Home Ministry supported the CDO's response and reaffirmed that Mr. Sharma was not in army custody or placed under their control.

2.10 On 16 February 2005, the Supreme Court quashed the writ of habeas corpus. The author waited for seven months for the grounds under which the writ was quashed to be revealed. On 23 September 2005, she was provided with the decision which stated that since Mr. Sharma had drowned in the river, he was not in the custody or control of the state and that there was thus no need to issue the writ. The Supreme Court took no action to compel the respondents to produce Mr. Sharma's body, regardless of the cause of death, as is required by a writ of habeas corpus.

The complaint

3.1 The author claims that she was not given an effective remedy in violation of Article 2(3). There was no thorough investigation into the disappearance of her husband. While her

husband was arrested during a declared state of emergency, the author recalls that Article 4 does not permit derogations to Articles 6, 7, 8, 11, 15, 16 and 18 of the Covenant, and that in any case, her husband's enforced disappearance was not required by the emergency situation. She argues that the failure to maintain current and accurate records of detainees increases the likelihood of detainees being subjected to torture and other abuses. The Supreme Court did not order an investigation, nor did it bring the perpetrators to justice. The author also argues that the 1996 Torture Compensation Act is of limited assistance since details of the torture inflicted on the victim must be provided and such information is not usually available. She recalls that the Committee has previously held that the failure to provide effective remedies was in itself a violation of the Covenant.[1]

3.2 The author claims that the State's failure to investigate her husband's disappearance breaches its obligation under Article 6. She recalls that States have a responsibility under Article 6 to take measures to prevent disappearances and to effectively investigate them.[2] By taking the author's husband on patrol in a Maoist-controlled area, the army was directly putting at risk his personal safety. It also took no reasonable steps to protect him during the alleged drowning. As of today, there is no independent report as to what has happened to the author's husband while he was in the custody of the army. The author notes that two contradictory responses were given to the Supreme Court. Most authorities claimed that the husband was never arrested or detained by them, while the CDO held that he drowned in a river while trying to escape.

3.3 The author claims that the enforced disappearance of her husband and the ill-treatment he was subjected to constitute violations of Article 7. Her husband was never detained in officially recognised places of detention. The family never knew his exact whereabouts. His name, place(s) of detention and the names of the persons responsible for his detention were never recorded in registers readily available and accessible to his relatives.[3] While the CDO maintains that he was held for a short period of time, without charge, for the purposes of an interrogation, he should have been traceable at all times. The author argues that her husband's arrest and *incommunicado* detention constitutes a breach of Article 7.[4] Moreover, she argues that the anguish caused to herself by her husband's disappearance is also a violation of Article 7.[5]

3.4 The author claims that her husband's rights under Article 9 were violated because he was arrested without a warrant and not informed of the grounds of arrest. He was never charged. Moreover, he was held incommunicado between 14 January 2002 and 21 January 2002 when he allegedly died. He did not have the opportunity to consult a lawyer and could not challenge the lawfulness of his detention.

3.5 The author claims that her husband's rights under Article 10 were violated because he was a victim of an enforced disappearance.

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[1] See Communication No.90/1981, *Luyeye Magana ex-Philibert v. Zaire*, Views adopted on 21 July 1983, para.8.

[2] See Communication No.449/1991, *Rafael Mojica v. Dominican Republic*, Views adopted on 15 July 1994, para.5.5; and Communication No.540/1993, *Celis Laureano v. Peru*, Views adopted on 16 April 1996, para.8.3.

[3] See Human Rights Committee, General Comment No.20, para.11.

[4] See Communication No.950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para.9.5; and See Communication No.440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para.5.4.

[5] See Communication No. 107/1981, *Quinteros Almeida v. Uruguay*, Views adopted on 21 July 1983, para.14.

3.6 With regard to the issue of exhaustion of domestic remedies, the author notes that she has attempted to obtain redress through a habeas corpus writ in order to find out the reasons for her husband's detention and his whereabouts. This was unsuccessful. Under the Judicial Administration Act of 1991, the Supreme Court may review a case decided by itself on two grounds, namely where a new fact arises after the decision and this fact is of vital importance to decide the case, or where the decision is inconsistent with the Supreme Court's previous jurisprudence. However, in the present case, the author cannot seek review on either ground since no new fact has arisen and there are many previous decisions quashing writs of habeas corpus where the respondents deny arrest and detention. The author has also approached the National Human Rights Commission and the Malego Commission, but without success. She considers that she has exhausted all domestic remedies.

3.7 The author requests that the Committee recommend to the State party that it must ensure that her husband's disappearance be thoroughly investigated by an impartial body in order to determine his situation and that this information be communicated to the family. On the basis of that information, the author should be released. If it is established that he has been killed, those responsible for his death should be identified, prosecuted and punished for obstructing the course of justice and causing the death of the author's husband. The State party should ensure that the family receives full and adequate reparation.

State party's observations on admissibility

4.1 By note verbale of 12 February 2008, the State party recalls that the author's husband was arrested by the security forces for an interrogation on his involvement in terrorist activities. While he was accompanying security forces to identify and show the hideouts of the rebels in the Amalachour area in Baglung district on 21 January 2002, they were ambushed and attacked by the rebels. Taking advantage of the situation, the author's husband jumped into the Kaligandaki river and drowned on his escape. He did not emerge from the river and was assumed drowned.

4.2 The State party challenges the admissibility of the communication on two grounds. Firstly, the State party argues that the author has not exhausted domestic remedies. It contends that there are established civil as well as criminal procedures available to the author. The author did not initiate criminal proceedings through the filing of a First Information Report (FIR), which is the starting-point for any legal action. This would have triggered an investigation of the case under the supervision of the Office of the District Attorney. The author could then have gone to the District Court, and then to the Appellate Court. Decisions by the Appellate Court can be appealed to the Supreme Court.

4.3 The State party notes that instead of following the ordinary course of action, the author filed in the Supreme Court a writ of habeas corpus. The State party argues that this is not the normal legal course of justice, but a complement to it. Writ jurisdiction is invoked only when facts and merits are established beyond doubt, but no other legal remedies are available. The author has created a false impression that she has exhausted domestic remedies because she resorted directly to the Supreme Court through her habeas corpus writ petition. In any case, the author failed to seek judicial review by the Supreme Court which has the power to review its own decisions. She passed her own subjective pre-conceived judgment that it was unlikely that the judges would change the decisions made in her case. The State party emphasizes that the exercise of writ jurisdiction by the Supreme Court does not bar in any way the right of an individual to seek a remedy under the ordinary legal procedures. Legal remedies are available and effective.

4.4 While acknowledging that at the time of the arrest of the author's husband, the country was under a declared state of emergency, the State party argues that this situation did not deprive persons from seeking normal legal remedies. It further notes that the Comprehensive Peace Accord signed on 21 November 2006 provides for the establishment of a Truth and Reconciliation Commission whose mandate will be to look into all cases of disappeared persons.

4.5 Finally, the State party argues that counsel does not appear to be authorized to represent the author before the Committee.

4.6 On 11 March 2008 and 5 June 2008, the State party was requested to submit information on the merits of the communication. The Committee notes that this information has not been received. It regrets the State party's failure to provide any information with regard to the substance of the author's claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have taken. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.

Author's comments on the State party's submissions

5.1 On 10 June 2008, the author argues that contrary to the State party's claims, domestic remedies have been exhausted in this case. Firstly, she recalls that there is no specific crime of enforced disappearance and that there is thus no domestic remedy to exhaust. There is no specific prohibition on enforced disappearances under the Interim Constitution. An order by the Supreme Court in 2007 to criminalise enforced disappearances has yet to be acted upon by the government. Under the domestic legal system, it is necessary to file a FIR (First Information Report) with the police for an investigation into an alleged crime to be investigated. Nonetheless, the State party had ample knowledge of the alleged crime through various official and unofficial sources and therefore had a duty to investigate. Indeed, the State party itself acknowledges that "it appears that the case does not seem to be one that can be remedied through a writ petition but might require detailed investigation." The State party failed to mention that a FIR can only be submitted for one of the crimes listed in Schedule 1 of the State Cases Act of 1992. Enforced disappearance is not one of the crimes listed. It is therefore impossible for the author to submit a FIR for the disappearance of her husband. It is also impossible for the author to submit a FIR for the torture of her husband, as torture is not a crime listed in schedule 1 of the State Cases Act. Although the Torture Compensation Act of 1996 allows a family member to make a complaint on behalf of the victim in a "disappearance case", it is impossible meet the burden of proof required by the Act, because a copy of a physical or mental check-up report must be made available to the concerned District Court. While the State party notes that there are civil procedures available to the author, it fails to list the specific remedies available. It is therefore impossible for the author under domestic law to seek redress for the disappearance of her husband as the existing legal system lacks the necessary mechanisms to allow her to submit a complaint to the competent authorities.

5.2 In some cases of disappearances, where it is known that the disappeared person died in custody, relatives have attempted to file FIRs under the State Cases Act for alleged homicide. However, in many cases, the fact that the person died cannot be proved in the absence of a body: filing a FIR for homicide or unlawful death is thus unlikely to lead to a successful investigation and prosecution. In any case, the filing of a FIR has led in some cases (not only

disappearance cases) to threats to the plaintiffs and their families to force them to withdraw the FIR.[6] Moreover, FIRs have been refused by the police for various reasons. On occasion, the police have claimed that the case was a political issue on which it could not take action or that the complaint is against army personnel senior to the police officer and who is still working in the district. If the FIR is refused by the police, it is possible to appeal to CDO (Chief District Officer) and then appeal to the appellate court. However, these appeals are ineffective since there have been several cases where despite an order from the CDO to register the FIR, the DPO (District Police Office) has continued to refuse to take action.

5.3 While the State party claims that the domestic judicial system was functioning properly, the author recalls that even if she had been able to submit a FIR for the "disappearance" of her husband in January 2002, any progress in the police investigation would have stopped by November 2003 when the government established a unified command structure, whereby the police and the paramilitary Armed Police Force were brought under the command of the Royal Nepalese Army. This meant that submitting a FIR to the police about actions taken by the army would not have been investigated independently and impartially. Very few people dared to approach the police during that period and, if they did, the response was that the police had no power to investigate actions taken by the army. The author also recalls that there was a state of emergency between November 2001 and November 2002. It is therefore clear that the disappearance of her husband took place at a time when access to justice was limited both by restrictions on the legal system itself due to the state of emergency and fear for personal safety due to the conflict situation. Just after the arrest of her husband, the author's telephone connection was cut off for a year as a punitive measure, leaving her with no means to contact people if she was in need of help or felt threatened.

5.4 As to the possibility of filing a FIR for unlawful death/killing, the author emphasises that the fact that her husband died during an attempt to escape the custody of the security forces has not been established. She is therefore not obliged to file a FIR for unlawful death. In any case, the State party had full knowledge of the disappearance and alleged death of her husband through both news articles documenting his disappearance at the time and the filing of the *habeas corpus* petition. Under Sections 7 and 9 of the State Cases Act and Rules 4 (5) and (6) of the State Cases Regulations, the DPO has the responsibility to initiate an investigation into all suspicious acts that come to its attention. The State party therefore had the responsibility to fully investigate the circumstances of the alleged death of the author's husband, even in the absence of a FIR.

5.5 The author recalls that although she filed a writ of habeas corpus in the Supreme Court, the investigation into the whereabouts of her husband ordered by the Supreme Court was biased and ineffective. She argues that she could not appeal to the Supreme Court as suggested by the State party, since there had been no court decision in this case for the reasons developed above. As there is no crime of "disappearance" in domestic law, she was unable to submit a complaint for the "disappearance" of her husband. She has not appealed against the Supreme Court's decision to dismiss the writ petition as there was no substantive reason to believe that the appeal would have been considered in a more independent manner. For a review of the Supreme Court's ruling to take place, the petitioner must show that there are new facts or evidence. This was not the case here. Furthermore, the ruling would have been reviewed by the same judge who dismissed the *habeas corpus* petition. This drastically restricts the chances that the case would have been reviewed effectively. These problems with the procedure are reflected in the fact that it is very rare in Nepal for petitioners to ask for review of dismissed *habeas corpus* decisions.

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[6] See Report of the Working Group on Enforced and Involuntary Disappearances, E/CN.4/2005/65/Add.12, 8 January 2005, para.26.

5.6 The author recalls that she has approached the National Human Rights Commission (NHRC). Her complaint was registered on 13 September 2002. On 15 May 2008, she was informed that the investigation is "in its last stages". In any case, the powers of the NHRC are limited. After the completion of an investigation, it can issue recommendations on compensation and further investigations to bring perpetrators to justice. However, it does not have the power to issue binding decisions. Many of its recommendations remain ignored. As for the Malego Committee, the author argues that the investigation by the Committee was less than satisfactory. The Committee simply quoted the response by the CDO, which states that the author's husband drowned while trying to escape from the armed forces. As to the State party's mention of the future Truth and Reconciliation Commission, the author finds this information irrelevant to the admissibility of the present case since this Commission still needs to be established and is not an existing remedy.

5.7 Finally, on the issue of authorization from the author to file to the complaint, the author points out that she signed the original copy of the communication submitted to the Committee.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of Article 5, paragraph 2(a), of the Optional Protocol.

6.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes the State party's argument that the author has not filed a First Information Report with the police. Nevertheless, the Committee also notes the author's argument according to which the filing of FIRs with the police rarely leads to any investigation being made into the disappearance of the person concerned. It also notes that the author has made many enquiries, including with the Chief District Officer (CDO) and the District Police Office of Baglung (see para.2.5 above). On 4 February 2003, she also filed in the Supreme Court a writ of habeas corpus which was quashed two years later, even though the circumstances of the disappearance of the author's husband remained unclear. The Committee also notes that six years after the author's complaint was registered with the National Human Rights Commission, the investigation is still on-going. In the circumstances, the Committee considers that the author has met the requirements of Article 5, paragraph 2(b), of the Optional Protocol.

6.4 With regard to the issue of authorization, the Committee notes that the author signed the original complaint submitted by counsel to the Committee. It therefore concludes that counsel was duly authorized by the author to submit her complaint to the Committee.

6.5 In the circumstances, the Committee finds that it is not precluded from considering the communication under Article 5, paragraph 2(b), of the Optional Protocol. The Committee finds no other reason to consider the communication inadmissible and thus proceeds to its

consideration on the merits, in as much as the claims under Article 6; Article 7; Article 9; Article 10; and Article 2-paragraph 3, are concerned.

Consideration of merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under Article 5, paragraph 1, of the Optional Protocol.

7.2 As to the alleged detention incommunicado of the author's husband, the Committee recognises the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its General Comment No.20 on Article 7, which recommends that States parties should make provision against detention incommunicado. It notes that the author claims that her husband was detained incommunicado from 12 January 2002 until the time of his alleged death on 21 January 2002. The Committee notes that the author saw her husband being taken to the army barracks. In these circumstances, and in the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations. The Committee concludes that to keep the author's husband in captivity and to prevent him from communicating with his family and the outside world constitutes a violation of Article 7 of the Covenant.[7]

7.3 With regard to the alleged violation of Article 9, the information before the Committee shows that the author's husband was arrested by uniformed army personnel without a warrant and held incommunicado without ever being informed of the reasons for his arrest or the charges against him. The Committee recalls that the author's husband was never brought before a judge and could not challenge the legality of his detention. In the absence of any pertinent explanations from the State party, the Committee finds a violation of Article 9.[8]

7.4 As to the alleged disappearance of the author's husband, the Committee recalls the definition of enforced disappearance in Article 7, paragraph 2(i), of the Rome Statute of the International Criminal Court: "Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Any act leading to such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of person (Art.9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Art.7) and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (Art.10). It also violates or constitutes a grave threat to the right to life (Art.6).[9] In the present case, in view of her husband's disappearance since 12 January 2002, the author invokes Article 2-paragraph 3, Article 6, Article 7, Article 9 and Article 10.

7.5 The Committee notes that the State party has provided no response to the author's allegations regarding the forced disappearance of her husband. It reaffirms that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the

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[7] See Communication No.540/1993, *Laureano v. Peru*, Views adopted on 25 March 1996, para.8.5; and Communication No.458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para.9.4.
[8] See Communication No.1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para.8.5.
[9] See Communication No.950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para.9.3.

State party alone has the relevant information.[10] It is implicit in Article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the State party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

7.6 In the present case, the author has informed the Committee that her husband disappeared on 14 January 2002 at the Kalidal Gulm army barracks where he was last seen by the author herself. He may have been seen at the army barracks on 20 January 2002 by a soldier. While the author was told on 23 January 2002 that her husband drowned in a river while escaping and was presumed dead, she still does not know the exact circumstances of his death and what has happened to him in the period preceding it. In the absence of any comments by the State party on the author's husband's disappearance, the Committee considers that this disappearance constitutes a violation of Article 7.

7.7 With regard to the alleged violation of Article 10, the Committee notes the author's argument that her husband's rights under this provision were violated because he was a victim of an enforced disappearance. It recalls that all persons deprived of their liberty have the right to be treated with humanity and with respect for the inherent dignity of the human person. In the present case, the author's husband disappeared and possibly died while he was in the custody of the State party. In the absence of any comments by the State party on the author's husband's disappearance, the Committee considers that this disappearance constitutes a violation of Article 10.

7.8 As to the possible violation of Article 6 of the Covenant, the Committee notes that both the author and the State party seem to agree that the author's husband is dead. Nonetheless, while invoking Article 6, the author also asks for the release of her husband, indicating that she has not abandoned hope for his reappearance. The Committee considers that, in such circumstances, it is not for it to appear to speculate on the circumstances of the death of the author's husband, particularly in the light of the fact that there has been no official inquiry into the event. Insofar as the State party's obligations under paragraph 9 below would be the same with or without such a finding, the Committee considers it inappropriate in the present case to make a finding in respect of Article 6.

7.9 With regard to author herself, the Committee notes the anguish and stress that the disappearance of the author's husband since 12 January 2002 caused to the author. It therefore is of the opinion that the facts before it reveal a violation of Article 7 of the Covenant with regard to the author herself.[11]

7.10 The author invokes Article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights enshrined in the Covenant. The Committee attaches importance to the States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its General Comment

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[10] See Communication No.139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para.7.2; and Communication No.1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para.8.3.

[11] See Communication No.107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983, para.14; and Communication No.950/2000, *Sarma v. Sri Lanka*, Views adopted on 31 July 2003, para.9.5.

No.31 which states that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[12] In the present case, the information before it indicates that the author did not have access to such effective remedies, and the Committee concludes that the facts before it reveal a violation of Article 2, paragraph 3, read together with Article 7, Article 9 and Article 10 with regard to the author's husband; and a violation of Article 2, paragraph 3, read together with Article 7 with regard to the author herself.[13]

8. The Human Rights Committee, acting under Article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of Article 7, Article 9, Article 10 and Article 2, paragraph 3, read together with Article 7, Article 9 and Article 10 with regard to the author's husband; and of Article 7, alone and read together with Article 2, paragraph 3, with regard to the author's herself.

9. In accordance with Article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's husband, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author's husband and by themselves. While the Covenant does not give individuals the right to demand of a State the criminal prosecution of another person,[14] the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish those held responsible for such violations.[15] The State party is also under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to Article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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[12] See para.15.

[13] See Communication No.1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para.7.10.

[14] See Communication No.213/1986, *H.C.M.A. v. The Netherlands*, Views adopted on 30 March 1989, para.11.6; and Communication No.612/1995, *Vicente et al. v. Colombia*, Views adopted on 29 July 1997, para.8.8.

[15] See Communication No.1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para.11; and Communication No.1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para.10.

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