

**THE RULE OF LAW IN DECLINE;  
STUDY ON  
PREVALENCE, DETERMINANTS AND CAUSES  
OF TORTURE AND OTHER FORMS OF CRUEL,  
INHUMAN OR DEGRADING TREATMENT OR  
PUNISHMENT  
(CIDTP) IN SRI LANKA**

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(RCT)



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## Abbreviations

AC	Appeal Cases [a United Kingdom publication of law reports]
AG	Attorney General [the chief legal officer of the State and the Head of the Attorney General's Department of Sri Lanka]
AGs branch	Adjutant General's branch [of the Army]
AGT files	Attorney General Torture files
AHRC	Asian Human Rights Commission
AI	Amnesty International
AJL	Administration of Justice Law No. 44 of 1973 (as amended)
ALR	Appellate Law Recorder ( a Sri Lankan publication of law reports)
ASG	Additional Solicitor General
ASP	Assistant Superintendent of Police [upper-rank officers having wide range of powers]
BASL	Bar Association of Sri Lanka
CA	Court of Appeal
CAM	Court of Appeal Minutes
CAT Committee	Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Act	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No 22 of 1994 (a statute)
CC	Constitutional Council
CCP Act	Code of Criminal Procedure Act, No. 15 of 1979 (as amended) [a statute]
CCPR	Committee on Civil and Political Rights (under the ICCPR)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CHA	Consortium of Humanitarian Agencies
CHRD	Centre for Human Rights and Development
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CID	Criminal Investigation Division
CIDTP	Cruel, Inhuman or Degrading Treatment or Punishment
CJ	Chief Justice
CLJ	Cambridge Law Journal [a publication]
CO	Concluding Observations
CRC	Convention on the Rights of the Child
CSU	Counter Subversive Unit
CYPO	Children and Young Persons Ordinance No 48, of 1939 (as amended)
DFID	Department for International Development (of the United Kingdom)
DIG	Deputy Inspector General [of Police]
DMO	Deputy Medical Officer
D.O.	Detention Order
DPP	Director of Public Prosecutions
DSG	Deputy Solicitor General
ECHR	European Convention on Human Rights
EHHR/EHRR	European Human Rights Case Reports
EMPPR	Emergency (Miscellaneous Provisions and Powers) Regulation
ER	Emergency Regulations
EU	European Union
EUCT	European Court of Human Rights
FES	Friedrich-Ebert-Stiftung
FR	Fundamental Rights
G.A. Res.	General Assembly Resolution
GC	General Comment
GCIB	Grave Crimes Information Book
GS branch	General Staff branch [of the Army]

HC	High Court [of the Provinces in Sri Lanka]	SLF	Sri Lanka Foundation
HCM	High Court Minutes	SLFI	Sri Lanka Foundation Institute
HQ	Head Quarters	SLMA	Sri Lanka Military Academy
HQI	Head Quarters Inspector	SLMC	Sri Lanka Medical Council
HR	Human Rights	SP	Superintendent of Police
HRCSL	Human Rights Commission of Sri Lanka	Sri LR	Sri Lanka Law Reports [a Sri Lankan publication of law reports]
HRMG	Human Rights Monitoring Group (established by the CHA)	SSC	Senior State Counsel
IBA	International Bar Association	SSP	Senior Superintendent of Police [upper rank officers having wide range of powers]
ICC	International Criminal Court	STF	Special Task Force
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (United Nations)	TAB	Trial-at-Bar
ICCPR	International Covenant on Civil and Political Rights	TID	Terrorist Investigation Department
ICESCR	International Covenant on Economic, Social and Cultural Rights	TISL	Transparency International, Sri Lanka
ICJ	International Court of Justice	TSYO	Youthful Offenders (Training Schools) Ordinance No. 28 of 1939 (as amended)
ICRC	International Committee of the Red Cross	UDHR	Universal Declaration of Human Rights
ID	Identity Card	UK	United Kingdom
IGP	Inspector General of Police	UN	United Nations
IHL	International Humanitarian Law	UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
IMWG	Inter-Ministerial Working Group	UNHRC	United Nations Human Rights Committee
INGOs	International Non-Governmental Organizations	UNSMR	United Nations Standard Minimum Rules for the Treatment of Prisoners
IPCC	Independent Police Complaints Commission [of the United Kingdom]	UNWG	United Nations Working Group
JMO	Judicial Medical Officer	US	United States
JSC	Judicial Service Commission	USAID	United States Agency for International Development
KDU	Kotelawala Defence University	VCLT	Vienna Convention on the Law of Treaties
LST	Law & Society Trust	WG	Working Group
LTTE	Liberation Tigers of Tamil Eelam	WLR	Law reports of the United Nations War Crimes Tribunal
MC	Magistrate's Court		
MGOs branch	Master General of Ordnance's branch [of the Army]		
NCPA	National Child Protection Authority		
NGOs	Non-Governmental Organizations		
NLR	New Law Reports [a Sri Lankan publication of law reports]		
NPC	National Police Commission		
OHCHR	Office of the High Commissioner for Human Rights		
OIC	Officer-in-Charge		
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment		
P.C.	President's Counsel		
PCC	Professional Conduct Committee (of the Sri Lanka Medical Council)		
PCID	Public Complaints Investigation Division (of the National Police Commission)		
PHTI	Police Higher Training Institute		
PSO	Public Security Ordinance, No. 25 of 1947 (as amended) [a statute]		
PTA	Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (as amended) [a statute]		
PTPU	Prosecution of Torture Perpetrators Unit (of the Attorney General's Department)		
QMGs branch	Quarter Master General's branch [of the Army]		
REDRESS	A registered charity in the United Kingdom		
RESIST	Reducing the Effects and Incidence of Torture Project		
SC	Supreme Court [of Sri Lanka]		
SCM	Supreme Court Minutes		
SC (FR) App. No.	Supreme Court Fundamental Rights Application Number		
SC (Spl.) L.A. No.	Supreme Court Special Leave to Appeal Application Number		
SC	State Counsel		
SG	Solicitor General		
SIU	Special Investigation Unit		

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**1. Executive Summary**

The Study on the prevalence, determinants and causes of torture and other forms of cruel, inhuman or degrading treatment or punishment (CIDTP) in Sri Lanka is meant to give a comprehensive breakdown of the legal and institutional set-up in Sri Lanka and analyse whether the system lives up to international standards. Further, the Study seeks to analyse how this legal and institutional framework functions in practice in order to identify possible gaps in the system that may lead to the occurrence of torture and CIDTP.

The main conclusions of the Study are:

1. There are well-documented allegations of wide-spread torture by law enforcement personnel as part of an established routine in Sri Lanka.
2. Torture has been criminalised in the CAT Act, but the Act does not live up to Sri Lanka's obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter referred to as UNCAT).
3. The deterrent effect of the criminalisation of torture in the CAT Act is minimal as there have only been three convictions since 1994 and because allegedly offending police officers are not removed from office during or after trial.
4. There is a fundamental lack of separation of powers and political interference from the Executive with otherwise independent institutions has led to politically motivated decisions and lack of accountability for human rights violations, including torture.
5. Basic legal guarantees are increasingly under pressure in national legislation and have been considerably weakened in emergency law regulations.
6. Very few of these legal safeguards are upheld in practice, including the right of information as to the reasons for arrest, the right to legal representation, the 24 hour time-limit for a judicial hearing after arrest. There are also cases of intimidation of the victims and witnesses and there are extreme time delays in forwarding indictments and during trial. The lack of these basic safeguards is a contributing factor to torture and CIDTP.
7. There is an increased militarisation of the police resulting in an increased level of torture and CIDTP and the lack of accountability.
8. There is no functioning independent system dealing with complaints of torture and CIDTP committed by law enforcement officials resulting in impunity and the lack of accountability.
9. The lack of disciplinary action against law enforcement officials remains as one of the main attributing factors to torture and CIDTP.
10. There is a fundamental lack of resources throughout the public sector, including lack of infrastructure, personnel and proper investigative equipment.

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11. Sub-standard conditions which prevail in places of detention, including severe overcrowding, lack of sanitation, food and drinking water as well as medical treatment amounts to CIDTP or even torture.

**The National Legal Framework**

**Ratification of international and regional human rights conventions**

Sri Lanka has ratified the seven main UN human rights conventions. In this regard Sri Lanka has submitted several periodic reports to the Committee Against Torture and the Human Rights Committee. Both Committees have expressed serious concern regarding continued well-documented allegations of widespread torture and enforced disappearances, which have not been investigated promptly and impartially. Sri Lanka has recognized the competence of the Human Rights Committee in individual communications and from 1999-2007, the HRC has declared a violation of ICCPR article 7 in five cases. However, none of the views expressed in the individual communications have been implemented to date. Furthermore, the Supreme Court has ruled in 2006 that the accession to the First Optional Protocol to the ICCPR was unconstitutional and that the views of the UN Human Rights Committee have no force or effect within Sri Lanka. This judgment remains uncontested.

The Special Rapporteur on Torture and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, have both recently visited Sri Lanka. In both reports, it is concluded that torture is widely practiced in Sri Lanka. Concern is expressed regarding the long duration of investigations in torture cases and allegations of threats made against torture victims.

**International Legal Standards and National Law**

The Constitution of Sri Lanka contains the prohibition against torture and CIDTP and Sri Lanka has enacted the CAT Act to give effect to Sri Lanka's obligations under the UNCAT. The Act falls short of living up to all of these obligations as the definition in the Act does not correspond to the definition in the UNCAT; the Act does not establish universal jurisdiction for acts of torture and the Act makes no reference to the principle of non-*refoulement*. Further, the Act does not directly provide that superior officers should be held liable for acts of torture committed by their subordinates. There are similar lacunae in other statutes such as the Penal Code and the 'ICCPR Act.'

**Basic Legal Guarantees in connection with Arrest, Initial Detention, Interrogation, Extended Detention and Trial (i.e. Safeguards against Torture and CIDTP) and their application in practice**

Most of the basic legal guarantees in connection with arrest, initial detention, interrogation, extended detention and trial are provided for in the constitutional provisions and in the criminal procedure laws of Sri Lanka. There is however no right to legal counsel for a criminal suspect and there is no right to inform members of the family regarding the arrest. However, the Emergency law regulations currently in place, due to the ongoing conflict between the Government and the Liberation Tigers of Tamil Eelam (LTTE), have virtually replaced the ordinary law. Under these emergency regulations, a vast array of basic legal safeguards is disregarded.

In particular, emergency law regulations have given the police and the military extensive powers of arrest and it is not specified that reasons should be given, when arrests are made. The time limits, before which a suspect must be produced before a judge, have been extended well beyond the 24 hour limit and a criminal suspect has no right to legal counsel, to contact his/her family or to seek medical assistance. Confessions given to police officers above a particular rank are admissible and the burden of proof is on the accused to prove that the confession was voluntary. Extension of detention is not subject to strict legality and administrative detention may be

applied for up to 1 year by a ministerial order, which is not subject to effective review in any court.

#### Application of Legal Guarantees in practice

The basic legal guarantees in connection with prosecution, indictment, guarantees of fair trial, judgment, appeal and imprisonment are provided for in the constitutional provisions, the criminal procedure laws and other relevant Sri Lankan legislation. There are no current applicable systems or procedures for the protection of witnesses, and there is no specific policy of reparations for victims of torture. A draft law on a witness protection programme was presented to Parliament in 2008, but is still pending.

In practice, the right to be informed of the reasons of arrest is not upheld. Suspects are detained without being informed of their rights and in many cases, the police fabricate charges after the arrest in order to be able to defend the initial arrest. The 24 hour time limit within which a suspect must be brought before a Magistrate is not enforced and suspects or decoys are often produced at the home of the Magistrate so as to hide any signs of torture and ill-treatment. Family members are not informed of an arrest and are often denied access to the detained person; suspects have little or no access to legal representation and when they do, lawyers have little possibility of conferring with their clients in private. There is very little access to independent medical examinations for detainees and in many instances the independence of the examination is jeopardized as victims of torture are accompanied to the examination by the same police officer, who is responsible for the alleged crime of torture. Often doctors do not record evidence of torture or provide false reports and some doctors have also indirectly participated in torture by providing treatment to victims without disclosing evidence of torture in official records.

Suspects of predominantly Sinhalese ethnicity are tortured by police officers to extract confessions for unsolved offences or they are arrested for frivolous reasons, and then severely assaulted to extract a confession that may in turn justify the arrest and detention. Where suspects of predominantly Tamil ethnicity are concerned, confessions are extracted under torture in police custody, so that they implicate themselves with the LTTE. There are cases where courts have convicted persons on evidence of confessions in spite of medical reports of torture, the absence of legal representation and an interpreter during interrogation and trial. Judicial supervision by the Magistrate's Court when extending periods of detention has become a technicality, which has been criticised by the Supreme Court. Suspects under administrative detention are in general not provided with the basic legal safeguards and have no possibility to effectively challenge the lawfulness of the detention.

In practice, long delays during the pre-trial and trial stage are a common phenomenon. The delays may be attributed to the actions of state and/or defence counsel as well as the police, who ask for adjournments on inadequate grounds. Delays also occur due to lack of resources within the courts, the Attorney General's Department and within the Government Analyst's Department (GAD), where analysts make take many years to analyse the evidence. The delays in the trial process have contributed to an overall increase in the cases before the courts and the delays before the commencement of a trial sometimes range from three years to ten years or more.

There are frequent complaints by the accused that they are unable to retain lawyers to appear for them, where the case involves policemen. The police and the security forces are known to put severe pressure on petitioners, lawyers, litigants, witnesses and families to drop human rights cases involving torture. In practice, intimidation of witnesses is not an isolated practice during times of emergency and war. Instead, it is a common practice among law enforcement agencies also during normal times. Corporal punishment is still practiced in detention facilities and child offenders are kept in detention facilities together with adults. Children are detained for long periods of time without release and their parents are not informed immediately of the child's arrest. There are few cases where a lawyer is present to represent the child during interrogation

and restraints and force are used during arrest. There have also been allegations of sexual abuse of women and children in custody.

Remand prisoners are not separated from convicted prisoners and the prisons are faced with severe overcrowding. There is lack of sanitation, adequate food and water and medical treatment and the prisoners have little exposure to sunlight. The building constructions are old and the spread of contagious diseases is high. There have been very few visits to detention facilities by Magistrates, so-called Board of Visitors and the National Human Rights Commission. There are no monitoring visits conducted to those facilities that accommodate inmates detained under emergency law or to police detention facilities.

#### **The Institutional Framework and the Separation of Powers**

There is a clear separation of powers between the Executive, the Legislature and the Judiciary in the Sri Lankan Constitution. The executive power is vested in the President and the legislative power with the Parliament. The Supreme Court is empowered to hear cases of violation of fundamental rights (which must be filed within one month of the violation) and the High Courts have jurisdiction *inter alia*, in respect of cases filed under the CAT Act. During past decades however, there has been an extreme politicisation of the governance process, which has led to political appointments in key position within the public and judicial service. This was attempted to be alleviated by the introduction of the 17<sup>th</sup> Amendment to the Constitution in 2001, which set-up a Constitutional Council to deal with appointments of persons to important positions in the public service as well as to a number of constitutional commissions on the judiciary, the police and the public service. The Council, comprising of eminent persons drawn from the retired ranks of the judicial service and the public service as well as *ex officio* members, was expected to intervene in these appointments which had earlier been the sole prerogative of the President. After engaging successfully in this mandate for three years, this Council ceased to exist from 2005 due to lack of political will, thereby reinstalling the previous system of political appointments.

The Attorney General of Sri Lanka is the government's chief legal advisor, the primary state lawyer in the Supreme Court and the state prosecutor in the High Courts and Magistrates' Courts. Appointment of the Attorney General falls under the auspices of the 17<sup>th</sup> Amendment of the Constitution. Indictments under the CAT Act are filed by the Attorney General in the High Courts. According to the government, the prosecution in torture cases is led by the officers of the Attorney General attached to the Prosecution of Torture Perpetrators Unit; however, there is no such Unit at present within the Attorney General's office and this has been referred to merely as an 'administrative convenience' when attempts have been made to ascertain the nature of its factual existence. The Department of the Police is led by the Inspector General of Police, who is also subject to appointment by the Constitutional Council even though, as in the case of the appointment to the post of Attorney General, this requirement has been disregarded in recent years. Police officers receive rudimentary training and there is a lack of basic discipline as well as deficiencies evidenced in the structures of the police force. The National Police Commission (NPC), which has been set-up under the 17<sup>th</sup> Amendment of the Constitution, is given the powers of appointment, promotion, transfer, disciplinary control and dismissal of all police officers except the Inspector General of Police. Here again, appointments being made to the NPC by the President in 2006 after the term of office of its initially appointed members lapsed, without due adherence to constitutional procedures have resulted in doubts being cast on its integrity.

The Sri Lankan army is one of the primary military arms of the State and is responsible for land-based military and humanitarian interventions. Army officers receive basic training, including human rights and training in humanitarian law. Internal disciplinary control is regulated by the Army Act and committing criminal offences may result in a trial before a court-martial.

There are a number of detention facilities in Sri Lanka. The estimated daily population in these facilities is 28,000. A large number of these prisoners are remand prisoner and it is estimated that only 25% of remand prisoners are ultimately convicted.

### **The Situation of Torture and other forms of Cruel, Inhuman or degrading Treatment or Punishment**

There is a nationwide pattern of custodial torture in Sri Lanka and custodial deaths are caused by law enforcement officials as part of an established routine. Prison officials admit that torture and CIDTP occur within prison walls and that there are no regular procedures of inquiry and report. Torture is widely practiced by the military particularly with regard to the armed conflict against the LTTE. The LTTE itself is known for its systematic resort to torture both as a means of punishment of dissenters as well as during interrogation.

Torture is inflicted by law enforcement officers for interrogation purposes and as a pure abuse of power. The risk of torture is increased by the lack of practical application of basic legal safeguards, including the right to be brought before a judge within a reasonable amount of time. Fabrication of charges by police officers in order to justify arrest and torture is common as is torture of suspects on the basis of mistaken identity. Sinhalese torture victims are predominantly males from the Colombo area. Torture victims are mainly the poor and unskilled workers. Torture methods include; beating with various weapons and under the soles of the feet (falaqa), blows to the ears (telephono), positional abuse when handcuffed or bound, suspension in various positions, burning with metal objects and cigarettes, suffocation with plastic bags with chilli pepper or gasoline and various forms of genital torture.

### **The Causes and Contributing factors to Torture**

#### Deficiencies in the Legal Framework

The fact that the CAT Act does not live up to Sri Lanka's obligations under the UNCAT is problematic and has led to lack of prosecutions for torture and CIDTP. Basic legal safeguards are for the most part ensured in the Sri Lankan legislation, but recent amendments to the legislation as well as Emergency law regulations have led to these safeguards being gradually whittled down. Even where legal guarantees are legally ensured, they are not applied in practice. In particular, legal safeguards during arrest, initial detention and trial are disregarded, which increases the risk of suspects being subjected to torture and CIDTP.

#### Deficiencies in the Legal Process

Fundamental rights cases before the Supreme Court are problematic, because of extreme delays in deciding admissibility and the merits of the cases. The time-limit of one month to file a fundamental rights petition also precludes a large number of victims from filing a complaint. In actual fact, this constitutional remedy lacks effective deterrence as very few cases result in disciplinary action of law enforcement personnel. Further, the Supreme Court has allowed many fundamental rights cases involving torture and CIDTP to be withdrawn, and there has been a drastic decrease in the number of cases heard and decided by the Court. Lawyers have been reluctant to take on fundamental rights cases, due to intimidation and harassment by law enforcement officials.

Despite the CAT Act being enacted in 1994, there have only been three convictions and more than seventeen acquittals by the High Courts in prosecutions under this Act. The deterrent effect of this Act remains minimal. The lack of convictions may be attributed to the lack of respect for basic legal safeguards. Further, the police officers, who have been charged under the CAT Act are, in most cases, not removed from their positions pending trial or even when they have been convicted. The absence of a witness protection system severely increases the risk of torture and CIDTP.

Documentation of the court processes has been particularly difficult due to the lack of public access to court records. Sri Lanka does not have a Right to Information Act.

#### Deficiencies in the Institutional Framework

The actual lack of the separation of powers, due to the lack of implementation of the 17<sup>th</sup> Amendment to the Constitution has resulted in the political appointment of key persons within the public and judicial sector. Thus, strong political ties are maintained between the Executive and the courts, the Attorney General's Office, the Police and the various oversight commissions, including the Human Rights Commission of Sri Lanka and the National Police Commission. This political interference with otherwise independent institutions has led to politically motivated decisions, resulting in lack of accountability for human rights violations, including torture. The increased militarization of the police and an increasingly blurred distinction between the police and the military has had a negative effect on police officers as they have become accustomed to the more broad powers afforded to them under the emergency law regulations. The difficulties in distinguishing between the police and the military, severely jeopardizes accountability for human rights violations.

#### Lack of Resources

Lack of resources is a major problem throughout the public sector. There is lack of infrastructure, including such basic needs as copy and fax machines and there is severe lack of personnel within the Courts system and the Attorney General's Department. The police lack qualified criminal investigators as well as investigative equipment. There is also lack of basic forensic equipment and personnel, which results in trial delays and the absence of proper evidentiary material. Further, the lack of proper training within the police and military forces is a primary reason for torture and CIDTP.

#### Deficiencies in Systems of Accountability

There is lack of independent investigations into cases of torture and CIDTP, as offences committed by police officers that may amount to torture and CIDTP, are investigated by fellow policemen. In reality, this reduces the possibility of police accountability for human rights violations resulting in very little public confidence in the system.

#### Deficiencies in Prosecuting and punishing perpetrators of torture and CIDTP

A majority of prosecutions initiated against police officers or members of the armed forces on charges of torture, have been inconclusive due to lack of satisfactory evidence (as this evidence is gathered by police, who are investigating their own colleagues) and unavailability of witnesses or intimidation of witnesses. The lack of prosecution may also be attributed to the lack of personnel within the justice sector, the long delays in indictments being filed and trial delays due to political influence being exerted in regard to the investigations. Complaints are also withdrawn, due to intimidations of victims and their families.

#### The lack of disciplinary action

The lack of disciplinary action against law enforcement officials remains as one of the main attributing factors to torture and CIDTP. Particularly, as regards the police, disciplinary procedures are fundamentally inadequate. The concept of command responsibility has lost value within the police force. The police are not removed from their positions if they are suspected of having committed torture and CIDTP and even after convictions in fundamental rights cases and cases under the CAT Act, offending police officers continue to hold the same positions and some have even later been promoted. The establishment of the National Police Commission (NPC) in 2002 did lead to the improvement of disciplinary action within the police and the interdiction of police officers indicted under the CAT Act and other laws for offences. However, currently, the NPC's mandate is put in question, due to its current members being unilaterally appointed by the President without the approval of the Constitutional Council which has led to public concern regarding its independence and a progressive decrease in the amount of complaints of police misconduct filed before the NPC.

Within the military, the lack of command responsibility and the lack of proper disciplinary measures are contributing factors to torture and CIDTP.

#### Detention practices

Detention practices, including *incommunicado* detention facilitates torture and CIDTP. Further, the sub-standard conditions in places of detention, including severe overcrowding, lack of sanitation, food and drinking water as well as lack of medical treatment may amount in itself to CIDTP or even torture. Visits to places of detention by independent bodies are almost non-existent and the Human Rights Commission of Sri Lanka, which has the mandate to visit places of detention, has not effectively fulfilled this mandate. Of particular importance is the lack of visits by independent monitors to police stations and detention places under emergency regulations.

#### External factors

Increased pressure on the police to solve crimes and corruption within the police force are also contributing factors to torture and CIDTP.

#### **State mechanisms and practices with regard to preventing torture**

The police and the military receive basic training, including in human rights, but the quality of the training is poor and the training facilities are sub-standard. The State has not adopted a national human rights plan. Little of the priorities in a national human rights plan put forward by the Human Rights Commission of Sri Lanka have been accomplished to date.

#### **State mechanisms with regard to punishing acts of torture**

The Human Rights Commission of Sri Lanka (HRCSL) is mandated to investigate fundamental rights violations. In practice however, the powers of investigation of the HRCSL have marginal impact, due primarily to the lack of its enforcement powers as well as its inability to put into place, clear policies and practices in relation to investigations as well as the lack of resources and staff. The National Police Commission (NPC), as previously mentioned, has adopted a public complaints procedure only in recent times and its impact is minimal. Judicial Medical Officers (JMO) have been found to be complicit in covering up acts of torture, and some JMOs have also indirectly participated in torture by providing treatment to victims thereby perpetuating the practice. There is no state sponsored system of rehabilitation afforded to torture victims and compensation awarded to torture victims in fundamental rights cases has been minimal, taken on an average.

## **2. The Legal Framework**

### **International law**

Sri Lanka is a state party to several international human rights conventions that are relevant and closely related to the prohibition of torture and cruel, inhuman and degrading treatment or punishment. Sri Lanka has ratified the Convention on the Prevention and Punishment of the Crime of Genocide (accession 1950), the International Covenant on Civil and Political Rights (hereafter ICCPR or the Covenant) (accession 1980), the First Optional Protocol to the ICCPR (1997), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter UNCAT or the Convention) (accession 1994). However, Sri Lanka is yet to ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter OPCAT) or to submit to Article 22 of UNCAT thereby allowing the Committee against Torture to consider individual complaints.

In addition to these, Sri Lanka is party to a number of other international human rights instruments that indirectly can have an affect on the crime of torture, since they protect individual rights of people and groups, e.g. the International Covenant on Economic, Social and Cultural Rights (ICESCR) (accession 1980), the Convention on the Elimination of All Forms of

Discrimination against Women (CEDAW) (ratified 1981), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (accession 1982) and the Convention on the Rights of the Child (CRC) (ratified 1991).

The numerous ratifications send a signal of Sri Lanka's willingness to adhere to the UN treaties and be guided by international law. However, this does not necessarily reflect the actual situation in regards to compliance with the international treaties, which also will be dealt with later in the study.

The Vienna Convention on the Law of Treaties (1969) (hereafter VCLT) articles 26 and 27 establishes that States are obligated to comply in good faith with the treaties that they have ratified and that a State may not invoke the provisions of its internal law as justification for its failure to perform with a treaty.<sup>1</sup> States are therefore bound to comply with the treaties, which it has ratified. Furthermore it is a well-established principle within international law, arising from the nature of treaty obligations and customary law that States have a duty to bring internal law into conformity with obligations under international law.<sup>2</sup>

The International Court of Justice has further established that it is "*the fundamental principle of international law that international law prevails over domestic law*".<sup>3</sup> However, the Sri Lankan government and the Sri Lankan Courts have, in some cases refused to comply with international obligations deriving from international treaties.

The Sri Lankan legal system is traditionally a dualist legal system. Consequently, an Act of Parliament is required to domestically implement international instruments which the State ratifies/accedes to. For example, the Convention Against Torture and Other Inhuman and Degrading Punishment Act No 22 of 1994 (hereafter the CAT Act) was enacted to give specific effect to the UNCAT. However, apart from such particular statutes, the State is generally obliged to follow international standards; Article 27(15) of Sri Lanka's Constitution, (in the Directive Principles of State Policy), specifically requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations."<sup>4</sup>

Further, Sri Lanka's Supreme Court has engaged in the extensive citation of international standards of rights protection, thus enhancing existing constitutional rights resulting in a complex body of jurisprudence that reflects international standards. Many decisions citing articles of the ICCPR as well as reasoning adopted by the juristic bodies of the United Nations, illustrates this principle. In 1991 for example, Article 13(1) of Sri Lanka's Constitution was judicially interpreted to hold that an 'arrest' includes not only a deprivation of liberty upon suspicion of having committed an offence, but also any arbitrary deprivation of liberty; ICCPR article 9, right to freedom from arbitrary arrest and detention, was utilized to support this judicial view.<sup>5</sup> In *Mediwake v Dissanayake*,<sup>6</sup> ICCPR article 25 was used by the Court to affirm the right of Sri Lankan citizens to vote at a provincial council poll in a manner that guarantees a free, equal and secret poll. The duality of the collective as well as individual aspect of the right to vote was emphasized. A similar judicial citation of ICCPR article 25 was evidenced in *Centre for Policy Alternatives v Dissanayake*.<sup>7</sup> In *Sriyani Silva v Iddamalgeda*,<sup>8</sup> the Court recognized the petitioner's right to sue and seek compensation for herself as the victim's widow and for the minor child, bringing the law

<sup>1</sup> In general, VCLT is a codification of already existing customary international law. Brownlie (2003), p. 580.

<sup>2</sup> Brownlie (2003), p. 35.

<sup>3</sup> Headquarters Agreement, ICJ Reports [1988], pr. 12.

<sup>4</sup> Article 27(15) is contained among the Directive Principles of State Policy which, though non-justiciable in Sri Lanka's constitutional context, have a direct impact on legal policy in the country. Article 27(1) states that: 'The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.'

<sup>5</sup> *Sirienu v Perera*, [1991] 2 Sri LR 97.

<sup>6</sup> [2001] 1 Sri LR 177.

<sup>7</sup> SC 26/2002, SCM 27/5/2003. Note that the judgment incorrectly cites ICESCR Article 25.

<sup>8</sup> [2003] 2 Sri LR 63.



into conformity with international obligations and standards, in this instance, article 14.1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>9</sup>

In *Wenulage Rani Fernando (wife of deceased Lama Hewage Lal) and others v OIC, Minor Offences, Seedana Police Station, Seedana and eight others*<sup>10</sup> the Court, in condemning the brutal treatment of the deceased by prison officials, laudably referred not only to the applicable domestic law contained in the Prisons Ordinance but also to relevant views of the Committee together with provisions of international treaties and declarations on the rights of prisoners.<sup>11</sup> In *Shahul Hameed Mohammed Nilam and Others v K Udugampola and Others*,<sup>12</sup> the judges, in finding a violation of the right to freedom from torture, conceded that pain of mind, provided that it is of a sufficiently aggravated degree, would suffice to prove a rights violation. Domestic, regional and international precedent articulating this principle was cited.<sup>13</sup>

In *Weeruwansa v. Attorney General and Others*<sup>14</sup> the Court declared particularly as follows;

*“A person deprived of personal liberty has a right of access to the judiciary, and that right is now internationally entrenched, to the extent that a detainee who is denied that right may even complain to the Human Rights Committee.*

*Should this Court have regard to the provisions of the Covenant [i.e. the ICCPR]? I think it must. Article 27(15) [of the Sri Lankan Constitution] requires the State to “endeavour to foster respect for international law and treaty obligations in dealings among nations”. That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes.”*

This positive trend of jurisprudential thought was however interrupted in 2006 in the context of Sri Lanka’s accession to the First Optional Protocol to the ICCPR<sup>15</sup> (hereafter the First ICCPR Protocol), which authorised the United Nations Human Rights Committee to consider individual communications and determine whether violations of the ICCPR have taken place. A Divisional Bench of Sri Lanka’s Supreme Court presided over by Chief Justice Sarath N. Silva ruled in the *Sinharasa Case*<sup>16</sup>, that the act of accession to the first ICCPR Protocol by the President was an unconstitutional exercise of legislative power as well as an equally unconstitutional conferment of

judicial power on the Committee. The views of the Committee were determined to be of no force or effect within Sri Lanka.<sup>17</sup>

In critical analysis, several aspects of this ruling may be contested. The President of Sri Lanka had acceded to both the ICCPR and the First ICCPR Protocol by virtue of Article 33(f) of the Constitution, which allows the President to “do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorised to do.” However, this was the very constitutional provision that the Court employed through a process of convoluted logic to determine that the accession to the First ICCPR Protocol was unconstitutional. The conclusion that ‘judicial power has been conferred upon the UN Human Rights Committee through the accession to the First ICCPR Protocol was interlinked with the reasoning that this act of accession was ‘an act of legislative power’, which (as the Court stated) ought to have been exercised by Parliament and not solely by the President.

However, this judicial reasoning was fundamentally flawed at its very core; quite simply, the UN Human Rights Committee had never claimed judicial power within a domestic legal system. This is made very clear in its most recent General Comment No 33 where the Committee reiterates that the function of the Committee in considering individual communications is not, as such, that of a judicial body though it was conceded that the views exhibit some important characteristics of a judicial decision.<sup>18</sup> Instead, the juristic base of the Committee’s authority has always rested on the basis that the rights in the ICCPR should be given effect to as part of the international human rights regime and that the Committee is the appropriate mechanism in terms of the ICCPR which is vested with that authority.

Thus, in the aforesaid General Comment No 33, the Committee states as follows;

*The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character and the importance which attaches to them from the integral role of the Committee under both the Covenant and the Optional Protocol.*<sup>19</sup>

Applying this rationale to the reasoning in the *Sinharasa Case*, it is difficult to see as to how a claim of ‘judicial power’ could be sustained on such a jurisprudential basis so as to determine that the very act of executive accession to the First ICCPR Protocol was unconstitutional.<sup>20</sup>

Subsequent to this ruling, the question as to whether Sri Lanka remained in compliance with the provisions of the ICCPR became a moot question. Responding primarily to international pressure in this regard, the government enacted Act, No 56 of 2007 purportedly to give ‘legislative recognition in respect of certain residual rights and matters in the Covenant that have not been appropriately contained in the Constitution and other operative laws.’ However, this Act, (which is discussed more fully in Section 2.2.2.3. below), did not remedy existing lacunae as it omitted certain core ICCPR rights, including most importantly the right to life which is not contained as a constitutional right and had been judicially recognised only in a limited context as implied from Article 13(4) 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.’<sup>21</sup>

<sup>9</sup> Act No 22 of 1994 does not contain any provision in regard to the right of either the victim or the dependant for compensation. Reliance was placed by the Court in this case on the CAT itself, rather than the CAT Act.

<sup>10</sup> SC(FR) No 700/2002, SCM 26/07/2004.

<sup>11</sup> *Thomas v Jamaica* (Communication No 266/1989, views of UN-HRC, 2 November 1993.) The Court also considered General Assembly Resolution 43/174 of 9<sup>th</sup> December, 1988 and the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955 and approved by the Economic and Social Council by its resolutions 663 C(XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>12</sup> SC(FR) Applications Nos 68/2002, 73/2002, 74/2002, 75/2002, 76/2002, SCM 29.01.2004.

<sup>13</sup> Jurisprudence of the European Court of Human Rights (EUCR) was considered in this case, specifically *Tyrer vs UK* (1978, 2 EHHR, 1), *the Greek case* (127 B (1969) Com. Rep. 70), *Campbell and Casani v UK* (Case law of the ECHR, Vol. 1, p. 170).

<sup>14</sup> [2000] 1 Sri L.R. 387 (26 June 2000). Per judgment of Mark Fernando J.

<sup>15</sup> Sri Lanka acceded to the ICCPR in 1980 and to the First Optional Protocol in 1997.

<sup>16</sup> *Nallaratnam Sinharasa v Attorney General and Others*, S.C. Spl. (L.A) No. 182/99, SCM15.09.2006. This judgment was delivered consequent to a petition being filed in the Court invoking its powers of revision and/or review concerning an earlier judgement of the Court regarding Sinharasa’s conviction of unlawfully conspired to overthrow the Government. The conviction was solely on the strength of a confession obtained under emergency law, the voluntary nature of which he was legally required to prove. After appeals in the domestic arena (up to the Supreme Court) resulted only in reduced sentence, Sinharasa filed a Individual Communication before the UN Human Rights Committee pleading, *inter alia*, a violation of his rights under ICCPR article 14(1)(g), in that it was impossible for him to prove that his confession was extracted under duress as he had been compelled to sign the confession in the presence of the very police officers by whom he had been tortured earlier. The Committee found a violation of his rights under ICCPR article 14(3)(g) as well as ICCPR, article 14, paragraphs 3(c), and 5 (*Vide, Nallaratnam Sinharasa v Sri Lanka, CCPR/C/81/D/1033/2001*, adoption of views, 21-07-2004). The State was directed to provide Sinharasa with an effective and appropriate remedy, including release or retrial and compensation and was also cautioned to avoid similar violations in the future and to bring its domestic law in conformity with the ICCPR. Yet, as the said views were not being implemented even after two years had lapsed thereafter, a revision application was filed before Sri Lanka’s Supreme Court urging that the Court reconsider its earlier order. The views of the Committee were cited in this instance as persuasive authority.

<sup>17</sup> The constitutional articles found to be violated in this regard were respectively Article 3 read with Article 4(c) read with Article 75 and Article 3 read with Article 4(c) and Article 105(1) of the Constitution. The Petitioner’s application was found to be misconceived and without legal basis. As the Court declared that accession to the Protocol violated Article 3 (read with Article 4 of Sri Lanka’s Constitution), any law passed seeking to give domestic effect to the views of the UN Human Rights Committee would therefore have to be approved by a two thirds majority in Parliament as well as by the people at a Referendum as mandated by Article 83(a) of the Constitution.

<sup>18</sup> See United Nations Human Rights Committee, General Comment No 33, CCPR/C/GC/33 on ‘The Obligation of State Parties under the Optional Protocol to the International Covenant on Civil and Political Rights’ adopted on 5<sup>th</sup> November 2008, at paragraph 11.

<sup>19</sup> *Ibid*, at paragraph 13.

<sup>20</sup> In direct consequence of the *Sinharasa Case*, the views handed down by the Committee became of theoretical effect within the country’s domestic legal regime as would be discussed in detail in section 2.1.2.2. below.

<sup>21</sup> *Sriyani Silva vs Iddamalgoda* [2003] 2 Sri L.R. 63, *Wenulage Rani Fernando case, SC(FR) No 700/2002, SCM 26/07/2004*.

In yet a further response to international scrutiny, the President referred the question, as to whether human rights protections contained in the ICCPR are sufficiently recognised in the domestic legal framework, to the Supreme Court for an advisory opinion in early 2008. The Court declared that existing legislative measures, the provisions of the Constitution and other laws including decisions of the superior courts of Sri Lanka do, in fact, 'adhere to the general premise of the Covenant that individuals within the territory of Sri Lanka derive the benefit and guarantee of rights as contained in the Covenant'.<sup>22</sup> However, this advisory opinion did little to detract from the fact that Sri Lanka's constitutional and legal structure remained significantly flawed, when evaluated against international standards.

Thus, the United Nations Human Rights Committee's observations in 2003, discussed in detail later, were reflective of continuing concerns;

*".....the Committee remains concerned that Sri Lanka's legal system still does not contain provisions which cover all of the substantive rights set forth in the Covenant, or all the necessary safeguards required to prevent the restriction of Covenant rights beyond the limits permissible under the Covenant. It regrets in particular that the right to life is not expressly mentioned as a fundamental right in chapter III of the Constitution of Sri Lanka, even though the Supreme Court has, through judicial interpretation, derived protection of the right to life from other provisions of the Constitution."*<sup>23</sup>

## 2.1. Ratification of international and regional human rights conventions

### 2.1.1. UNCAT (Reporting to CAT, Art. 22 Individual complaints, Article 20 inquiry visits and OPCAT)

Sri Lanka acceded to UNCAT on 3 January 1994.<sup>24</sup> Thereafter, it submitted the first Periodic Report in 1997<sup>25</sup> and the 2nd Periodic Report in 2004<sup>26</sup> leading to Concluding Observations of the CAT Committee in 1998<sup>27</sup> and 2005.<sup>28</sup>

Characteristically, Sri Lanka's Periodic Reporting in terms of the Convention has been marked by extreme delay in the submission of reports.<sup>29</sup> In its 1<sup>st</sup> Periodic Report submitted in 1997<sup>30</sup>, Sri Lanka's Government detailed the legislative steps taken to criminalize torture through the CAT Act and also outlined the constitutional mechanisms available for torture victims together with the work performed by monitoring bodies which had been functioning during the reporting period such as the Human Rights Task Force. It reiterated that cases of torture were not the 'outcome of a deliberate policy, but were isolated acts engaged in by some individuals'<sup>31</sup> and referred to various educational and training programmes being carried out with the armed forces and police service with the objective of safeguarding human rights in investigating, detaining and interrogating suspects.

<sup>22</sup> In the Matter of a Reference under Article 129(1) of the Constitution, SC Ref No 01/2008, hearing on 17.03.2008. As in the Sinhara Case discussed above, this advisory opinion was handed down by a Divisional Bench presided over by the Chief Justice.

<sup>23</sup>United Nations Human Rights Committee, Concluding Observations on Sri Lanka (2003), CCPR/CO/79/LKA, 01/12/2003, at paragraph 7.

<sup>24</sup> The Convention entered into force for Sri Lanka on 2 February 1994. Enabling legislation under the Convention was adopted by Parliament on 25 November 1994.

<sup>25</sup> United Nations Committee against Torture, Sri Lanka, First Periodic Report, CAT/C/28/Add.3, 21/11/1997.

<sup>26</sup>United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2 06/08/2004. Second Periodic Reports of States parties due in 1999. Though this is referred to as the 2<sup>nd</sup> Periodic Report in the CAT Committee Records, the Government has referred to it as the combined Second and Third Periodic Report, thus occasioning some confusion.

<sup>27</sup>United Nations Committee against Torture, Concluding Observations on Sri Lanka (1998) A/53/44, paras.243-257 19/05/1998.

<sup>28</sup>United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005.

<sup>29</sup>United Nations Committee against Torture, List of issues, SRI LANKA (CAT/C/48/Add.2). The Government's combined 3<sup>rd</sup> and 4<sup>th</sup> Report was due to be submitted by 1<sup>st</sup> February 2007, which however has not been submitted to date.

<sup>30</sup> United Nations Committee against Torture, Sri Lanka, First Periodic Report, CAT/C/28/Add.3, 21/11/1997.

<sup>31</sup> *ibid*, at paragraph 38.

In response, the CAT Committee<sup>32</sup> pointed to several significant concerns regarding particularly, the fact that there were few, if any, prosecutions or disciplinary proceedings despite continuous Supreme Court warnings and awards of damages to torture victims. The Committee recommended, among other measures, that the Government review the emergency regulations and the Prevention of Terrorism Act as well as rules of practice pertaining to detention in order that they conform to the provisions of the Convention and that the authorities ensure that all allegations of torture – past, present and future – are promptly, independently and effectively investigated.

In 2000, the Government permitted a visit by a two member team of the CAT Committee under the Article 20 inquiry procedure of the UNCAT.<sup>33</sup> The delegation's preliminary findings included recommendations that the Government should reduce and eventually suppress the many overlapping jurisdictions between agencies investigating offences under the Prevention of Terrorism Act and the Emergency Regulations, and establish clear spheres of competence, conducive to enhancing efficiency in preventing torture in all its forms,<sup>34</sup> abolish the power of the Secretary of Defence to order preventive detention for a period of up to a year without judicial review,<sup>35</sup> establish an effective mechanism for the criminal prosecution of public officials who commit acts of torture<sup>36</sup> and guarantee the access of counsel to detainees in police custody.<sup>37</sup> The delegation report concluded that, although a disturbing number of incidences of torture and ill-treatment (defined by Articles 1 and 16 of the Convention) were taking place, this was under extraordinary circumstances as a result of internal armed conflict and could not be termed as 'systematic' torture and ill-treatment.<sup>38</sup>

Yet, it could justly be observed that this reasoning fell short of the rigorous standard required from inquiry reports of this nature. It bypassed evidence on record that evidenced the resort to torture by law enforcement and custodial officers even during peace time. The language used in the report was also imprecise and contradictory in some instances as for example in paragraph 177, where it is observed that 'Even though the number of instances of torture is rather high, the majority of suspects are not tortured; some may be treated roughly.' Appropriately it may be questioned as to why it is stated that the 'number of instances of torture is rather high', while at the same time, there is a finding that these may not be torture cases at all, but as implied, instances where rough treatment is resorted to. Consequently therefore, the question as to when 'rough treatment' amounts to torture or to other forms of cruel, inhuman or degrading treatment or punishment (CIDTP), becomes pertinent.

Disturbingly, the findings of this inquiry team were put forward as appropriate justification for their policies by government officials in its Second Periodic Report to the CAT Committee in 2004.<sup>39</sup> This Report substantially reflected the same assertions as in its 1<sup>st</sup> Periodic Report with the distinction that the ceasefire between the Government and the Liberation Tigers of Tamil Eelam in February 2002 had resulted in the lapsing of the emergency laws earlier critiqued by the CAT Committee. However, the mere fact that these provisions had (temporarily) been allowed to lapse, did not prevent the CAT Committee from detailing several concerns regarding impunity

<sup>32</sup>United Nations Committee against Torture, Concluding Observations on Sri Lanka (1998) A/53/44, paras.243-257 19/05/1998.

<sup>33</sup> Activities of the Committee under Article 20 of the Convention: Sri Lanka, A/57/44, 17/05/2002, at paragraphs 117-195. (Inquiry under Article 20). A summary account of the results of the proceedings concerning the inquiry on Sri Lanka, including the preliminary recommendations, appears in the *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 44 (A/57/44)*, paras. 123-197.

<sup>34</sup>*ibid*, at point b) of paragraph 136.

<sup>35</sup>*ibid*, at point d) of paragraph 136.

<sup>36</sup>*ibid*, at point f) of paragraph 136.

<sup>37</sup>*ibid*, at point g) of paragraph 136.

<sup>38</sup> *ibid*, specifically at paragraphs 181 and 182. 'In reaching this conclusion, the Committee took into account its views with regard to the meaning of "systematic practice of torture" expressed at the end of its first inquiry under article 20 of the Convention in 1993 and endorsed in subsequent inquiries (A/48/44/Add.1, para. 39; A/51/44, para. 214; and A/56/44, para. 163).<sup>1</sup> These describe the ordinary meaning to be ascribed to the term "systematic" in the context of its use in article 20 of the Convention as required by article 31 of the Vienna Convention on the Law of Treaties of 1969'.

<sup>39</sup> See United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2 06/08/2004, at paragraph 55. Second Periodic Reports of States parties due in 1999. .

for perpetrators of torture and CIDTP in its Concluding Observations in 2005.<sup>40</sup> In Recommendation no; 12, which is of crucial importance, the Committee expressed serious concern regarding continued well-documented allegations of widespread torture and enforced disappearances which remained not investigated promptly and impartially. The Government was put on inquiry to ensure prompt, impartial and exhaustive investigations into all such allegations, which investigations should moreover be conducted not by or under the authority of the police, but by an independent body. This recommendation was in line with a long standing demand by activists in Sri Lanka that an independent Prosecutor's Office should be established with a mandate to supervise investigations as well as conduct prosecutions.

In addition, the Committee observed that where *prima facie* cases of torture are concerned, the accused should be subject to suspension or reassignment during the process of investigation, especially if there is a risk that the investigation may be impeded. Where appropriate, the perpetrators should be convicted and appropriate sentences imposed. An effective witness protection programme was stated to be imperative in this regard. These aspects are more particularly dealt with in the succeeding segments of this Study.

Significantly, the CAT Committee resorted to Rules of Procedure calling upon the Government to reply in respect of these prioritized issues not within the normal four year reporting period but within an accelerated one year.<sup>41</sup> The Government thereafter issued a follow-up response in February 2007, not providing any new information on the issues but merely reiterating what had been stated earlier.<sup>42</sup>

#### 2.1.1.1 Making a Declaration under Article 22 of UNCAT/Ratification of OPCAT

Insofar as making a declaration under Article 22 of UNCAT<sup>43</sup> is concerned, the government has declared that it would 'consider' making such a declaration.<sup>44</sup> A similar token willingness has been expressed in regard to becoming a party to the Optional Protocol to the Convention against Torture (OPCAT).<sup>45</sup>

However heightened conflict in the North-East between the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan Government since 2006 has resulted in the Government rejecting international scrutiny in respect of its human rights record. In this context, it is difficult to expect that the Government will submit to additional monitoring obligations in terms of the international treaty bodies.

Further, insofar as an Article 22 declaration is concerned, the judgement of Sri Lanka's Supreme Court in the *Sinharasa Case* has had a negative impact. As the individual communications remedy under the ICCPR Protocol has been ruled to be of no force or effect in Sri Lankan law, it is unlikely that the Government will submit itself to a similar individual communications remedy under UNCAT or to ratification of OPCAT. The obstacles posed by the *Sinharasa Case* to the State's ratification of OPCAT was, in fact, acknowledged by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak in his February 2008 report to the General Assembly.<sup>46</sup>

<sup>40</sup>United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, at paragraph 12.

<sup>41</sup> The UN-HRC also imposed similar accelerated reporting procedures on Sri Lanka in 2003 after considering Sri Lanka's Fourth Periodic Report in terms of the International Covenant on Civil and Political Rights (ICCPR) which again, have not been complied with.

<sup>42</sup>United Nations Committee against Torture: Sri Lanka, CAT/C/LKA/CO/2/Add.1 (Comments by Government of Sri Lanka on the Concluding Observations of the CAT Committee), 20/02/2007.

<sup>43</sup> Conferring the right to any person subject to Sri Lanka's jurisdiction to lodge individual communications before the Committee alleging a violation of provisions of CAT.

<sup>44</sup>United Nations Committee against Torture, Comments by Government of Sri Lanka to the Conclusions and Recommendations of the Committee against Torture, CAT/C/LKA/CO/2/Add.1, 20/02/2007 at point a) of paragraph 23.

<sup>45</sup> Ibid.

<sup>46</sup>Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at paragraph 19, footnote 5

Until the *status quo* changes in Sri Lanka, the possibility of a declaration under Article 22 of UNCAT/submission to OPCAT appears to be remote.

#### 2.1.2. ICCPR (Reporting to the HRC and Individual complaints)

Sri Lanka's 1978 (current) Constitution does not incorporate the full catalogue of rights recognized by the ICCPR. Notably, the Constitution lacks the right to life and the right to privacy, among other rights. At the time of Sri Lanka's accession to the ICCPR in 1980, none of these rights had been brought in, (even impliedly by way of judicial interpretation), into the constitutional document. As repeatedly referred to in this research analysis, it was only as recently as in 2003 that two judges of the Supreme Court interpreted a limited right to life from the constitutional guarantee in Article 13(4) not to be punished with death or imprisonment except by court order.<sup>47</sup> Even thereafter, such liberal reasoning has remained confined to these cases only.

In this environment of extreme disparity manifested between the rights guaranteed by the Covenant and rights guaranteed by Sri Lanka's Constitution, the manner in which successive governments have conformed to the State's obligations in terms of the Covenant has been less than satisfactory.

#### 2.1.2.1. Periodic Reporting to the UN Human Rights Committee

Following Sri Lanka's accession to the ICCPR in 1980, the Third Periodic Report was submitted in 1994<sup>48</sup> and the Fourth Periodic Report was submitted in 2002<sup>49</sup>.

The Periodic Reports detail the nature and substance of the constitutional remedies in respect of rights violations, including advances in jurisprudence in respect of certain rights, such as the right to equality (Articles 12(1) and (2) of the Constitution), freedom from torture, cruel, inhuman or degrading treatment or punishment (Article 11 of the Constitution), right to be free from arbitrary arrest and detention (Articles 13(1) and (2) of the Constitution) and the right to freedom of speech and expression (Article 14(1)(a)). The Government also set out the provisions of law, including emergency law in terms of which restrictions on rights could be imposed, (primarily in the context of the conflict between the Liberation Tigers of Tamil Eelam and the Government), but stressed that these restrictions were subject to judicial review at all times. Administrative and monitoring mechanisms in regard to minimising human rights violations in custodial institutions, including specifically the police and the prisons were explained in detail.

In response, the Concluding Observations issued respectively by the UN Human Rights Committee in 1995<sup>50</sup> and 2003<sup>51</sup> focused on the continuing question of impunity for perpetrators of grave human rights violations, despite the law, judicial decisions and other preventive measures purportedly in place as described in the Periodic Reports.

<sup>47</sup> *Sriyani Silva vs Iddamalinda* [2003] 2 Sri LR 63 per judgment of Justice Mark Fernando (who retired from Sri Lanka's Supreme Court in early 2004) and the *Wenavale Rani Fernando case*, SC(FR) No 700/2002, SCM 26/07/2004, per judgment of Justice Shiranee A. Bandaranayake. The judges in these two cases stated that a dependant has the right to come before court on a rights petition when a family member dies as a result of police torture. This reasoning was reiterated in *Kanapathipillai Machchavallaran vs OIC, Army Camp, Plantain Point, Trincomalee and Others* (SC Appeal No 90/2003, SC (Sp) L.A. No 177/2003, SCM 31.03.2005. These decisions are discussed in detail later in the analysis.

<sup>48</sup>United Nations Human Rights Committee, Third Periodic Report of Sri Lanka, Third Periodic Report due in 1991, CCPR/C/70/Add.6 27/09/1994. For the Initial Report submitted by the Government of Sri Lanka, see CCPR/C/14/Add.4 and Add.6, for its consideration see CCPR/C/SR.471 to 473 and SR.477, or Official Records of the General Assembly, Thirty-ninth session, Supplement No. 40 (A/39/40), paragraphs 95 to 135 and for the Second Periodic Report of Sri Lanka, see CCPR/C/42/Add.9, and for its consideration by the Committee see CCPR/C/SR.1057 to SR.1060, or Official Records of the General Assembly, Forty-sixth session, Supplement No. 40 (A/46/40), paragraphs 454 to 491.

<sup>49</sup>United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002.

<sup>50</sup>United Nations Human Rights Committee, Concluding Observations on Sri Lanka (1995), CCPR/C/79/Add.56, 27/07/1995.

<sup>51</sup> United Nations Human Rights Committee, Concluding Observations on Sri Lanka (2003), CCPR/CO/79/LKA, 01/12/2003.

In 1995<sup>52</sup>, the Committee expressed its concern that the derogation of rights under the various emergency laws and regulations may not be in full compliance with the requirement of the provisions of article 4, paragraph 2, of the Covenant. While being concerned with the fact that courts do not have the power to examine the legality of the declaration of emergency and of the different measures taken during the state of emergency, it was emphasized that the obligations assumed by Sri Lanka as a State party to various international instruments must be respected even in times of states of emergency.

Particularly, the Committee voiced its serious concern regarding the loss of life of civilians, disappearances, torture, and summary executions and arbitrary detention caused by both parties in the conflict and noted that an effective system for the prevention and punishment of such violations does not appear to exist. It was also underlined that violations and abuses allegedly committed by police officers have not been investigated by an independent body and frequently the perpetrators of such violations have not been punished. It was observed that this may contribute to an atmosphere of impunity among perpetrators of human rights violations and constitute an impediment to the efforts being undertaken to promote respect for human rights.

These concerns were reiterated in 2003<sup>53</sup>. While appreciating Sri Lanka's ratification of the ICCPR First Optional Protocol in October 1997 and the entering into a ceasefire agreement by the Government with the LTTE, it was observed by the Committee that Sri Lanka's report did not provide full information on the measures taken to implement (emphasis mine) the Committee's Concluding Observations issued in 1995 in regard to Sri Lanka's Third Periodic Report.

Thus, it was regretted that the majority of prosecutions initiated against police officers or members of the armed forces on charges of abduction and unlawful confinement, as well as on charges of torture, have been inconclusive due to lack of satisfactory evidence and unavailability of witnesses. Despite a number of acknowledged instances of abduction and/or unlawful confinement and/or torture, only very few police or army officers have been found guilty and punished.

It was noted that victims of human rights violations feel intimidated from bringing complaints or are subjected to intimidation and/or threats, thereby discouraging them from pursuing appropriate avenues to obtain an effective remedy (ICCPR Article 2). Sri Lanka was requested to adopt legislative and other measures to prevent such violations, in keeping with Articles 2, 7 and 9 of the Covenant, and ensure effective enforcement of relevant legislation. The State was enjoined to ensure in particular, that allegations of crimes committed by state security forces, especially allegations of torture, abduction and illegal confinement, are investigated promptly and effectively with a view to prosecuting perpetrators.

A number of national oversight mechanisms in regard to human rights protection were scrutinized. The Committee recommended that there should be diligent inquiry into all cases of suspected intimidation of witnesses, an effective witness protection program should be put in place and the capacity of the National Human Rights Commission to investigate and prosecute alleged human rights violations should be strengthened. The non-implementation of Article 155G (2) of the Constitution (by the 17<sup>th</sup> Amendment) directing the National Police Commission (NPC) to put into place procedures to entertain and investigate public complaints or complaints of aggrieved persons against an individual police officer or the police service, was a significant concern.<sup>54</sup> Many of these concerns will be referred to in this analysis when dealing with particular deficiencies in the Sri Lankan law, practice and procedures.

<sup>52</sup> Supra

<sup>53</sup> Supra

<sup>54</sup> *ibid.*, at paragraph 9. Since then, a complaints procedure has been put into place but the very credibility of the NPC, (given the unconstitutional appointments of its current members) has been put in issue. The effectiveness of the complaints procedure is also in question and is a matter that will be dealt with in the succeeding segments of this Study.

Sri Lanka was directed by the UN Human Rights Committee under Rule 70, paragraph 5 of the Committee's Rules of Procedure, to provide information, within one year in regard to four issues, as contained in paragraphs 8, 9, 10, and 18 of the Committee's recommendations, including importantly, concerns relating to persistent reports of torture and cruel, inhuman or degrading treatment or punishment of detainees by law enforcement officials and members of the armed forces as well as amendment of the 'restrictive' definition of torture in the CAT Act which was opined by the Committee to raise problems in the light of article 7 of the ICCPR.<sup>55</sup> Comments to the Committee's Concluding Observations were issued by the Government in February 2008 but with no substantive new information.<sup>56</sup>

### 2.1.2.2. Invocation of the Individual Communications remedy

#### A. General Context

Sri Lanka's experience with the individual communications remedy in terms of the First ICCPR Protocol<sup>57</sup> illustrates the problems that may arise in regard to accession to similar remedies offered by international human rights treaties, particularly UNCAT. Sri Lanka acceded to the First ICCPR Protocol on 3 October 1997. At that time, the State made a declaration that it recognised the competence of the UN Human Rights Committee only in respect to events, or decisions relating to events, occurring on or after that date. No reservations were made either to the First ICCPR Protocol or to the ICCPR itself.

From the year 2000 onwards, the invocation of the right to lodge individual communications to the UN Human Rights Committee became frequent. This was primarily due to serious concerns being evidenced regarding the protection of rights by the domestic courts.<sup>58</sup> Many aggrieved persons, who had failed to obtain relief from Sri Lanka's Supreme Court, thereafter appealed to the Committee. The fact that all the Covenant rights have not been guaranteed in Sri Lanka's Constitution as referred to earlier, made resort to the individual communications remedy particularly interesting. The number of Individual Communications filed during the period 1999-2008 exceeded fifteen with some being declared inadmissible by the Committee on the ground of non-exhaustion of domestic remedies.<sup>59</sup>

#### B. Specific Instances of ICCPR violations pertaining to right to freedom from torture and CIDTP

By late 2008, the UN Human Rights Committee had declared violations of ICCPR rights in eleven Communications of considerable importance.<sup>60</sup> In some cases, the rights recognised as

<sup>55</sup> *ibid.*

<sup>56</sup> United Nations Human Rights Committee, Comments by the Government of Sri Lanka on the Concluding Observations of the Human Rights Committee, CCPR/CO/79/LKA/Add.1, 27/02/2008.

<sup>57</sup> First Optional Protocol to the International Covenant on Civil and Political Rights, Article 4(1) (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 9).

<sup>58</sup> Report by the United Nations Special Rapporteur on the Independence of the Judiciary in April 2003 to the UN Commission on Human Rights, E/CN.4/2003/65/Add.1 25, February 2003, at paragraph 178 and among several relevant press releases of the Special Rapporteur, see releases dated 27 February 2003 and 28 May 2003. Also Report of the International Bar Association, 2001 "Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary", at paragraph 1.13. For a fuller discussion relevant to the deterioration of the independence of the judiciary in Sri Lanka, see Pinto-Jayawardena, Kishali, "A Praxis' Perspective on Subverted Justice and the Breakdown of the Rule of Law in Sri Lanka" in Jasmine Joseph (ed.), *Sri Lanka's Dysfunctional Criminal Justice System* (Asian Human Rights Commission, Hong Kong, 2007), available at [http://www.ahrchk.net/pub/pdf/Dysfunctional\\_AHRC.pdf](http://www.ahrchk.net/pub/pdf/Dysfunctional_AHRC.pdf).

<sup>59</sup> *Susila Malani Dahanayake and Others v Sri Lanka* CCPR/C/87/D/1331/2004, Decision on admissibility 25.07.2006. Declared inadmissible under article 2 of the Protocol as authors had not substantiated that their right to life in terms of ICCPR article 6 was violated because they were deprived of a healthy environment. Also declared inadmissible under article 1 of the Protocol as authors can no longer be considered a victim with their claim concerning unequal treatment being remedied by the domestic court. *Hiran Ekanayake v Sri Lanka* CCPR/C/88/D/1201/2003, decision on admissibility, 31-10-2006, inadmissible under article 5(2)(b) of the Protocol, domestic remedies have not been exhausted inadmissible under article 2 of the Protocol, claim concerning ICCPR article 26 is insufficiently substantiated.

<sup>60</sup> These Communications are as follows; *Anthony Michael Emmanuel Fernando v Sri Lanka*, CCPR/C/83/D/1189/2003, adoption of views, 31-03-2005; *Nallaratnam Sinharasa v Sri Lanka*, CCPR/C/81/D/1033/2001, adoption of views, 21-07-2004; *S. Jegatheesavara*

violated were also rights incorporated in Sri Lanka's Constitution, such as ICCPR, article 19 the right to freedom of expression<sup>61</sup> and ICCPR article 7, the right to freedom from torture.<sup>62</sup> In other instances, the Committee affirmed a number of rights that were not explicitly secured in the domestic constitutional structure. These included an expanded right to liberty and security,<sup>63</sup> the right to be tried without undue delay<sup>64</sup> and the principle that no one shall be compelled to testify against himself or confess guilt.<sup>65</sup>

The right to freedom against torture and CIDTP was specifically an issue in three Communications before the Committee. In the *Sarma Case*<sup>66</sup>, the Committee liberally interpreted the conventional reach of this right to find a violation of the right to freedom from torture not only of the son, who had been 'disappeared', but also of his parents, who the Committee opined, had suffered 'anguish and stress' by the continuing uncertainty concerning his fate and whereabouts.<sup>67</sup>

In *Dingiri Banda's Case*,<sup>68</sup> a Lieutenant in the Gajaba regiment of the Sri Lanka Army petitioned the Committee in respect of violations that he had suffered allegedly at the hands of his superior officers. He complained that in late 2000, while he was sleeping at his quarters in the Officers Mess at the Saliyapura Camp, two identified army officers of a superior rank, inflicted acts of torture and CIDTP upon him as part of a so called ragging ceremony. Thereafter, he had to undergo months of hospitalisation and was retired from the Army service on medical grounds. Though, an internal inquiry was held, he was not permitted to present evidence at this inquiry. The Court, comprising officers from the Gajaba Regiment, decided that the two perpetrators had acted offensively and scandalously, thereby causing disrepute to the Army. Yet, the perpetrators were not court martialled, but temporarily suspended and later promoted to the rank of captain. Dingiri Banda's fundamental rights petition to the Supreme Court (which he filed after affording himself of legal aid through the Bar Association) was, as he alleged, settled, against his wishes. The case that was filed in the Magistrate's Court was still pending at the non-summary stage after more than five years, apparently due to the delay to forward the relevant medical report to court. A civil matter that he had filed was also pending.

The Committee, after considering the matter, rejected the State party's argument that the two perpetrators had already been tried and punished by a Military Court of Inquiry and could not be tried again. It was pointed out that this Court of Inquiry had no jurisdiction to try anyone for acts of torture, that the author was not represented and that the punishment given to the two perpetrators was only forfeiture of seniority, despite the fact that Dingiri Banda had to be hospitalised for several months as medically attested. It was also noted that none of the legal proceedings had resulted in effective relief being given to him. Consequently, this violated the duty imposed upon the State in terms of the ICCPR to thoroughly investigate alleged violations

*Sarma v Sri Lanka*, CCPR/C/78/D/950/2000, adoption of views, 16-07-2003; *Jayalath Jayawardena v Sri Lanka*, CCPR/C/75/D/916/2000, adoption of views, 22-07-2002; *Victor Ivan Majumwana Kankanang v Sri Lanka*, CCPR/C/81/D/909/2000, adoption of views 27-07-2004 and *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of Saint Francis in Menzigen v Sri Lanka*, CCPR/C/85/D/1249/2004, adoption of views, 21-10-2005. *Sundara Arachchige Lalith Rajapakse v Sri Lanka*, CCPR/C/87/D/1250/2004, adoption of views, 14-07-2006; *Raththinde Katupallande Gedara Dingiri Banda vs Sri Lanka*, CCPR/C/D/1426/2005, adoption of views 26-10-2007; *Dissanayake Mudyavelage Sumanawera Banda v Sri Lanka* CCPR/C/93/D/1373/2005, adoption of views 22-7-2008; *Vadivel Sathasivam and Parathesi Saraswathi v Sri Lanka* CCPR/C/93/D/1436/2005, adoption of views 8-7-2008; *Sonutha Bandaranayake v Sri Lanka* CCPR/C/93/D/1376/2005, adoption of views 24-7-2008.

<sup>61</sup> The *Victor Ivan case* (ibid). For purposes of comparative relevance, Article 14 (1)(a) of Sri Lanka's Constitution embodies the right to freedom of expression.

<sup>62</sup> The *Sarma case* (supra).

<sup>63</sup> ICCPR article 9 affirmed in *S. Jegatheeswara Sarma v Sri Lanka*, CCPR/C/78/D/950/2000, adoption of views, 16-07-2003 (supra) and in *Anthony Michael Emmanuel Fernando v Sri Lanka*, CCPR/C/83/D/1189/2003, adoption of views, 31-03-2005 (supra).

<sup>64</sup> ICCPR article 14(3) (c) affirmed in *Victor Ivan Majumwana Kankanang v Sri Lanka*, CCPR/C/81/D/909/2000, adoption of views 27-07-2004 (supra) and in *Sundara Arachchige Lalith Rajapakse v Sri Lanka*, CCPR/C/87/D/1250/2004, adoption of views, 14-07-2006 (supra).

<sup>65</sup> ICCPR article 14 (3)(g) affirmed in *Nallaratanam Sinharasa v Sri Lanka*, CCPR/C/81/D/1033/2001, adoption of views, 21-07-2004.

<sup>66</sup> *S. Jegatheeswara Sarma v Sri Lanka*, CCPR/C/78/D/950/2000, adoption of views, 16-07-2003, (supra).

<sup>67</sup> It is relevant to note that this jurisprudential expansion had not been evidenced in Sri Lanka's domestic jurisprudence relating to Article 11 (the constitutional right to freedom from torture and cruel, inhumane or degrading treatment) as would be clear from the analysis in Section 3.3.3.1.

<sup>68</sup> *Raththinde Katupallande Gedara Dingiri Banda vs Sri Lanka*, CCPR/C/D/1426/2005, adoption of views 26-10-2007.

of human rights, and to prosecute and punish those held responsible. The settled rule of general international law that all branches of government, including the judicial branch, may be in a position to engage the responsibility of the State party was reiterated. Accordingly, a violation of ICCPR article 2(3) read with article 7 was found.

In *Sundara Arachchige Lalith Rajapakse v Sri Lanka*,<sup>69</sup> the Committee dealt with a complaint of a torture victim that he had been arbitrarily arrested by several police officers and tortured during his subsequent detention, which caused serious injuries. The injuries were attested to by the medical reports. He claimed violations of ICCPR article 2(3), article 7 and article 9 and further claimed that the State party's failure to take adequate action to ensure that he was protected from threats issued by police officers, violated ICCPR article 9(1). The State party had moreover failed to ensure that the competent authorities investigate his allegations of torture promptly and impartially, thus violating his right to an effective remedy under ICCPR article 2(3).

This Communication will be examined somewhat in detail as it exposes deficiencies regarding the effective apprehension and prosecution of perpetrators of torture in Sri Lanka's legal system.

The author had specifically complained as follows;

- a) He had tried to obtain legal redress domestically both in the criminal court and in the Supreme Court but these efforts were to no avail;
- b) No criminal investigation was initiated for over three months after the torture, despite the severity of his injuries and the necessity to hospitalise him for over one month;
- c) The alleged perpetrators were neither suspended from their duties nor taken into custody, enabling them to place pressure on and threaten the author, and the investigations were at a standstill;
- d) In any event, procedures for dealing with torture allegations in Sri Lanka have generally been demonstrated to be ineffective and the authorities had shown a lack of diligence in the present case. Thus, the pending criminal or civil procedures cannot be considered to constitute an effective remedy for the alleged violations.

The State Party submitted that the Attorney General had indicted the Sub-Inspector of Police implicated in the alleged torture under the CAT Act. The trial judge had been requested to expedite the matter. The application in the Supreme Court had remained pending, but the author himself had not claimed undue delay in the matter and had made no attempt to request the Supreme Court to expedite the hearing of this case.

The author meanwhile counter-responded that the delay in the Supreme Court was habitual and that insofar as the criminal proceedings were concerned, the trial procedure was deficient, as demonstrated by the fact that only one person had been charged in the criminal case, although several were involved in the allegations. The State party's argument that the author only identified one individual in the identification parade was contended to be hardly satisfactory, since the author had been in a coma for over two weeks following the alleged torture, and obviously under those circumstances his capacity for identification was limited. In addition, evidence existed upon which other officers could have been charged, including documentary evidence submitted by the police officers themselves to the Magistrates Court and Supreme Court. In the author's view therefore, sole reliance on the author's identification, particularly in the circumstances of this case, had resulted in the complete exoneration of the other perpetrators. The author also argued that the only charge filed against the police officer in the criminal proceedings was that of torture; no charges had been filed regarding the illegal arrest and/or detention. It was observed that the State party offered no information on what measures had been adopted to put a stop to the threats and other measures of intimidation to which he had been subjected in the context of the absence of a witness protection programme.

<sup>69</sup>CCPR/C/87/D/1250/2004, adoption of views, 14-07-2006 (supra).

First, in determining the question of admissibility, the Committee noted that the issues raised by the author were still pending before the High Court as well as the Supreme Court, despite nearly three years having passed since their institution. Further, the police officer alleged to have participated in the torture of the author still continued under indictment in the criminal case. The Committee considered it significant that the State party had not provided any reasons, why either the fundamental rights case or the indictment against the police officer could not have been considered more expeditiously. Nor had it claimed the existence of any elements of the case, which should have complicated the investigations and judicial determination of the case, preventing its determination for nearly three years. The delay in the disposal of the Supreme Court case and the criminal case was found to have amounted to an unreasonably prolonged delay within the meaning of article 5, paragraph 2 (b) of the Protocol. The Communication was declared admissible.

Secondly, and on the merits, the Committee reiterated its finding that the delay of one and a half years in the disposal of both cases amounted to an unreasonably prolonged delay within the meaning of article 5 (2) (b) of the Protocol. While it was reiterated that the ICCPR does not provide a right for individuals to require that the State party criminally prosecute another person, a duty was imposed on the State party to thoroughly investigate alleged violations of human rights and to prosecute and punish those held responsible for such violations. The State party's reliance on the High Court's large workload could not excuse it from complying with its obligations. The delay was meanwhile further compounded by the State party's failure to provide any time frame for the consideration of the case, despite its claim that, following directions from the Attorney General, the prosecutors had requested the trial judge to expedite the case. The Committee found the State party to have violated ICCPR article 2(3) in connection with ICCPR article 7.<sup>70</sup>

In regard to the claim of violations of ICCPR article 9 relating to the circumstances of the arrest, the Committee noted that the State party has not contested that the author was arrested unlawfully, was not informed of the reasons for his arrest or of any charges against him and was not brought promptly before a judge, but merely argued that these claims were made by the author in his fundamental rights application to the Supreme Court, which remains pending. The State party was thus found to have violated ICCPR article 9, paragraphs 1, 2 and 3 alone and together with ICCPR article 2 (3). The Committee recalled its jurisprudence that ICCPR article 9(1) protects the right to security of person also outside the context of formal deprivation of liberty.<sup>71</sup>

*The interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the current case, it would appear that the author has been repeatedly requested to testify alone at a police station and has been harassed and pressurised to withdraw his complaint to such an extent that he has gone into hiding. The State party has merely argued that the author is receiving police protection but has not indicated whether there is any investigation underway with respect to the complaints of harassment nor has it described in any detail how it protected and continues to protect the author from such threats. In addition ... the alleged perpetrator is not in custody.*

The author was declared entitled, under ICCPR article 2 (3)(a), to an effective remedy and the State party was under an obligation to take effective measures to ensure that the pending legal proceedings are expeditiously completed, the author is protected from threats and/or intimidation with respect to the proceedings and is granted effective reparation. The State party was under an obligation to ensure that similar violations do not occur in the future.

### C. Non-Implementation of the views

<sup>70</sup>Consequently, the Committee did not consider it necessary, in this particular case, to determine the issue of a possible violation of article 7 alone of the Covenant.

<sup>71</sup>Case No. 821/1998, *Chongwe v Zambia*, Views adopted on 25 October 2000, Case No. 195/1985, *Delgado Paes v Colombia*, Views adopted on 12 July 1990, Case No. 916/2000, *Jayanarantena v Sri Lanka*, Views adopted on 22 July 2002.

However, despite eleven communications of views having been handed down as aforesaid by the Committee, none of these views have been implemented so far.<sup>72</sup> The sequence of events in *Fernando v Sri Lanka*<sup>73</sup> points to the lack of political will in this respect. Here, the UN Human Rights Committee had decided that the arbitrary sentencing of a lay litigant for contempt by the Supreme Court resulted in a violation of ICCPR Article 9(1). The Committee stated the fact "that an act constituting a violation of Article 9(1) is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole."<sup>74</sup> The State party was required to provide payment of compensation for the violation and to ensure that similar violations would not take place in the future. The enactment of a Contempt of Court Act was called for. However, the Government's response was that it could not implement the Views, since this would be construed as an interference with the judiciary.<sup>75</sup>

This argument has resulted in the country's international obligations being rendered of little practical value within Sri Lanka. If this view is upheld, Sri Lanka would be unable to give effect to each and every communication of views by the Committee, given the general condition that domestic remedies must be exhausted before lodging a communication to the Committee, which implies necessarily that a decision of the Supreme Court could be in issue in each and every case. Clearly, such a position is fundamentally incompatible with the State's professed commitment to its international obligations and particularly to its obligations under the Protocol.<sup>76</sup> Moreover, the reason as to why an assertion that the acts of the judiciary cannot provide a defence to violations of the Covenant has been explained very well in General Comment 31 of the UNHRC<sup>77</sup> which states *inter alia*, as follows;

Para 4:

*"The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty..'"*

According to established international law norms, the State is regarded as a unity and its internal divisions, whether these be territorial, organizational, institutional or other, cannot be invoked in order to avoid its international responsibility.<sup>78</sup> The argument that internal difficulties may

<sup>72</sup>In the *Victor Ivan case* (supra), the Government referred the decision as to the exact amount of compensation for the rights infringed to the Human Rights Commission of Sri Lanka. Though this amount was determined by the Commission and the government informed therewith, the compensation was never paid.

<sup>73</sup>*Anthony Michael Emmanuel Fernando v Sri Lanka*, CCPR/C/85/D/1189/2003, adoption of views, 31-03-2005

<sup>74</sup>Ibid.

<sup>75</sup>Submission from the Government of Sri Lanka (dated 8 August 2005) to the UN Human Rights Committee in response to its Views in *Anthony Michael Emmanuel Fernando v Sri Lanka*, CCPR/C/85/D/1189/2003, adoption of views, 31-03-2005

<sup>76</sup>See Counter-Submission to the UN Human Rights Committee (dated March 6, 2006) by this writer as legal counsel on behalf of the applicant in *Fernando v Sri Lanka*, (ibid), published in 'State Sovereignty, Peoples' Rights and International Treaties: The Optional Protocol to the International Covenant on Civil and Political Rights', LST Review, Law & Society Trust, Volume 17 Joint Issue 227 and 228, September & October 2006, at p56. See further United Nations Human Rights Committee, General Comment No 33, CCPR/C/GC/33 on 'The Obligation of State Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' adopted on 5<sup>th</sup> November 2008 for a general statement of the authoritative nature of the Committee's views in this regard.

<sup>77</sup>United Nations Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004.

<sup>78</sup>See Article 4 of the International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts which declares that the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. In addition, the International Court of Justice has categorically re-affirmed this rule. The Court stated that: "According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule which is reflected in (...) the Draft Articles on State Responsibility, is of a customary character"

preclude the implementation of the views of the Committee is also not plausible.<sup>79</sup> There is no doubt that the State, having voluntarily engaged in specific treaty obligations, is legally bound to discharge them.

The non-implementation of the views by the Sri Lankan Government was further buttressed by the decision of the Supreme Court in the *Sinbarasa Case* discussed above, which deprived the First Optional Protocol procedure of substantial authority within the country's domestic legal order.

### 2.1.3. Charter based mechanisms

The Special Procedures mechanisms have resulted in several visits to Sri Lanka by United Nations Special Rapporteurs<sup>80</sup> in recent years as well as interventions by the United Nations Working Group on Enforced or Involuntary Disappearances. This segment of the Study will examine recent<sup>81</sup> interventions by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak (2008)<sup>82</sup>, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston (2006)<sup>83</sup> as well as his Follow-up Recommendations (2008)<sup>84</sup> and observations made by the Working Group on Enforced or Involuntary Disappearances (2000).<sup>85</sup>

#### 2.1.3.1. The February 2008 Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak.<sup>86</sup>

This Report is of primary importance in the context of this research. The Special Rapporteur's findings underscore a commonly accepted reality; namely, that the freedoms of life and liberty of the Sri Lankan people are still very much at risk from the very guardians entrusted with its care and custody. Consequent to recording numerous and credible allegations from detainees, who complain of torture, the Report concluded that torture is 'widely practiced in Sri Lanka.'<sup>87</sup>

Its specific concerns were as follows;

see *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, p. 62, at p. 87, para. 62.

<sup>79</sup> Report on the Conference on Enforcement of Awards for Victims of Torture and Other International Crimes<sup>90</sup> section on UN Treaty Bodies, based largely on the presentation by Markus Schmidt, (OHCHR); REDRESS and Freshfields Bruckhaus Deringer. Among the examples cited in this Report are the following: *Mukong v. Cameroon (case 458/1991)*; where compensation was granted to a Cameroonian journalist jailed and held in unacceptable conditions of detention. Also *Pinto v. Trinidad and Tobago (case 512/1992)* where a death row inmate was released after a Committee ruling; In *Villares Ortega v. Ecuador (case 481/1991)*; compensation was paid after a Committee decision that the complainant had been tortured and ill-treated in detention; *Osburne v. Jamaica (case 759/1997)* where a judicial sentence involving corporal punishment and whipping was remitted after the Committee found that it violated article 7 of the Covenant. In some countries such as in Columbia, Law 288 of 5 July 1996 ensures the enforcement of awards of compensation in accordance with the Committee's views. In the Czech Republic, the Ministry of Justice is empowered by Act No. 517/2002 to coordinate the implementation of the views of the Committee.

<sup>80</sup> Special Rapporteurs are independent experts who are appointed by the United Nations Human Rights Council. When a Special Rapporteur receives reliable and credible information that, for example, gives grounds to fear that a person may be at risk of torture or other forms of ill-treatment, he may transmit an urgent appeal to the Government concerned. The communications sent by the Special Rapporteur have a humanitarian and preventive purpose, and do not require the exhaustion of domestic remedies. Governments are requested to clarify the substance of the allegations, take steps to protect the person's rights, and are urged to investigate the allegations and prosecute and impose appropriate sanctions on any persons guilty of torture and other cruel, inhuman or degrading treatment or punishment. Special Rapporteurs also undertake fact finding visits to countries.

<sup>81</sup> Previous Reports in terms of the UN Charter based Special Mechanisms will not be dealt with particularly here but will be referred to whenever relevant during the course of this Study. In addition, contextual references will be made to other Reports such as those dealing with displacement under relevant segments of the Study.

<sup>82</sup> Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008.

<sup>83</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006.

<sup>84</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston (Follow-up Recommendations) (2008), A/HRC/8/3/Add.3, 14 May 2008, Eighth session of the Human Rights Council.

<sup>85</sup> United Nations Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances (25-29 October 1999) E/CN.4/2000/64/Add.1 21 December 1999; Presented to the UN Commission on Human Rights at its 56th sessions, March-April 2000

<sup>86</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008.

<sup>87</sup> The term 'widely practised' was interpreted by the Special Rapporteur to mean referral to 'instances of probable torture in several diverse locations and not as a systematic practice.' See *ibid*, at paragraph 70, footnote 20

- While being 'encouraged by the significant number of indictments' filed by the Attorney General and 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, it was regretted that the indictments have led so far only to three convictions, while eight cases were concluded with acquittals. Further, the long duration of investigation in regard to these cases often more than two years and allegations of threats against complainants and torture victims was of special concern;<sup>88</sup>

- 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 has been filed on the basis of command responsibility;<sup>89</sup>

- There is an absence of an effective *ex officio* investigation mechanism in accordance with article 12 of the Convention Against Torture<sup>90</sup>

- The functioning of important monitors of human rights violations such as the National Police Commission and the National Human Rights Commission has been compromised due to the '2006 presidential appointments of the Commissioners'<sup>91</sup>

- Though there is legal prohibition of corporal punishment, there is a high incidence of such punishment corroborated by medical evidence<sup>92</sup>

- Severe overcrowding/lack of space in prisons is evidenced and amounts to degrading treatment. Detainees are locked up in basic cells without sufficient light or ventilation which conditions becomes inhuman for suspects held for several months under Emergency Regulations (ER);<sup>93</sup>

- Many of the legal safeguards contained in the ordinary criminal procedure laws do not apply to cases of detention under emergency regulations, thus facilitating suspects taken in under ER to become victims of torture;<sup>94</sup>

The Special Rapporteur's recommendations included, *inter alia*, that detainees should be given access to legal counsel within twenty four hours of arrest, with reference particularly to persons arrested under ER, that Magistrates routinely conduct independent medical examinations in accordance with the Istanbul Protocol even in the absence of a complaint from a detainee, that all allegations of torture and ill treatment are promptly and thoroughly investigated by an independent authority, that confessions made by persons in custody without a presence of a lawyer and not confirmed before a judge, should be inadmissible and that the burden of proof should shift to the prosecution to determine the voluntary nature of the confession.<sup>95</sup> It was further recommended along with a number of special measures for penal reform that special courts dealing with torture and ill treatment should be established and that the Government ratify the OPCAT.

<sup>88</sup> *ibid*, at paragraphs 51 and 77.

<sup>89</sup> *ibid*, at paragraph 52. The Government's response has been 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. However, see Section 2.2.2.1.B. of this Study for a persuasive argument as to why the principle of command responsibility could be brought in within the ambit of the CAT Act.

<sup>90</sup> *ibid*, at paragraph 55

<sup>91</sup> *ibid*, at paragraph 57

<sup>92</sup> *ibid*, at paragraph 80

<sup>93</sup> *ibid*, at paragraph 83 and 84

<sup>94</sup> *ibid*, at paragraph 78

<sup>95</sup> *ibid*, points c), g) and h) of paragraph 94. It is pertinent that this was the same recommendation strongly made to the Sri Lankan Government by the UN Human Rights Committee in *Nallaratnam Sinbarasa v. Sri Lanka*, (CCPR/C/81/D/1033/2001, adoption of views, 21-07-2004) referred to earlier even though this Communication of Views is not specifically mentioned in the Special Rapporteur's Report.

These recommendations would be referred to in each relevant part of this Study examining the specific legal position in that respect.

### 2.1.3.2. The March 2006 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions<sup>96</sup> and the May 2008 Follow-Up to Country Recommendations<sup>97</sup>

In March 2006,<sup>98</sup> the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston following a mission visit to Sri Lanka between 28 November and 6 December 2005 reflected similar concerns. It concluded that apart from summary executions, the other main cause of death in police custody was torture and that Government officials were generally candid in recognising that torture is widespread.<sup>99</sup> It was pointed out that this acknowledgement was ‘often accompanied by a complacent and fundamentally tolerant attitude’ which, it was opined, was ‘highly problematic.’<sup>100</sup> What is significant is the Report’s observation that there was a nationwide pattern of custodial torture in Sri Lanka and that custodial deaths are caused not by rogue police, but by ordinary officers taking part in an established routine.<sup>101</sup>

The 2006 Alston Report placed crucial emphasis on reforming the broader deficiencies of the Sri Lankan system of criminal justice, most particularly the culture and practices of police, prosecutors, and the judiciary.<sup>102</sup> Its expansion into the wider context of the Rule of Law framework in Sri Lanka is a particularly distinguishing factor. Specific recommendations included that the Government should publicly confirm that it will insist upon respect for the Constitution’s allocation of powers between the National Police Commission (NPC) and the Inspector General of Police (IGP) and that, the IGP should play only a consultative role in the NPC’s exercise of its ‘powers of promotion, transfer, disciplinary control and dismissal.’<sup>103</sup> It was also recommended that the Government should ratify the Rome Statute of the ICC without reservation or declaration.<sup>104</sup>

Importantly, in May 2008, the Follow-Up to Country Recommendations by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions presented to the Human Rights Council<sup>105</sup> detailed the lack of implementation<sup>106</sup> of his recommendations issued in 2006.

*“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.*

*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*

<sup>96</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006.

<sup>97</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston (Follow-up Recommendations) (2008), A/HRC/8/3/Add.3, 14 May 2008, Eighth session of the Human Rights Council.

<sup>98</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006.

<sup>99</sup> *ibid.*, at paragraph 54.

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.*, at paragraphs 51 to 58. It was observed most succinctly that ‘An ineffective justice system creates a climate of public opinion conducive to condoning police torture and the summary execution of suspects,’ specifically at paragraph 52.

<sup>103</sup> *ibid.*, at paragraph 81

<sup>104</sup> *ibid.*, at paragraph 83.

<sup>105</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston (Follow-up Recommendations) (2008), A/HRC/8/3/Add.3, 14 May 2008, Eighth session of the Human Rights Council.

<sup>106</sup> ‘...the view that human rights violations are necessary has led to 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. This would appear to explain why the recommendations of the Special Rapporteur to the Government and the LTTE have been almost completely disregarded’, *ibid.*, at paragraphs 13 and 14.

*Rapporteur’s visit took place, the Government has required the Inspector General of Police to report to the Minister of Defence.’<sup>107</sup>*

Particularly, the continued weakening of oversight mechanisms such as the Human Rights Commission and the National Police Commission attracted stringent criticism;<sup>108</sup> hence the Special Rapporteur’s assertion that the President has made a clear decision to ensure that Sri Lanka has no independent police oversight body.<sup>109</sup>

The 2006 findings of the Special Rapporteur’s mission visit as well as the follow-up to country recommendations in 2008 will be referred to at relevant points in the detailed analysis in this Study.

### 2.1.3.4. Interventions by the UN Working Group (UNWG) on Enforced or Involuntary Disappearances

In December 1999, a third visit was made to Sri Lanka by the UNWG on Enforced or Involuntary Disappearances following its earlier visits in 1991 and 1992.<sup>110</sup> Though the UNWG’s recommendations and findings related largely to enforced disappearances, the Report relevantly focuses on the impunity afforded for perpetrators of grave human rights violations, including torture. One important finding in this Report was that although criminal investigations had been initiated in relation to grave human rights violations, only very few of the suspected perpetrators have actually been convicted, and some of them have even been promoted.<sup>111</sup> The UNWG commented therefore that ‘many families rightly feel that justice has not yet been done to them.’<sup>112</sup> Further, the UNWG expressed concern that the emergency law statutes, namely the PSO and the PTA had not been brought into line with international standards relating to personal liberty, due process of law and humane treatment of prisoners.<sup>113</sup>

More recently, the UNWG has observed that its earlier recommendations issued following mission visits to the country still remain un-implemented.<sup>114</sup>

### 2.1.3.5. General Comments on the Use of the Special Procedures in relation to Sri Lanka

Despite concerns expressed by the office of the Special Rapporteur itself on lack of adherence of government to the Special Procedures, particularly in regard to urgent appeals<sup>115</sup>, the use of the

<sup>107</sup> *ibid.*, at paragraphs 56 and 57. There was only one police-related recommendation in regard to which, the Special Rapporteur was aware of any positive action; this was in reference to a ‘proactive programme of recruitment’ in the course of which 200 new Tamil speaking police officers had been trained.

<sup>108</sup> *ibid.*, at paragraph 37, where it was pointed out that ‘the National Human Rights Commission is no longer independent of the executive branch of the Government since its members are now directly appointed by the President. Further, the lack of adherence of the Commission to the Paris Principles (GA Res.48/134 (20 December 1993) and its downgrading by the 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) are specifically referred to. Meanwhile, at paragraph 59, the Special Rapporteur observes that ‘the NPC has failed to improve police accountability in part because it has lost its independence’ and reiterates 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.

<sup>109</sup> *ibid.*, at paragraph 59.

<sup>110</sup> United Nations Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances (25-29 October 1999) E/CN.4/2000/64/Add.1 21 December 1999; Presented to the UN Commission on Human Rights at its 56th sessions, March-April 2000. The first visit of the UNWG to Sri Lanka took place from 7 to 17 October 1991 and the Report (E/CN.4/1992/18/Add.1) was presented to the Commission on Human Rights at its forty-eighth session. The second visit of the UNWG took place from 5 to 15 October 1992 for the purpose, *inter alia*, of evaluating the progress of the implementation of its recommendations formulated in 1991 and the report was submitted to the Commission at its fiftieth session (E/CN.4/1993/25/Add.1)

<sup>111</sup> *ibid.*, at paragraph 60

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*, at paragraph 62

<sup>114</sup> United Nations Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/4/41, 25 January 2007, at paragraph 393.

<sup>115</sup> Vide for example, the following comment ‘In general, responses to urgent appeals in this period were characterized by significant delays; often information was provided on criminal allegations against the individuals without addressing the allegations of torture or ill-treatment; they often indicated that investigations into the allegations were underway, but rarely responded with information on outcomes, including compensation paid to victims or their families. This is disturbing and discouraging. Without any substantive reply (confirming or repudiating the torture allegation and indicating the measures taken) the



Special Procedure mechanisms in relation to Sri Lanka has compelled the Government to provide information and take action in respect of cases of grave human rights violations. It is relevant that the Special Rapporteurs have, for example, insisted on a high standard of accountability by the Government in meeting their obligations in terms of the Special Procedures.

One specific example of this is the following exchange of communications between the Special Rapporteurs and the government of Sri Lanka. By letter dated 22 July 2004<sup>116</sup>, the Government inquired whether the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Special Rapporteur on Violence Against Women, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, and the Special Rapporteur on the right to Freedom of Opinion and Expression could accept as final replies to cases of alleged human rights violations, to receive the indictments in the cases, where the investigations are completed and the Attorney General of Sri Lanka has sent an indictment to the relevant Court to initiate criminal proceedings. The Government noted that once judicial proceedings begin, the State has no control over them and that the courts may sometimes take a long time to issue the final verdict.

However, the reply by the Special Rapporteurs (by letter dated 23 September 2004), pointed out that even in instances where investigations are completed and where criminal proceedings have been initiated, they needed additional information (i.e. details of conclusions of inquiries, judicial or other proceedings, reports of penal or disciplinary sanctions imposed on the perpetrators, as well as an indication of whether compensation and assistance were provided to the victims or their families) to thoroughly assess the specific situation and to be able to draw conclusions.<sup>117</sup>

This response places a duty on the State and the Attorney General's Department in regard to Sri Lanka's obligations in terms of the respective treaty bodies, which extends to more than the mere filing of an indictment.

Insofar as mission visits are concerned in the context of torture prevention efforts, there is no doubt that the mission reports cited above have been useful, both in drawing attention to the systemic nature of human rights violations in Sri Lanka, as well as identifying fundamentally problematic structural deficiencies in Sri Lanka's legal system.

#### 2.1.4 The International Criminal Court (ICC)

In principle, the government has declared its willingness to Sri Lanka's accession to the Statute of the International Criminal Court.<sup>118</sup> However, given the stance of the Government that Sri Lanka will not tolerate international scrutiny on the basis of human rights and/or humanitarian protections, coupled with the emphasis on state sovereignty as illustrated by the *Sinharasa Case*, the country's accession to the ICC is not, by any means, a foreseeable development in the future.

#### 2.1.5. Regional conventions

There are no enforceable regional conventions prescribing adherence to rights protections in South East Asia.

*SR is not in a position to assess whether his Urgent Action had any effect. The statistical data provided above casts serious doubt on whether the Urgent Actions procedure, once regarded as one of the most effective and powerful tools of the Commission's special procedures, has any meaningful impact on the practice of torture world-wide' in statement made by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the Commission on Human Rights at its 61<sup>st</sup> session, 4<sup>th</sup> April 2005; (<http://www.unhcr.ch/hurricane/hurricane.nsf/view01> - accessed November 23rd, 2008).*

<sup>116</sup>As referred to in the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/2005/62/Add.1., 30 March 2005, at paragraphs 1633 and 1634

<sup>117</sup>*ibid.*

<sup>118</sup>United Nations Committee against Torture: Sri Lanka, CAT/C/LKA/CO/2/Add.1 (Comments by Government of Sri Lanka on the Concluding Observations of the CAT Committee), 20/02/2007, at paragraph 23.

### International Legal Standards and National Law

#### 2.2. Prohibition of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in National Law

##### 2.2.1. Constitutional Standards

ICCPR article 7 and UNCAT articles 1 and 2 establishes the right to freedom from torture and cruel, inhuman, degrading treatment or punishment. This right has been established as a fundamental human right under international law, and therefore any violation hereof is prohibited. This includes all aspects of criminal investigations and derogation thereto can never be justified, cf. ICCPR article 4(2).

The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, (hereafter the Constitution), Chapter 3, Article 11 prescribes:

*"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

This pre-eminent prohibition in the Constitution in relation to the right to freedom against torture and CIDTP is an entrenched safeguard; consequently, it cannot be amended otherwise than through a stringent process including approval by a two thirds majority of members of parliament as well as approval by the people at a referendum.<sup>119</sup>

However, a curious anomaly has long been the fact that the Constitution omits the right to life. This omission has had a singularly negative effect on the right to freedom against torture and CIDTP. For example, if an individual is severely tortured and survives the abuse, he or she has an enforceable constitutional right in terms of Article 11 above. Yet, if that victim of torture dies as a result, then that right to a remedy is lost as a result of the fact that the right to life is absent in Sri Lanka's Constitution as well as by the fact that Article 126(2) of the Constitution gives the right to go to court only to a person alleging the infringement of any right 'relating to such person', or an attorney at law on his behalf.<sup>120</sup> Recourse to the Court is further hampered by other procedural restrictions, such as the fact that a victim needs to come before court within one month of the date of occurrence of the violation.<sup>121</sup>

In 2003, Sri Lanka's Supreme Court inferred an implied right to life in a limited context as flowing from the prohibition imposed in Article 13(4) 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.'<sup>122</sup> The right to life as so implied was confined to the physical right to life rather than its positive affirmation. Even though limited, (and necessarily so given the restrictions of the constitutional formulation), this development is important in that it secured the right of dependants, next-of-kin and intestate heirs to invoke the jurisdiction of the Court for relief when a family member dies due to torture at the hands of state officers.<sup>123</sup> Later, this judicially implied right to life was reiterated (by one of the Justices who had been instrumental in initially expanding the existing constitutional provision) in the context of a *habeas corpus*<sup>124</sup> application in the Machchavallan Case.<sup>125</sup> These decisions evidence liberal judicial attitudes in implying a right to life, even in a limited sense, into the existing constitutional document. Regretfully however, the

<sup>119</sup> Vide Article 83 of the Constitution.

<sup>120</sup> Article 126(2) - No public interest standing is allowed unlike in the Indian jurisdiction.

<sup>121</sup> Article 126(2) of the Constitution. This restriction as well as the limitation on public interest petitions is again peculiar only to Sri Lanka in the context of South Asian jurisdictions.

<sup>122</sup> *Sriyani Silva vs Iddamalagoda* [2003] 2 Sri LR 63, per Justice Mark Fernando; *Wenavale Rani Fernando case*, SC(FR) No 700/2002, SCM 26/07/2004, per Justice Shiranee Bandaranayake

<sup>123</sup> *ibid.*

<sup>124</sup> the traditional English remedy of *habeas corpus* "to produce the body of the person" is contained in Article 141 of the Constitution.

<sup>125</sup> *Kanapathipillai Machchavallan vs OIG, Army Camp, Plantain Point, Trinomalee and Others* (SC Appeal No 90/2003, SC (Spl) L.A. No 177/2003, SCM 31.03.2005, per Justice Shiranee Bandaranayake. This decision is discussed in detail later in the Study.

reasoning in these cases has not been reflected on – or expanded upon - in the later thinking of the Supreme Court.

Despite these innovative judicial interpretations, the deficiencies in the constitutional formulation prejudice robust judicial protection of the right to freedom against torture and CIDTP. More detailed analysis of the manner in which the Court has protected the nature of the right is contained in Section 3.3.3.1. of this Study.

## 2.2.2.. Criminalisation of torture and CIDTP in national legislation (CAT Act, Penal Code ICCPR Act etc.)

Article 4 of the UNCAT establishes that:

*“Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”*

### 2.2.2.1 The CAT Act

The primary domestic statute in regard to the punishment of perpetrators of torture and CIDTP is the CAT Act enacted to give effect to Sri Lanka’s obligations in terms of the UNCAT. The CAT Act designates and defines torture as a specific crime and vests jurisdiction in the High Court of Sri Lanka for offences of torture committed in or outside the territory of the country, where the alleged offender or the victim is a citizen of Sri Lanka or the alleged offender (whether a citizen or not) is in Sri Lanka or on board a ship or aircraft registered in Sri Lanka.<sup>126</sup> A person guilty of an offence under this Act is liable for a minimum of seven years and a maximum of ten years imprisonment of either description as well as a fine.<sup>127</sup>

The specific requirements in the UNCAT and the various features of the CAT Act are discussed in the following analysis.

#### A. Definition of Torture and CIDTP

Article 1(1) of the UNCAT states:

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

The CAT Act defines ‘Torture’ in Section 12 (interpretation section) as follows: “Torture” with its grammatical variations and cognate expressions, means any act which causes severe pain,

<sup>126</sup> Section 4, CAT Act.

<sup>127</sup> Section 2(4), CAT Act. An offence under this Act is a non-bailable and cognizable offence according to sub section (5) of this same Section.

whether physical or mental, to any other person, being an act which is done for any of the following purposes that is to say;

- obtaining from such other person or a third person, any information or confession; or
- punishing such other person for any act which he or a third person has committed, or is suspected or having committed; or
- intimidating or coercing such other person or a third party; or
- done for any reason based on discrimination, and being in every case, an act which is done by, or other person acting in an official capacity.

The parallel definition in the UNCAT includes the term "suffering", which is however omitted in the CAT Act. This deficiency was noted by the UN Human Rights Committee in its Concluding Observations in respect of Sri Lanka’s Periodic Reports under ICCPR in 2003<sup>128</sup> and formed part of the issues before the CAT Committee in its consideration of Sri Lanka’s Periodic Report in 2005. The Government responded on the basis that the expression "cause severe pain whether physical or mental" would necessarily include any suffering that is caused to any person, stating further that the judicial interpretation of the term "torture" would take into account any suffering, physical or mental that any person would be subject to.<sup>129</sup>

In its Concluding Observations in 2005, the CAT Committee continued to re-iterate this concern.<sup>130</sup> In the Government’s follow-up response to the Concluding Observations of the CAT Committee, it was merely observed that steps will be taken to refer this matter for the consideration of the Sri Lanka Law Commission to recommend any changes if necessary to bring the domestic legislation in full conformity with the Convention.<sup>131</sup> No concrete action has been yet taken in this respect. These concerns were reiterated by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading treatment or Punishment Manfred Nowak in his report to the United Nations General Assembly in February 2008.<sup>132</sup>

The question is whether the omission of ‘suffering’ in the definition of ‘torture’ has been detrimental in practice. In the exercise of its jurisdiction under the CAT Act, the High Court has delivered a mere three convictions up to date. These three convictions<sup>133</sup> relate to guilt being determined following actual physical pain caused to the victims by the accused, though the degree differs according to the facts of each case. In one case for example,<sup>134</sup> a conviction was sustained despite serious injuries not being caused to the torture victim.<sup>135</sup> However, none of these convictions are sufficient to use as an example demonstrating a successful prosecution based on the guilt of the accused in causing ‘suffering’ to the victim.

Examination of indictments prepared by the Attorney General in attempting to further analyse this question does not yield any information either. Alleged perpetrators of torture are indicted by the Attorney General’s Department with a certain measure of laxity, (in certain instances omitting indictment of even the officer-in-charge of the police station who had ‘consented and

<sup>128</sup> The UN Human Rights Committee expressed concern in 2003 that ‘the restrictive definition of torture in the 1994 Convention against Torture Act continues to raise problems in the light of article 7 of the Covenant’ - see United Nations Human Rights Committee, Concluding Observations on Sri Lanka (2003), CCPR/CO/79/LKA, 01/12/2003, at paragraph 9.

<sup>129</sup> See for example, United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2, 06/08/2004, Second periodic reports of States parties due in 1999, at paragraph 82.

<sup>130</sup> United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, at paragraph 5.

<sup>131</sup> United Nations Committee against Torture: Sri Lanka, CAT/C/LKA/CO/2/Add.1 (Comments by Government of Sri Lanka on the Concluding Observations of the CAT Committee), 20/02/2007, at paragraph 10.

<sup>132</sup> Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at paragraph 25.

<sup>133</sup> *Republic of Sri Lanka vs Madilayawatte Jayalalige Thilakarathna Jayalath*, HC Case No: H.C 9775/99, Colombo High Court, HC Minutes, 19.01.2004; *Republic of Sri Lanka vs Edirisinghe* HC Case No: 1592/2003, Colombo High Court, HC Minutes 20.08.2004; *Republic of Sri Lanka vs Selvin Sella and Another*, HC No: 966/2002, Colombo High Court HC Minutes 20.07.2007.

<sup>134</sup> *Republic of Sri Lanka vs Edirisinghe* HC Case No: 1592/2003, Colombo High Court, HC Minutes 20.08.2004.

<sup>135</sup> See segment 3.3.3.3. below for a detailed discussion of these cases.

acquiesced' in the torture perpetrated upon the victim).<sup>136</sup> Thus, it is not a matter for surprise that there is reluctance to indict perpetrators who inflict suffering or for that matter, mental pain.

## B. Consent or acquiescence of a public official or other person acting in an official capacity

The wording of UNCAT article 1 naturally entails that whoever participates or consents to acts of torture can be punished for these acts. Furthermore UNCAT article 2(3) establishes that an order from a superior officer or a public authority never can be invoked as a justification for torture.

There is a comprehensive rationale in maintaining that Parliament, when it enacted the CAT Act, had the express intent of bringing an officer of a police station, who 'consents and acquiesces' in torture perpetrated by his subordinate officers, within its ambit.

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', the definition catches up in its ambit, an officer-in-charge (OIC) of a police station, who permits abuse under his command.

This interpretation is, indeed, supported by the fact that the definition of torture contained in the Act, insofar as the element of *mens rea* (criminal intention is considered) is broader than the Convention, which refers to acts "intentionally inflicted" in Article 1, whereas Act No. 22 does not include the pre-condition of 'intention' in defining torture in Section 12. While it may be true that the necessity to prove *mens rea* underpins the general ethos of the criminal law, a persuasive argument should at least be made out by prosecutors in trials under the CAT Act, as to why officers in charge of police stations should be indicted, where they have 'consented or acquiesced' in torture.

In practice however, indictments are not filed against OICs by the Attorney General. In one particularly striking example, where a torture victim (Gerald Perera) was killed days before he was due to give evidence in the trial under the CAT Act<sup>137</sup> the OIC of the police station, at which the victim was tortured, was first indicted and then his name withdrawn from the indictment. The failure to indict the OIC occasioned criticism by the High Court, which acquitted the other accused police officers on the basis that there was no evidence directly implicating them as having caused the torture, even though it was established that the victim had been brought into the police station while hale and hearty, but taken out with multiple injuries.

The failure on the part of the Attorney General to indict the OIC in the *Gerald Perera Case* was subjected to severe criticism by activist groups.<sup>138</sup> This failure has not been confined to this case but indeed extends to other torture indictments under the CAT Act as well.<sup>139</sup> Deficiencies in the prosecutorial process will be addressed more in detail in the succeeding parts of this Study.

## C. Universal Jurisdiction

<sup>136</sup> *Republic of Sri Lanka vs Suresh Gunasena and Others*, Negombo High Court, HC Minutes 02.04.2008, judgment of High Court judge J Tennekoon.

<sup>137</sup> *ibid*. The torture victim was Gerald Perera who had been arrested and tortured to the extent of causing renal failure by officers attached to the Wattala police station on mistaken identity. His fundamental rights petition in the Supreme Court was decided in his favour by Justice Mark Fernando writing for the Court in *Sanjeewa v Suraweera*, [2003] 1 Sri LR 317, was to be a *locus classicus* on the responsibility of officers in charge of police stations in respect of abuses committed 'under their command.' The relevant officer-in-charge here was Sena Suraweera.

<sup>138</sup> See press release issued by the Asian Human Rights Commission – AHRC-PL-04-2005 – *Sri Lanka's AG erred in excluding two police officers from torture charges*. 'Also, Asian Human Rights Commission Forwarded Open Letter; Sri Lanka; 'Law & Society Trust requests the AG to file appeal on Gerald's torture judgment,' Thursday 10<sup>th</sup> April 2008.

<sup>139</sup> *ibid*. In the case of the torture of Lalith Rajapakse, the officer-in-charge of the Kandana police station, N.D.B. Attanayake was also not indicted despite the fact that Rajapakse was arrested, interrogated and tortured under his supervision.

Article 5 of the UNCAT establishes the requirement of universal jurisdiction, which entails that a state party to the Convention must take all necessary measures to establish its jurisdiction over offences referred to in article 4 in the Convention, so to ensure that all acts of torture are punished.

The CAT Act vests jurisdiction in the High Court of Sri Lanka for offences of torture in the following categories; acts allegedly committed within Sri Lanka or on board a ship or aircraft registered in Sri Lanka irrespective of citizenship, acts allegedly committed by a Sri Lankan citizen or against a Sri Lankan citizen irrespective of the place where the acts allegedly take place.

Yet, acts of torture committed by non-Sri Lankan perpetrators outside the country's territory, but who are present in the territory of Sri Lanka and who have not been extradited, are left out from this definition. The CAT Act's lack of conformity with article 5 of the Torture Convention in this regard has been adversely commented upon by the CAT Committee.<sup>140</sup> The Government's response however has been that with the introduction of the CAT Act, the Extradition Law was also amended by designating the offence of torture as an extraditable offence under the Extradition Law, so that an "extradite or prosecute" regime is put into place. Thus, it is maintained that the existing legal regime is sufficient for the purpose.<sup>141</sup> It is also stated that this question would be submitted to the Law Commission for an opinion.<sup>142</sup> However, this still does not change the fact that the CAT Act does not, in its present form, fulfil the requirements of article 5 of the UNCAT.

## D. The Absolute Prohibition of Torture

UNCAT article 2(2) and 2(3) prescribes the absolute prohibition of torture; no circumstances at all can/may be invoked as a justification of torture.

In conforming to the relevant CAT articles, Section 3 of the CAT Act states that the existence of a state of war, threat of war, internal political instability or public emergency are not an adequate defense to acts of torture constituting an offence under the Act. Neither is the justification of superior orders an acceptable defense.

## E. The Right to Redress and Compensation

UNCAT article 14 (1) establishes:

"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."

In *Sriyani Silva vs. Iddamalagoda*,<sup>143</sup> the Supreme Court, (exercising its fundamental rights jurisdiction in terms of Article 126 of the Constitution), recognized the petitioner's right to sue and seek compensation for herself as the victim's widow and for the minor child. By doing so, the law "was brought into conformity with international obligations and standards."<sup>144</sup> Reliance was

<sup>140</sup> See United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, at paragraph 10.

<sup>141</sup> See for example, United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2, 06/08/2004, Second Periodic Reports of States parties due in 1999, at paragraph 83.

<sup>142</sup> United Nations Committee against Torture: Sri Lanka, CAT/C/LKA/CO/2/Add.1 (Comments by Government of Sri Lanka on the Concluding Observations of the CAT Committee), 20/02/2007, at paragraph 11.

<sup>143</sup> [2003] 2 Sri LR 63.

<sup>144</sup>*ibid*.

placed by the Court in this case primarily on the Convention itself rather than the CAT Act, which does not contain any provision in regard to the right of either the victim or the defendant for compensation.

The Government has somewhat unconvincingly argued that, in terms of Section 17 (4) of the Criminal Procedure Code, “the Court may order the person convicted or against whom the Court holds the charges to be proved, to pay within such time or in such instalments as the Court may direct, such sum by way of compensation to any person affected by the offence as the Court shall seem fit.” Consequently, it is contended that this covers, *inter alia*, compensation for the injury caused by the offence committed including in the case of prosecutions under the CAT Act<sup>145</sup>, thus not warranting a specific provision in this regard in the CAT Act. None of the three convictions delivered by Sri Lanka’s High Courts under the CAT Act so far<sup>146</sup> have indicated a direction to pay compensation as differentiated to the imprisonment and/or fines ordered.

Sri Lanka moreover has no comprehensive policy on redress and rehabilitation of torture victims.

## F. The Principle of *Non-refoulement*

UNCAT article 3 contains the principle of *non-refoulement*, which means that a state must not expel, return or extradite a person to another country where there are substantial grounds for believing that the person might be subjected to torture.

This principle is not included in Sri Lanka’s CAT Act. Here again, the Government’s response has been that the existing extradition law is sufficient for this purpose and that the CAT Act need not be amended. Upon this question being repeatedly raised by the CAT Committee, it has been claimed that this question would be submitted to the Law Commission for an opinion.<sup>147</sup>

### 2.2.2.2. The Penal Code

In instances where the alleged offence is deemed to lack the elements of gravity that go to demonstrate an offence in terms of the CAT Act, the prosecution takes place in respect of hurt, criminal force or assault under the relevant provisions of the Penal Code. The Penal Code No 2 of 1883 (as amended) is a pre-colonial enactment. Relevant prosecutions in respect of torture or CIDTP are referable to the following sections; causing hurt and its categories thereof (Sections 310-329), wrongful restraint and wrongful confinement (Sections 330-339) and criminal force and assault (Sections 340-349). Where hurt is caused in order to extract information or a confession, the punishment is aggravated (Section 321) and it is interesting that three of the illustrations provided in this provision relate to respectively a police officer and a revenue officer committing torture on an individual. In certain instances where torture has resulted in rape and murder, the relevant provisions of the Penal Code are Section 357 of the Penal Code, (abduction with intent that the victim may be compelled or knowing it to be likely that she will be forced or seduced into illicit sexual intercourse), Section 364 (rape) and Section 296 of the Penal Code (murder).<sup>148</sup>

<sup>145</sup> See for example, United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2, 06/08/2004, Second Periodic Reports of States parties due in 1999, at paragraphs 67 and 102.

<sup>146</sup> *Supra*.

<sup>147</sup> United Nations Committee against Torture: Sri Lanka, CAT/C/LKA/CO/2/Add.1 (Comments by Government of Sri Lanka on the Concluding Observations of the CAT Committee), 20/02/2007, at paragraph 11.

<sup>148</sup> High Court of Colombo, Case No 8778/97, Bench of Three Judges, Analysis of judgment of Judge Gamini Abeyratne, High Court judge Negombo, 1998.07.03 The bench of three judges was appointed by the Chief Justice in order to execute justice and equity in the shortest time in terms of sub-section (2) 450 of the Criminal Procedure Code Act No 15 of 1979 as amended by Act No 21 of 1988 as a result of the information submitted by the Attorney General under subsection 450(4) of the Criminal Procedure Code, No 15 of 1979 (as amended) in order to conduct a special judicial hearing in the High Court before a three judge bench without a jury. Their appeals against the convictions were dismissed in the appellate process.

The Government has asserted that these provisions have been used by the prosecutorial and judicial authorities for good effect in combating torture and CIDTP.<sup>149</sup> However, this is not demonstrably the case. Prosecutions in the Magistrate’s Court in respect of certain offences may be initiated by police officers under Section 136(b) of the CCP Act rather than by state counsel; thus, minimum elements of objectivity are lacking and in many instances, cases are fabricated against persons who complain against the police as is discussed later in this analysis. Moreover, while the delay that takes place in High Court trials in respect of indictments under the CAT Act is pronounced, delays in prosecutions in terms of the Penal Code are even greater, resulting in the trials being rendered of little effect.

Further, the Code lacks a specific crime of enforced disappearances. Torture and CIDTP is often practiced on persons involuntarily disappeared, then tortured and later, extra-judicially executed.<sup>150</sup> Clearly, in many cases, the act of enforced disappearance cannot be separated from the act of torture and CIDTP, particularly in the context of conflict related abuses. This is a significant lacuna in the law. The Penal Code also lacks any provision enforcing command responsibility, whereby senior officers may be made liable in regard to the abuses committed by junior officers under their command. In certain prosecutions, though the Attorney General has sought to use the provision of culpable inaction to argue that senior officers are found guilty on this basis, which has not been successful.<sup>151</sup> These lacunae in the country’s primary penal statute, combined with fundamental deficiencies in the investigative and prosecutorial structure, have resulted in the penal provisions being largely ineffective in combating practices of torture and CIDTP.

### 2.2.2.3. The ‘ICCPR Act’

The ICCPR contains several of the most fundamental human rights; here among the right to life in article 6, the right to freedom from torture and ill-treatment in article 7 and the right to liberty and security of person in article 9, and both article 6 and 7 are non-derogable rights. Sri Lanka, being a state party, to the covenant, is under a strict obligation to implement these fundamental rights into its national legislation.

In 2007 the Supreme Court’s decision in the *Sinharasa Case* underlined the importance of bringing the domestic legal regime into conformity with the obligations imposed by the ICCPR. The extent to which Sri Lanka is bound by international treaties also became a crucial question of economic policy, when implementation of the obligations contained in key international human rights treaties was stipulated as a key condition by the European Union in order for the country to re-apply for trade preferences (the GSP+ scheme) in 2008. It was accordingly felt by policy makers that the most preferable manner in which such adherence could be demonstrated was by passing a local statute bringing the ICCPR rights into domestic law. Though this intention itself

<sup>149</sup> In paragraph 59 of the Second Periodic Report submitted to the CAT Committee in 2004, (CAT/C/48/Add.2, 06/08/2004, Second Periodic Reports of States parties due in 1999), the Government stated that apart from prosecutions under the CAT Act, ‘over 300 police officers have been charged for offences of abduction and wrongful confinement. Of those, 12 police officers have been convicted and sentenced.’

<sup>150</sup> Article 4 (1) “All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness.”(UN Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992). Adopted by General Assembly resolution 47/133 of 18 December 1992). In its General Commentary on Article 4 of the Declaration, the Working Group on Enforced or Involuntary Disappearances (WG) has stated that, although States are not bound to follow the definition contained in the Declaration strictly in their criminal codes, they shall ensure that the act of enforced disappearance is defined in a way that clearly distinguishes it from related offences such as abduction and kidnapping.

<sup>151</sup> *The Bindunneewa case - S.C. Appeal 20/2003 (TAB) H.C. Colombo No. 763/2003 SCM 21.05.2005*. Though a conviction in the basis of culpable inaction (as contained in Sections 30 and 31 of the Penal Code) was entered into at the High Court stage by a Trial-at-Bar, this conviction was overturned on appeal by the Supreme Court. The insufficiency of evidence in respect of the illegal omissions or positive (illegal) acts on the part of the accused police officer was decided to shut out criminal liability. The Court consequently acquitted the accused, stating that “if the officer in charge has exercised his discretion bona fide and to the best of his ability, he cannot be faulted for the action he has taken even though it may appear that another course of action could have proved more effective in the circumstances.” This position could be critiqued on the basis that it does not set the bar high enough regarding accountability for acts as heinous as the killing of the rehabilitation centre detainees.

cannot be faulted, the content of the International Covenant on Civil and Political Rights Act No 56 of 2007 (the so-called 'ICCPR Act'), which was passed by Sri Lanka's Parliament in late 2007 "to give effect to certain articles in the ICCPR", fell far short of the standards demanded from the ICCPR. Though its long title states that it is meant to give effect to human rights 'which have not been given recognition through legislative measures', the Act merely reproduces just four rights out of the more than twenty-two substantive rights contained in the ICCPR.<sup>152</sup>

Absenting several important ICCPR rights on the spurious justification that these are already part of the constitutional framework cannot be justified. Among those rights left out is the right to life. The right to life has been recognised by one or two liberal judges of Sri Lanka's Supreme Court (as discussed earlier in this Study) as implied in the existing constitutional rights structure. However, these decisions are not attended by any guarantee of absolute certainty in Sri Lanka's legal system, in the first instance, as these rulings were handed down by Benches constituting of three judges and as such, are liable to be departed from by later Benches constituting of more conservative judges and may even be rejected at any point in time as an unwarranted expansion of the law. Thus, it may be argued that the implied right to life is not unequivocally part of Sri Lanka's constitutionally guaranteed rights framework until it is so affirmed by a Full Bench of the Court.

Even then, the inclusion of these articles in specific statutory form is highly desirable. It was precisely on this same reasoning that the CAT Act was enacted, despite the prior existence of a specific constitutional provision, namely Article 11, prohibiting torture and other forms of cruel, inhuman or degrading treatment or punishment. If therefore the same reasoning on which it is sought to justify the non-inclusion of the right to life in the 'ICCPR Act' is applied to the CAT Act, then there would be little reason for the enactment of the latter Act as well, given (as aforesaid) the pre-existing constitutional right enshrined in Article 11.

### 2.3. Basic Legal Guarantees in connection with Arrest, Initial Detention, Interrogation, Extended Detention and Trial (i.e. Safeguards against Torture and CIDTP)

Legal safeguards against resort to torture or CIDTP in respect of the procedures pertaining to arrest, detention and interrogation are contained in the constitutional provisions as well as in the criminal procedure laws. These safeguards will be examined against the relevant provisions in emergency laws, which (owing to the ongoing conflict in the largely Tamil dominated North/East between the Government and the Liberation Tigers of Tamil Eelam as well as an armed insurrection by Sinhalese youths that took place in the seventies and in the eighties) have virtually replaced the ordinary law for the past three decades. Emergency law comprises Emergency Regulations promulgated under the Public Security Ordinance (hereafter the PSO) No 25 of 1947 (as amended) and by the Prevention of Terrorism Act (Temporary Provisions) Act No 48 of 1979 (as amended) (hereafter the PTA). Use of the PTA and the PSO is largely at the order of the political executive though parliamentary control is decreed in respect of a proclamation of emergency under the PSO.<sup>153</sup> The PTA was used as a complementary emergency law to the PSO from the seventies onwards.<sup>154</sup>

<sup>152</sup>The Act refers to four substantive rights, in brief, the right of every person to recognition as a person before the law, a number of procedural entitlements to an accused already existing in criminal procedure, clauses relating to the rights of a child and an afterthought regarding the right of access of every citizen to take part in the conduct of public affairs, either directly or through any representatives and to have access to benefits provided by the State. It also contains the prohibition of propagation of war, religious hatred and so on. The remedy provided is to the High Court against executive or administrative action and should be invoked within three months of the alleged infringement either by the person whose rights have been or are to be infringed or by a person on his behalf. In its Determination communicated to the Speaker upon the Bill being referred to the Supreme Court as an 'urgent bill', the Court stipulated a right of appeal from the High Court and stated further, that the jurisdiction of the High Court should be limited to 'residual rights' that are not within the limits of the constitutional rights chapter.

<sup>153</sup>The Public Security (Amendment) Law, No. 6 of 1978 stated that a Proclamation of Emergency (bringing into operation part II of the Public Security Ordinance) will be operative only for a period of one month and had to be passed in Parliament within fourteen days from the date on which the provisions of part II comes into operation. Article 155 of the 1978 Constitution required Parliament to meet within 10 days of the making of a Proclamation and further required that such Proclamation be approved by a resolution of Parliament. If such approval is not given, the Proclamation shall lapse within 14 days. A Proclamation will be in effect for 30 days and no Proclamation made within the next 30 days ensuing shall come into operation until approved by a resolution of Parliament. Once

Both the PTA and Emergency Regulations promulgated under the PSO are in extensive use currently and will be examined in detail as they constitute a vital part of the legal conditions governing arrest, detention and interrogation. The Emergency Regulations examined in this analysis are the Regulations prevalent as of December 31<sup>st</sup> 2008, namely the Emergency (Miscellaneous Provisions and Powers) Regulation No 1. of 2005 as contained in Gazette No 1405/14 (hereafter EMPPR 2005) as amended by Gazette 1651/11 of 5<sup>th</sup> August 2008 (hereafter Amendment Regulation 2008) and the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation No 7 of 2006 as contained in Gazette No 1474/5 of 6<sup>th</sup> December 2006 (hereafter EMPPR 2006).

A later suspended Amendment Regulation 2008 brought in two primary changes to EMPPR 2005 which will be examined in detail. For the purpose of overview, it may be stated at this point that the Amendment Regulation 2008 in a new Regulation 1C authorised detention up to one and a half years as differentiated from the one year previously authorised by Regulation 19 of EMPPR 2005. Secondly, Amendment Regulation 2008 allowed a suspect previously in fiscal custody to be returned to detention in a 'place of detention authorised in a detention order. Amendment Regulation 2008 was suspended by order made by the Supreme Court on December 15<sup>th</sup> 2008.<sup>155</sup> However, its provisions will also be discussed in the succeeding analysis in relation to each legal guarantee.

#### 2.3.1. Legal Guarantees during Arrest, Initial Detention and Interrogation

##### 2.3.1.1. International Guarantees

ICCPR article 9(1) is the key provision concerning lawful arrest and detention and states:

*"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."<sup>156</sup>*

The UN Human Rights Committee (HRC) has in General Comment no. 8 on ICCPR article 9(1) stipulated that the paragraph is applicable to all kinds of deprivations of liberty, i.e. criminal cases, mental illness, vagrancy, drug addiction, educational purposes, immigration control etc. Unacknowledged detention, abductions and involuntary disappearances are also in violation of ICCPR article 9.

Furthermore, The UN Working Group on Arbitrary Detention has stated that:

*"To enable it to carry out its tasks using sufficiently precise criteria, the Working Group adopted criteria applicable in the consideration of cases submitted to it, drawing on the above-mentioned provisions of the Declaration and the Covenant as well as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Consequently, according to the Group,*

90 days emergency rule have passed or there has been an aggregate of ninety days emergency rule during any six month period, then the approval must be by a two thirds majority of Parliament.

<sup>154</sup>This 'temporary' law was made permanent in 1982.

<sup>155</sup>The order was made by the Court in SC (FR) Application No 351/2008. The case is still pending at the time of this analysis and there is therefore no certainty (at the time of writing this analysis) that the Amendment Regulation will be struck down by the Court.

<sup>156</sup>In the paragraph 91 of page 42 of the ICJ Judgement in the case "Concerning United States Diplomatic and Consular Staff in Teheran" (popular name: *Hostages in Teheran Case*), [1980] ICJ Reports 3, the Court stated in its obiter dictum that "it is incompatible with the principles of the UN Charter and UDHR article 3 to wrongfully deprive human beings of their freedom and to subject them to physical constraint." This implies that States that have not ratified ICCPR are nonetheless bound by other legal sources to ensure a persons right to liberty and security, which also follows from international customary law.

deprivation of liberty is arbitrary if a case falls into one of the following three categories:

- When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him)(Category I);
- When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II);
- When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (Category III).<sup>157</sup>

When a person is suspected of having committed an offence he/she can legitimately be arrested. However, it is an international recognised standard that there must be *reasonable suspicion* of that the suspect committed the offence, in order for the arrest and pre-trial detention to be legitimate.<sup>158</sup> The level of suspicion must be considered *objectively*, which implies that the detainee must not be suspect to any preceding presumptions or prejudices. Furthermore the respondent government must be capable of supplying information of that the arrested is guilty. The criterion of *reasonable suspicion* is also a safeguard against arbitrary arrest and detention.

ICCPR article 9(2) contains the specific safeguards concerning arrest:

*“Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” (emphasis mine)*

Furthermore the first section of article 9(3) establishes that persons arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and be entitled to trial within a reasonable time or to release. The Special Rapporteur on Torture Manfred Nowak stresses that *“Legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention”*.<sup>159</sup>

In regards to interrogations, the HRC has during its analysis of ICCPR article 7 stated that the time and place of all interrogations must be recorded; together with the names of all those present and that this information should be available for purposes of judicial or administrative proceedings.<sup>160</sup> This is an important safeguard to ensure that torture does not take place during interrogation. Furthermore ICCPR article 14(3)(g) guarantees the right of everyone *“Not to be compelled to testify against himself or to confess guilt.”* This safeguard is also connected

<sup>157</sup> United Nations Office of the High Commissioner for Human Rights, *Fact Sheet No. 26*, The Working Group on Arbitrary Detention, May 2000.

<sup>158</sup> This standard is outlined in ECHR article 5(1)(c).

<sup>159</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Recommendations of the Special Rapporteur on Torture, E/CN.4/2003/68, at paragraph 26(g). For the reiteration of this basic safeguard in specific relation to Sri Lanka's legal system, see Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at paragraph 94(b), ie; the Government should 'ensure that detainees are given access to legal counsel within 24 hours of arrest, including persons arrested under the Emergency Regulations.'

<sup>160</sup> United Nations Human Rights Committee, General Comment No. 20 (on the prohibition of torture and cruel, inhuman or degrading treatment or punishment), adopted on 13 March 1992, at paragraph 11.

with ICCPR article 7, and this evidently entails that it is unacceptable to treat an accused in a way contrary to article 7 in order to extract a confession.<sup>161</sup>

Article 9(4) of the ICCPR further stipulates:

*“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”*

ICCPR article 14(3)(d) establishes the right “to defend himself [herself] in person or through legal assistance of his [her] own choosing; to be informed, if he [she] does not have legal assistance, of this right; and to have legal assistance assigned to him [her], in any case where the interests of justice so require, and without payment by him [her] in any such case if he [she] does not have sufficient means to pay for it.” Furthermore, principle 11 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment prescribes that “A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.”

In order for the right to legal assistance to be effectively available all of the above conditions must be in place, otherwise this will be a violation of article 14(3)(d).<sup>162</sup> The obligation to ensure compliance lies with the State's domestic courts.

Principle 16 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment establishes that a person promptly after arrest “...shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest...”

Article 10 of ICCPR also secures a fundamental right regarding detention to the following effect;

*“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.*

Insofar as protection of rights under emergency are concerned, specific standards are laid down in international law. Under Article 4, ICCPR, a state may declare a temporary state of emergency and suspend certain rights only if the emergency “threatens the life of the nation” which demands therefore an appropriate level of crisis before an emergency could be declared by a State party. All measures taken thereto must be strictly required by the exigencies of the situation; must be temporary, necessary and proportionate. To be established in law as a crime even in terms of emergency laws, the criminal offence should be clearly defined, described in precise and unambiguous language.<sup>163</sup> However, the right to life in article 6 and the right to freedom from torture in ICCPR article 7 are both non-derogable rights that must be respected at all times, cf. ICCPR article 4(2). Furthermore, as above-mentioned the prohibition of torture in UNCAT article 2 – is absolute, no circumstances at all, not even a state of emergency, can warrant the derogation from this provision.

<sup>161</sup> United Nations Human Rights Committee, General Comment No. 32 on ‘Right to equality before courts and tribunals and to fair trial’, adopted on 23 August 2007, at page 13, paragraph 41.

<sup>162</sup> HRC, Communication no. R.2/8, *B. Weismann Lanza and A. Lanza Perdomo v. Uruguay*, and Communication no. R.1/6, *M.A. Millán Sequeira v. Uruguay*. HRC, Communication no. 138/1983, *N. Mpandanjila et al. v. Zaire*. In HRC, Communication no. R.7/28, *Weinberger v. Uruguay* K Mr. Weinberger did not have access to legal assistance the first 10 months of his detention, and was not present when the case was tried.

<sup>163</sup> See United Nations Human Rights Committee, General Comment No 29, States of Emergency, adopted on 31 August 2001, at paragraph 7.

*Incommunicado detention*, which means deprivation of liberty for a short or longer period of time in complete isolation from the outside world, is often used when a state wishes to keep the detainee of a person secret. Persons subjected to this form of detention are often prevented from exercising his/her legal rights and therefore more vulnerable and in risk of being subjected to torture or ill-treatment. International human rights law does not prohibit *incommunicado detention*, however the HRC has emphasised in General Comment no. 20 under ICCPR article 7 that provisions prohibiting *incommunicado detention* should be drafted under national law. Furthermore the above-mentioned legal right of judicial remedy, i.e. the right for the detainee to have his/her case tried before a court of justice, also applies in cases of *incommunicado detention*. The prevalence of *incommunicado detention* has been declared to be a crucial determining factor to ascertain as to whether an individual is at risk from torture.<sup>164</sup> Detainees must be subjected to prompt judicial scrutiny, must be able to confidentially access legal counsel and be entitled to legal representation of their choice.<sup>165</sup>

### 2.3.1.2. Domestic Guarantees

#### A. Right to be informed of the reasons of arrest

Article 13(1) of the Constitution states that 'no person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.'<sup>166</sup>

This is the pivotal constitutional provision relating to the right to be given reasons for arrest, which reflects long established judicial authority in the context of the ordinary criminal procedure of the land. The Code of Criminal Procedure Act, No 15 of 1979 (as amended, hereafter the CCP Act) incorporates detailed procedures in relation to arrest. Section 23(1) of the CCP Act states that 'in making an arrest, the person making the arrest shall not actually touch or confine the body of the person to be arrested, unless there be submission to custody by word of action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested.'<sup>167</sup>

There are two modes of arrest; firstly with a warrant in terms of Sections 53 and 54 of the CCP Act, the person executing a warrant of arrest issued by a court must notify the substance of it to the person arrested and if so required, to show the warrant or copy of thereof signed by the person issuing it. The person arrested must be brought, without unnecessary delay, before the

<sup>164</sup> Cf. Report of the Special Rapporteur, E/CN.4/2004/56, para. 37, and Report of the Special Rapporteur, A/57/173, 2 July 2002, para. 16. Also see Committee against Torture (Concluding Observations on Georgia and Ukraine, in 1997; Spain (1998); Libyan Arab Jamahiriya (1999) and Finland, A/51/44, para.127), as well as Preliminary Observations of the UN Human Rights Committee on Peru, CCPR/C/79/Add.67, para. 23.

<sup>165</sup> See e.g. Article 14 (3) (b) and (c) ICCPR, and Principles 17 and 18, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988.

<sup>166</sup> The term 'procedure established by law' cannot be expansively used by the judges as for example, in India, to inquire into the essential fairness of the law under review and where such a law was unfair and oppressive either in substance or form, to strike it down. The Sri Lankan Supreme Court is precluded from doing so due to the Court not being conferred the power of judicial review (i.e. the power to examine and if necessary strike down existing legislation). Article 16(1) of the Constitution states that all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the Constitution. The phrase "law" is specifically interpreted in the Constitution to mean "any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution" (Article 170 of the Constitution). In other words, if the procedure laid down in a law is followed by the officers of the state in a particular situation, their action is constitutional even though the law itself is fundamentally unjust. Such a law could be challenged only when in draft form and that too, within a short period of one week upon the Bill being placed upon the Order Paper of Parliament.

<sup>167</sup> This provision of the CCP Act today in respect of informing a suspect of the reason for arrest reflects similar principles in the old Criminal Procedure Code to which it succeeded. For a seminal decision on this point see *Muttusamy v Kannangara* (52 NLR, 324) where Gratien J followed the English legal precedent principle laid down in *Christie v Leachinsky* (1947)AC 573. Judicial interpretation of this power to arrest has prescribed that the person arrested must be the person concerned in a cognisable offence or against whom a complaint has been made or credible information has been received. A person cannot be arrested on a vague and general suspicion, without knowledge of the precise crime suspected of having been committed, but with the hope of obtaining evidence of the commission of a crime by searching the suspect after arresting him.

Court. Further when warrant is issued for the arrest for a bailable offence, an endorsement for bail has to be made. Secondly, an arrest may be made by any peace officer in terms of Section 32 of the CCP Act without warrant in particular categories of offences.<sup>168</sup>

Apart from these provisions, which detail a methodical sequence of events in relation to arrest that are designed to safeguard the rights of an accused person, administrative regulations applicable to police officers also reflect these safeguards. Thus, for example, Police Departmental Order No A. 20<sup>169</sup> directs in Section 2 that arrests will be made as far as possible without violence and that only that amount of absolutely essential force should be used in order to bring a violent person under control.

A plethora of cases by the Supreme Court establishes the importance of this principle<sup>170</sup>, to the extent of stating that it will not suffice for the arresting officer to state merely that the petitioner was 'informed of the offence.'<sup>171</sup> Instead, the particulars of the reason must be given and the substance of the warrant must be indicated.<sup>172</sup> In certain situations, such as during an active robbery, reasons for the arrest may be inferred from the circumstances.<sup>173</sup>

Yet, emergency law has consistently undermined these safeguards. Article 15(7) of the Constitution privileges regulations made under the PSO over and above the safeguards provided for in Article 13(1). Emergency Regulations currently promulgated under the PSO confer extensive powers of arrest on military officers as well as police officers in relation to vague and general offences<sup>174</sup> as does the PTA.<sup>175</sup> None of these Regulations or provisions of the PTA specify that reasons should be given, when arrests are made<sup>176</sup> and consequently offend ICCPR article 9(1) and (2).

<sup>168</sup> I.e. (a)Who in presence of the arresting officer commits any breach of peace; (b)Who has been concerned in any cognisable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned; (c) Having in his possession without excuse (the burden of proving which excuse shall lie on such person) any implement of housebreaking; (d)Who has been proclaimed as an offender; (e)In whose possession anything is found which may reasonably be suspected to be property stolen or fraudulently obtained and who may reasonably be suspected of having committed an offence with reference to such thing; (f)Who obstructs a peace officer while in the execution of his duty or who has escaped or attempts to escape from lawful custody; (g) Reasonably suspected of being a deserter from the Navy, Army or Air Force; (h)Found taking precautions to conceal his presence under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognisable offence; and (i)Who has been concerned in or against whom reasonable suspicion exists of having been concerned with an act which is punishable as an offence and for which he is under any law relating to extradition or to fugitive persons or otherwise liable to be apprehended or detained in custody.

<sup>169</sup> Issued by the Department of Police.

<sup>170</sup> *Muttusamy v Kannangara* (52 NLR, 324 which was affirmed by the Court in *Corna vs the Queen* (55 NLR 457). See also *Mariadas Raj vs AG and another* (FRD (2) 397, at 402-404). For one of the more recent examples, see *Shaul Hamed Mohamed Nilam and others v. K. Udugampala, and others*, SC (FR) No. 68/2002, SC (FR) No. 73/2002, SC (FR) No. 74/2002, SC (FR) No. 75/2002, SC (FR) No. 76/2002, 29.01.2004 where the Supreme Court found a violation of Articles 11, 12(1), 13(1) and 13(2) and awarded Rs. 800,000/- to each of the five petitioners, all of whom were members of a Sri Lankan military intelligence "long range reconnaissance patrol." The petitioners had been arrested, detained, paraded in front of the media, and kept in overcrowded and filthy conditions after a military intelligence safe house in Millenium City Housing Complex, Athurugiriya was raided. The Court came to the finding that the version of the 1<sup>st</sup> respondent police officer was not credible and that, at the time of the arrest of the petitioners, the 1<sup>st</sup> respondent had no valid basis for the arrest. Neither had the petitioners been informed about the reasons for the arrest, which was pointed out by the judges to be a mandatory requirement stipulated by law.

<sup>171</sup> *Dharmatilake vs Abeynaike*, SC No 156/86, SCM 15.2.1988.

<sup>172</sup> *Ibid*.

<sup>173</sup> *Koralliyangge Palitha Thissa Kumara v Silva and Others*, SC(FR) Application No 121/2004, SCM 17.02.2006.

<sup>174</sup> Emergency (Miscellaneous Provisions and Powers) Regulation No 1. of 2005 as contained in Gazette No 1405/14 (EMPPR 2005) allows arrest on the basis of preventive detention (Regulation 19). Regulation 20(1) of EMPPR 2005 confers powers of search, seizure, arrest and detention on any public officer, any member of the Sri Lanka Army, Air Force or (unjustifiably broadly) 'any person authorised by the President' in respect of any person who is concerned with or has committed *inter alia*, an offence under the Emergency Regulations.. Reasonable grounds must exist for such suspicion. The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation No 7 of 2006 as contained in Gazette No 1474/5 of 6<sup>th</sup> December 2006 (EMPPR 2006) creates equally broad offences of engaging in 'terrorism' or 'acts of terrorism.' Regulation 6 prohibits "terrorism" or "specified terrorist activity", or any act in furtherance thereof. Regulation 20 defines "terrorism" to mean "any unlawful conduct", which, *inter alia*, "involves the use of violence", "threatens or endangers national security", "intimidates a civilian population or group thereof", "disrupts or threatens public order", "causing destruction or damage to property" - if such conduct is aimed at, *inter alia*, "threatening or endangering the sovereignty or territorial integrity" of Sri Lanka'

<sup>175</sup> Section 6(1) of the PTA allows arrest, by any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorised in writing by him, of any person concerned in or connected with in any 'unlawful activity' which is an unjustifiably broad phrase.

<sup>176</sup> EMPPR 2005 20(9) merely enforces the duty of arresting officers to issue a receipt acknowledging the fact of arrest to the relatives of the arrestee. Where it is not possible to issue a receipt to that effect, such fact shall be recorded in the information book of the relevant police station. Clearly, these are inadequate safeguards against abuse.

On 7 July 2006, the President issued Directives on Protecting Fundamental Rights of Persons Arrested and/or Detained to the Heads of the Armed Forces and the Police Force to enable the Human Rights Commission of Sri Lanka to “exercise and perform its powers, functions and the duties [sic] and for the purpose of ensuring that fundamental rights of persons arrested and detained are respected and such persons are treated humanely.” The Presidential Directives state that the police and armed forces shall assist and facilitate the work of the Human Rights Commission (HRC) in the exercise of its powers and duties, to ensure the fundamental rights of those arrested and detained and it states that an arresting officer should identify himself to the arrested person and give reasons for the arrest.<sup>177</sup>

The Government has stated that these Directives have been disseminated to all the police stations in Sri Lanka in all three languages to be prominently displayed in all police stations, to ensure any arrestee would be aware of his rights. Further steps have been taken to give wide publicity to the said Directive in the mass media with a view of educating the people of their rights.<sup>178</sup>

However, the Directives (hereafter the July 2006 Presidential Directives) have no strict legal force as they are not contained in the Emergency Regulations themselves.

## **B. Right to be brought promptly before a judge and notification of arrest/detention to independent authority**

Article 13(2) of Sri Lanka’s Constitution stipulates:

*‘Every person detained in custody or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to 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 procedure established by law.’*

A finding of violation of Article 13(2) involves the failure to produce the suspect before a Magistrate before a reasonable time period. Section 36 of the CCP Act mandates production of a person arrested before a Magistrate (having jurisdiction in the case) without unnecessary delay. Section 37 states in turn that such period shall not exceed twenty four hours (exclusive of the journey from the place of arrest to the Magistrate). These provisions reflect the constitutional guarantee in Article 13(2), which has been explicitly interpreted by the Supreme Court to state that police detention for a period exceeding twenty-four hours would be unconstitutional.<sup>179</sup> Section 38 of the CCP Act requires that Officers in Charge of Police stations must report to the Magistrate’s Court of their respective districts, the cases of all persons arrested without warrant by any police officer attached to their stations or brought before them and whether such persons have been admitted to bail or otherwise.

Similarly, Section 65 of the Police Ordinance states that “a person taken into custody by any police officer without warrant (except persons detained for the mere purposes of ascertaining their name and residence) must forthwith (emphasis mine) be delivered into the custody of the officer in charge of a station, in order that such a person may be secured until he can be brought before a Magistrate, to be dealt with according to law.” Butressing these statutory provisions,

<sup>177</sup>Further, the Directives state that 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

<sup>178</sup> This assertion has been made in connection with similar Directives issued in the past - See United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2, 06/08/2004, Second Periodic Reports of States parties due in 1999, at paragraph 59.

<sup>179</sup> *Kapugekijana v Hettiarachchi* [1984] 2 Sri LR 153. Also *Faiyaz v Attorney General* [1995] 1 Sri LR 372

Police Departmental Order No A. 20<sup>180</sup> states in Section 2 subsection (ii) that a person arrested must be brought before a Magistrate without unnecessary delay and that the period of detention shall not exceed twenty-four hours (exclusive of the journey from the place of arrest to the Magistrate).

Further, in order to minimise cases of torture during the period prior to being produced before a judge and remanded into fiscal custody, Police Departmental Order No A.3 stipulates that an officer-in-charge is expected to daily inspect the station lock-up barracks and other places and make an entry to that purpose<sup>181</sup> and also to provide facilities for members of the public, who are desirous of lodging any complaint.<sup>182</sup> Such complaints must be attended to as expeditiously as possible.<sup>183</sup>

Whatever the safeguards may be in terms of the ordinary law as discussed above, emergency law has significantly reduced the rights of suspects in this regard. As in the case of Article 13(1) discussed above, Article 15(7) of the Constitution privileges regulations made under the PSO over and above the safeguards provided for in Article 13(2) as well. Thus, departing from the strict time limits prescribed under the normal law, Regulation 21 (1) of EMPPR 2005 states that persons arrested in terms of Regulation 19 (preventive detention) should be produced before a Magistrate ‘within a reasonable time having regard to the circumstances of such case and in any event, not later than thirty days from the date of such arrest’.<sup>184</sup> Sections 36 and 37 of the CCP Act, which related *inter alia* to prompt production before a Magistrate are explicitly dispensed with.<sup>185</sup>

In terms of arrests made under Regulation 20 of EMPPR 2005 for investigation purposes, (as differentiated from arrest made for preventive detention purposes under Regulation 19), there is no stipulation that the suspect must be produced before a judge. Instead, Regulation 20(2) merely states that such a person must be handed over to the nearest police station within twenty-four hours. It is silent on the procedure to be followed thereafter, except to require the arresting officer to report the arrest to the relevant superior officer (Regulation 20(8)) and to notify the family members of the fact of arrest through the prescribed form, in default of which penalties are imposed (Regulations 20(9)). These Emergency Regulations are in violation of ICCPR article 9(3).

The PTA, Section 7(1) states that suspects arrested under Section 6(1) (‘connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity’) may be kept in police custody for a period of seventy-two hours. Thereafter, if a preventive detention order under Section 9 has not been made, such suspect should be taken before a Magistrate, who is then compulsorily (‘shall’) required to remand the suspect until the conclusion of the trial.

Where preventive detention orders are made under Section 9 of the PTA by the Defence Secretary, magisterial supervision is not applicable at all and the suspect may be kept for a period of eighteen months with detention orders being extended three months at a time.<sup>186</sup> These provisions are also a significant erosion of ICCPR article 9 (3).

Insofar as notification of arrest/detention to an independent authority is concerned, all arrests and detention under the Prevention of Terrorism Act (PTA) must be reported to the Human

<sup>180</sup> Issued by the Department of Police.

<sup>181</sup> Section 3 of Part 11.

<sup>182</sup> Part 11.

<sup>183</sup> *ibid*.

<sup>184</sup> The Amendment Regulation 2008, in Regulation 19(1) A., 1(B) and 1(C).

<sup>185</sup> The Amendment Regulation 2008 changed this to some extent by Regulation 19(1) A. which stated that the period of thirty days was to be calculated from the date of ‘detention’ rather than ‘arrest.’ However as stated previously, this Amendment Regulation was suspended by the Suprem Court on December 15<sup>th</sup> 2008.

<sup>186</sup> proviso to Section 9(1) of the PTA. However, judicial interventions have sought to infer some protections in regard to persons arrested under preventive detention provisions in the PTA as for example in *Weerawansa vs AG* [2000] 1 Sri LR 387, discussed in section 4.5. below.



Rights Commission of Sri Lanka (HRC)<sup>187</sup> within forty-eight hours and the place at which such person is being held must also be informed. All subsequent transfers must be notified to the HRC. Sanctions are imposed for failure to adhere to these duties; offenders may be liable, after a summary trial by a Magistrate, to imprisonment for a period not exceeding one year or to a fine not exceeding five thousand rupees or to both such fine and imprisonment.<sup>188</sup> These stipulations are also reflected in the July 2006 Presidential Directives discussed above.

### C. Access to a lawyer and to inform members of the family upon arrest

There is no constitutional right to legal counsel for a suspect in Sri Lanka, though Article 13(3) of the Constitution affirms that 'any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court. There is however no right to legal counsel for a suspect in the CCP Act. Nor is there a right to inform members of the family regarding the arrest. The CCP Act does not specify the interrogation conditions, it does not contain an independent right to a lawyer of the detainee's choice, it does not confer upon a detainee the right to inform family members about the arrest and it is silent about the necessity for a lawyer and an interpreter to be present during the interrogation. This has been observed by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, as a lack of access to basic safeguards preventing torture.<sup>189</sup>

The Criminal Procedure Special Provisions Act first passed in 2005 and then further extended for a period of two years in 2007<sup>190</sup>, states that any person arrested and detained in terms of its provisions (which extends the period of detention up to forty-eight hours), in relation to a particular category of offences<sup>191</sup> shall be afforded an opportunity to consult an attorney-at-law of his choice and to communicate with any relative or friend of his choice during the period of such detention. However, this right is only in relation to special circumstances and is not applicable in the generality of arrests.

The Government's position is as follows;

*The Police Department does not object to counsel/attorney-at-law representing the rights of suspects detained at police stations, interviewing/advising such suspects prior to their being produced before a Magistrate. However, owing to the need to ensure that police investigators are able to conduct the initial investigation and interview suspects in an unhindered manner, such interview (by counsel representing suspects) shall not take place prior to the recording of the statement of the suspect. This facility helps the suspect to divulge any assault or harassment at the time of initial production before the Magistrate. Under the prevailing practice, counsel/attorney-at-law representing arrested suspects has the right to interview the officer-in-charge of the relevant police station any time after the arrest (even prior to the recording of the first statement of the suspect). At this interview, the counsel/attorney-at-law would be able to ascertain the basis of allegations against his client (suspect) and the date, time and location relating to the production of the suspect before a Magistrate.*<sup>192</sup>

As far as the PTA and Emergency Regulations are concerned, this right is not secured in any way whatsoever for detainees or suspects. As stated earlier, there is only a duty on an arresting officer, whenever an arrest is made in terms of EMPPR 2005 Regulation 20, to issue to the spouse, father, mother or any other close relative, a document acknowledging the fact of arrest.<sup>193</sup> Where

it is not possible to issue such a document, an entry must be made at the police station, explaining as to why it was not possible to issue such a document.<sup>194</sup> Where such document is not given without reasonable cause or the reasons for not so issuing are wilfully not recorded, this shall amount to an offence under EMPPR 2005 and shall be punishable with a term of imprisonment extending to two years and a fine.<sup>195</sup> Yet, even such minimum safeguards are not applicable in terms of arrests made for the purposes of preventive detention under EMPPR 19 or in the cases of arrests made under the PTA.

The 7<sup>th</sup> July 2006 Presidential Directives affirmed the right of an arrested person to communicate with a relative or friend. However, there was no reaffirmation of the right to communicate in private with legal counsel. IN any event, these Directives are not legally enforceable.

### D. Independent medical examination upon arrest

Article 122 (1) of the CCP Act states that where an officer in charge (OIC) 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. Such medical examination is therefore at the instance of the OIC and suspects do not have an independent right to medical assistance. This lacunae has been commented upon adversely in the February 2008 Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak.<sup>196</sup> The CCP Act lacks comprehensive safeguards against torture.<sup>197</sup>

Detainees may also complain to Magistrates before whom they are produced, of ill treatment and request a medical examination by a Judicial Medical Officer.

The emergency regulations do not provide the right to seek medical assistance. As such, both the normal law and the emergency law are in violation of international law standards.<sup>198</sup>

### E. Absolute prohibition of confessions made to police officers.

The ordinary law, through the provisions of the Evidence Ordinance Act, No 14 of 1895 (as amended)<sup>199</sup> precludes proof of three categories of confessions, namely confessions caused by an inducement, threat or promise, confessions made to a police officer, a forest officer or an excise officer and confessions made by any person while in the custody of the following three categories of officers.<sup>200</sup> These sections reflect British precedent that safeguarded the liberty of the subject and which have been further expanded by s Sri Lankan jurists.

As illustration, the privilege against self incrimination was stipulated to be "a fundamental postulate in conformity with which both procedural and substantive laws need to be interpreted."<sup>201</sup> This privilege was not confined in its application to proceedings that takes place in a judicial forum, but accommodates within its ambit the entire course of the police investigation, which precedes the framing of the charge or the presentation of the indictment.<sup>202</sup>

<sup>184</sup> EMPPR 2005 Regulation 20(9) proviso

<sup>185</sup> EMPPR 2005 Regulation 20(10).

<sup>186</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at para 36.

<sup>187</sup> *ibid.*

<sup>188</sup> *ibid.* For an outline of such safeguards, see the Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Recommendations of the Special Rapporteur on Torture, E/CN.4/2003/68, at para. 26.

<sup>189</sup> This is the primary statute which lays down of rules of evidentiary procedure during legal proceedings in Sri Lanka. It applies to all judicial proceedings in Sri Lanka other than courts-martial and proceedings before an arbitrator – Section 2 of the Evidence Ordinance

<sup>190</sup> Evidence Ordinance, Sections 24, 25(1) and (2) and 26(1) and (2) respectively.

<sup>191</sup> *De Mel v Haniffa* (1952) 53 NLR 433.

<sup>192</sup> *Debergeda v Alwis* (1913) 16 NLR, 233, *Van Cullenberg v Caffor* (1933) NLR 433.

<sup>187</sup> Section 28(1) of the Human Rights Commission of Sri Lanka Act No 21 of 1996

<sup>188</sup> *ibid.*, Section 28(3)

<sup>189</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at paragraph 36.

<sup>190</sup> Code of Criminal Procedure (Special Provisions) Act No 15 of 2005 and 42 of 2007.

<sup>191</sup> Sections 102, 113(b), 296, 297, 300, 355, 356, 358, 359, 364, 371, 383, 384, 490 (i.e. abetment, conspiracy, murder, kidnapping/abducting with intent to secretly and wrongfully confine, etc.

<sup>192</sup> See United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2, 06/08/2004, Second Periodic Reports of States parties due in 1999, at paragraphs 36, 37 and 38.

<sup>193</sup> EMPPR 2005 Regulation 20(9)

The importance of preventing the conviction of an accused person from being furthered by statements made by him/her, was explicitly acknowledged<sup>203</sup> and judicial restraint of police abuse eroding the fundamental rights of the citizen was clearly manifested.<sup>204</sup>

However, these principles are overridden in the currently applicable provisions of emergency law in Sri Lanka. As stated earlier, Article 15(1) of the Constitution expressly declares that ‘the exercise and operation of the fundamental rights declared and recognised by Articles 13(5) (ie the principle relating to the presumption of innocence) and 13(6) <sup>205</sup> shall be subject ‘to such restrictions as may be prescribed by law in the interests of national security. For the purposes of this paragraph, ‘law’ includes regulations made under the law for the time being to public security.’

Thus, the PTA allows the admissibility of confessions given to police officers above the rank of an Assistant Superintendent of Police (ASP)<sup>206</sup> and imposes a burden on the accused to prove that the confession was voluntary.<sup>207</sup> Currently applicable Emergency Regulations also reflect this same laxity.<sup>208</sup>

## 2.3.2. Right to invoke the writ of *habeas corpus*

### 2.3.2.1. International Guarantees

The key provision regulating the right for a detained person to have the lawfulness of his/her detention tried by a court (or the relevant authority) within reasonable time is the earlier-mentioned ICCPR article 9(3).

The UN Human Rights Committee has established that what constitutes “reasonable time” is a matter of assessment in the particular case; however lack of financial resources or delays in investigations does not justify a detention lasting several years without adjudication.<sup>209</sup>

It is a prerequisite that speedy and effective recourse to writs of *habeas corpus* must be available particularly during emergency periods.<sup>210</sup>

### 2.3.2.2. Domestic Guarantees

The jurisdiction of the Court of Appeal in writ applications of *habeas corpus* may be invoked in terms of Article 141 of the Constitution. The Court of Appeal is empowered to either order that

<sup>203</sup> *R v Buddharakkita* (1961) 63 NLR 43, at p 47.

<sup>204</sup> *R vs Gnanasecha* (1968) 73 NLR 154 at page 180, *R v Murrigan Ramaswamy* (1964) 66 NLR 265, at p 268.

<sup>205</sup> Article 13(6) states that ‘No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence and no penalty shall be imposed for an offence more severe than the penalty in force at the time such offence was committed.’ One instance of such ex post facto legislation was the Offences Against Aircraft Act, No 24 of 1982 which made the hijacking of an Alitalia aircraft by a Sri Lankan national punishable after the event but which was justified on the basis that international laws pertaining to air safety permitted ex post facto legislation in such instances. The UN Human Rights Committee observed that there was serious concern regarding the conformity of Article 15 of Sri Lanka’s Constitution with the provisions of the Covenant, see United Nations Human Rights Committee, Concluding Observations on Sri Lanka (2003), CCPR/CO/79/LKA, 01/12/2003, at paragraph 8.

<sup>206</sup> Section 16(1) of the PTA.

<sup>207</sup> *ibid*, Section 16 (2) of the PTA.

<sup>208</sup> EMPPR 2005, Regulations 63 and 41(4).

<sup>209</sup> In HRC, Communication no. 336/1988, *Fillastre v. Bolivia*, Communication no. 314/1988, *P. Chitko Bwaha v. Zambia* and Communication no. 386/1989, *F. Kone v. Senegal* it was established that article 9(3) was breached, since the suspects were all detained for 1-4 years without having their cases tried before a judicial authority. The duration of detainment without trial could not be justified, for instances due to the fact that the State Parties were not able to satisfactorily explain the reason for detainment without trial.

<sup>210</sup> In United Nations Human Rights Committee, General Comment No 29, States of Emergency, adopted on 31 August 2001, at paras. 14 and 16. The remedy must not be prolonged – see United Nations Human Rights Committee, Concluding Observations on the Dominican Republic, CCPR/CO/71/DOM, 26/03/2001.

the individual concerned be produced in person in court or alternatively, could order a court of first instance to enquire and submit a report on the alleged detention. Some statistics have been provided in reference to the invocation of this remedy by the Government in the Fourth Periodic Report submitted in 2002 to the UN Human Rights Committee;<sup>211</sup> however, this information merely states that from 1996 to June 2001, some three hundred and seventy four applications have been filed. The statistics do not indicate as to how many of these applications are still pending and how many have been disposed of. Moreover, they do not appear to indicate the correct picture as to the number of applications that have been filed in the Court as inquiries reveal that this number is, in fact, higher than the indicated number.

The High Courts’ also possess jurisdiction to hear and determine *habeas corpus* applications as would be discussed in detail later in Section 3.3.3.3.B. below.

### 2.3.3. Extension of detention

#### 2.3.3.1. International Guarantees

ICCPR 9(4) states that ‘Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.’

#### 2.3.3.2. Domestic Guarantees

In terms of the ordinary law, a suspect could be detained only for twenty-four hours in police custody and must thereafter be brought before a judge.<sup>212</sup>

Under the ordinary law, after the prescribed period following arrest during which a suspect may be kept in police detention, further detention must be at the order of the Magistrate before whom the suspect is produced. Such production is contingent upon the responsible officer having grounds to believe that further investigation is necessary and must be accompanied by a report of the case, together with a summary of the statements, if any made by the witnesses examined during the court of the investigations.<sup>213</sup> Thereafter, the Magistrate is required to satisfy himself that it is expedient to detain the suspect in custody pending further investigations and may, after recording his reasons, remand the suspect into the custody of prison officials for a period of fifteen days.<sup>214</sup> The suspect may then be released after three months, if legal proceedings are yet not instituted against him, unless the Attorney General moves the High Court for further detention, which is extended three months at a time.

The Bail Act, No 30 of 1997, (hereafter Bail Act, 1997) specifies generally that, unless a person has been convicted and sentenced by a court, no person shall be detained in custody for a period

<sup>211</sup> United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 47.

<sup>212</sup> Sections 36 and 37 of the CCP Act. This general rule is departed from in certain specific instances and under specific statutes. For example, the Criminal Procedure (Special Provisions) Act first passed in 2005 and then further extended for a period of two years in 2007 (Code of Criminal Procedure (Special Provisions) Act No 15 of 2005 and 42 of 2007) allows police detention beyond the ordinary period of twenty four hours in relation to suspects arrested in relation to a particular category of offences (emphasis mine). The proviso to Section 2 of the Special Provisions Act states that; “Provided that where the arrest is in relation to an offence as is specified in the Schedule to this Act;<sup>212</sup> such period of detention in police custody may, on production before him of the person arrested and on a certificate filed by a police officer not below the rank of the Assistant Superintendent of Police submitted prior to the expiration of the said period of twenty-four hours, to the effect that it is necessary to detain such person for the purpose of further investigations, be extended upon an order made in that behalf by the Magistrate for a further period not exceeding twenty-four hours, so however that the aggregate period of detention shall not exceed forty eight hours.” Section 5 of the Special Provisions Act states meanwhile that “Any proceedings in terms of the provisions of this Act shall be concluded within a period of ninety days from the date of the commencement of proceedings under Chapter XV of the Code of Criminal Procedure Act, No.15 of 1979.”

<sup>213</sup> Section 115 (1) of the CCP Act

<sup>214</sup> Section 115 (2) of the CCP Act

exceeding twelve months from the date of arrest.<sup>215</sup> One year is the limit of the extension of detention in ordinary cases, renewable three months at a time.

However, where an application is made by the Attorney General to a High Court, the High Court may, for good and sufficient reasons that may be recorded, order that a person who has not been convicted and sentenced by a court and who has been in detention for twelve months, be detained in custody for a further period, but this further period cannot itself exceed more than twelve months.<sup>216</sup> Thus, insofar as this category of special cases are concerned, the total period of time that a person could be detained is two years.

In certain instances, the Bail Act empowers an officer-in-charge of a police station to release persons (where the offence is a bailable offence), on a written undertaking subject to ordering the suspect to appear before the Magistrate on a given date.<sup>217</sup> In cases of serious offences punishable with death or life imprisonment, the High Court is authorised to grant bail to a suspect.<sup>218</sup>

Extension of detention under emergency law is however not subject to the strict legality prescribed in terms of the ordinary law as discussed above. Section 7(1) of the PTA allows detention up to seventy-two hours. Thereafter, a suspect may be kept indefinitely pending trial subject to being produced before a Magistrate. Magisterial scrutiny is however limited to merely remanding the suspect until the conclusion of the trial in terms of Sections 7 (1) and (2) of the PTA. Under Section 9 of the PTA, suspects could be kept in preventive detention up to eighteen months by ministerial order that may be extended every three months. There is no provision for judicial scrutiny of the periods of extension of preventive detention under the PTA.

In terms of EMPPR 2005 Regulation 19 and 21 (preventive detention) is permitted up to one year. Within that one year period, upon the expiration of ninety days since the date of arrest, the suspect must be released by the officer-in-charge of that place of detention if the suspect is not produced before a court.<sup>219</sup> When produced before a court, such a suspect must be placed in a prison and consequently in fiscal custody.<sup>220</sup>

However, by Amendment Regulation 2008, the period of preventive detention of suspects arrested under Regulation 19 was sought to be extended to a further period of six months, where it appeared that the release of such a person would be detrimental to the interests of national security, thus, extending the entire period of preventive detention to one and a half years. Such a suspect was mandated to be produced before a Magistrate every sixty days during this period.<sup>221</sup> Sanction of the Attorney General is needed for bail to be granted.<sup>222</sup> The power of the officer-in-charge of the place of detention to release the suspect after ninety days detention, if the suspect is not produced before a court, was taken away. Consequent to its operation for several months, this Regulation was suspended by order made by the Supreme Court on December 15<sup>th</sup> 2008, which meant that the old Regulation 19 and Regulation 21 of EMPPR 2005 were revived. Accordingly, the state of the law at this point in time is that suspects are required to be brought before a Magistrate after thirty days following arrest and are then liable to be kept up to ninety days in detention, in a place 'authorised by the Inspector General of Police (IGP). Following the expiration of the ninety day period, they have to be remanded by a Magistrate into fiscal custody. And though the Regulation indicates that custody thereafter could be only up to one year, the

<sup>215</sup> Section 16 of the Bail Act, No 30 of 1997

<sup>216</sup> *ibid*, Section 17.

<sup>217</sup> *ibid*, Section 6

<sup>218</sup> *ibid*, Section 13.

<sup>219</sup> EMPPR 2005, Regulation 21 (2) states that "Any person detained in pursuance of the provisions of the Regulations 19 in a place authorized by the Inspector General of Police (IGP) may be so detained for a period not exceeding 90 days reckoned from the date of his arrest and shall at the end of that period be released by the officer in charge of that place unless such person has been produced before the expiry of that period before a court..."

<sup>220</sup> EMPPR 2005, Regulation 21 (3). This was categorically affirmed by the Supreme Court in *Thararasa vs de Alwis and others*, SC(FR) Appln No 173/08, SCM 29.07.2008..

<sup>221</sup> Regulation 1C

<sup>222</sup> Regulation 1A, second proviso

current practice is that fiscal custody is thereafter indefinitely extended periodically by remand orders issued by Magistrates. Lawyers appearing for these suspects say typically that a suspect is detained for up to two years or more until the Attorney General decides to indict him/her or in the alternative, ask for the suspect's discharge.<sup>223</sup>

Further, despite the initial production of a suspect before a Magistrate not later than thirty days after arrest, this production has dwindled to a pure technicality. Custody is therefore extended without an independent judicial mind being brought to bear as to whether extended detention is necessary.

These regulations as well as the provisions of the PTA are in violation of ICCPR article 9(4) as they authorise extension of detention without effective judicial scrutiny.

### 2.3.4. Pre-trial detention including access of police officers to suspects and possible transfers

#### 2.3.4.1. International Guarantees

ICCPR article 9(3) is also the key provision in regards to pre-trial detention. The provision further establishes that: *"It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial..."* As earlier mentioned the criteria of *reasonable suspicion* must be fulfilled in order to legitimately subject a person to pre-trial detention. Furthermore the UN Human Rights Committee has established that pre-trial detention should be an exception and as short as possible.<sup>224</sup>

#### 2.3.4.2. Domestic Guarantees

In terms of the ordinary law, as stated above, pre-trial detention may extend up to one year<sup>225</sup> renewable by court order, three months at a time. In a special category of cases, upon an application made by the Attorney General to a High Court, the High Court may, for good and sufficient reasons that may be recorded, extend this period in order that a person, who has not been convicted and sentenced by a court, be detained in custody for a period in excess of twelve months by orders made three months at a time. This further detention period shall not exceed twelve months.<sup>226</sup> The period of pre-trial detention may therefore extend, in such exceptional cases, up to two years.

Section 115(2) of the CCP Act mandates that the suspect should be in the custody, not of the police, but of the superintendent of prisons, throughout the period of remand.<sup>227</sup> This reflects the basic principle of criminal law that the interrogating authority and the custodial authority should be separate. The independent element of custody in the hands of the Prisons Department during remand custody is supposed to act as a barrier to torture and CIDTP. Thus, the regular production of such persons before the Magistrate is meant to provide a further safeguard.

Section 115 (4) of the CCP Act allows a police officer to have access to a suspect while in fiscal custody during 'reasonable hours' for the purpose of investigation, upon court order. Such suspect may also be taken from place to place (other than to a police station) if in the opinion of

<sup>223</sup> Interviews with lawyers appearing for suspects detained under the PTA or ER, 22/01/2009

<sup>224</sup> United Nations Human Rights Committee, General Comment 8 - Right to liberty and security of persons (Article 9), adopted on 30 June 1982, at p. 131, para. 3 and HRC, Communication no. 526/1993, *M. and B. Hill v. Spain*.

<sup>225</sup> Section 16 of the Bail Act, No 30 of 1997

<sup>226</sup> *ibid*, Section 17.

<sup>227</sup> "It is not unreasonable to assume that the legislature had good cause to provide that the detention of a citizen in the custody of the police beyond a specified period should come within the surveillance of judicial authority." (*Koligalla v Spd. Of Prisons* (1961) 66 NLR, at page 416 per T.S. Fernando J.). Thus "the law sees to it that custody of the suspect during the period (where the investigation is underway) is entrusted not to the police but to a 'neutral' official" – *R v Sugathapala* (1967) 69 NLR 457 at 460.

the court, such action is considered necessary for the purpose of the investigation. The element of judicial intervention in these instances is expected to be a sufficient safeguard against abuse. Section 4 of the Prisons Ordinance provides for the Commissioner to be able to remove prisoners from one prison to another.

Yet, emergency provisions detract from safeguards imposed by the ordinary law to ensure that pre trial detention is not used to facilitate abuse of rights. The PTA<sup>228</sup> and emergency regulations under the PSO<sup>229</sup> authorise excessive periods of pre trial detention. As stated above, in terms of Regulation 19 and Regulation 21 of EMPPR 2005, suspects arrested and detained preventively<sup>230</sup> are required to be remanded into fiscal custody (ie; custody into a prison), after ninety days of detention in a 'place authorised by the Inspector General of Police'<sup>231</sup> following initial production before a Magistrate not later than thirty days after arrest. As stated previously, custody in this manner is typically extended up to two years. Bail is at the discretion of the Attorney General.

'Places of detention' authorised by the Inspector General of Police (Regulation 19(3)) may not necessarily be prisons, but may be police stations or unauthorised and undisclosed detention centres as explained later in Section 2.5. of the Study. The one safeguard against abuse in this respect was a recent ruling of the Supreme Court, which imposed the strict rule that fiscal custody should necessarily follow a period of ninety days in police custody.<sup>232</sup> However, as discussed earlier, the effect of this order by the Court was sought to be made nugatory by the Amendment Regulation 2008 (which attempted to replace the old Regulation 21 in EMPPR 2005) and explicitly authorised the detention of a person previously in fiscal custody back into a 'place of detention' specified in the relevant detention order. This Amendment Regulation 2008 was suspended by order made by the Supreme Court on December 15<sup>th</sup> 2008, where the Court ordered that the detainees brought back to the police stations from the fiscal custody were entitled to apply for bail and if bail was not granted, to apply for transfer back to fiscal custody with notice to the Attorney General.

Regulation 49 (a) (i) of EMPPR 2005 confers on a police officer or other duly authorized person, the right to question any person, including those detained under an emergency regulation, and "to take such person from place to place for the purpose of such investigation during the period of such questioning". Regulation 68 (2) of EMPPR 2005 provides that for the purposes of questioning any officer "may remove such person from any place of detention and keep him in the temporary custody of such officer for a period not exceeding seven days at a time." Section 7 (3) (a) of the PTA allows a police officer conducting an investigation to "take such person during reasonable hours to any place for the purpose of interrogation and from place to place for the purposes of investigation." Transferral of a detainee in terms of Emergency Regulations or in terms of the PTA from one 'place of detention' to another is not governed by any discernible safeguards against abuse.

The PTA and the Emergency Regulations violate ICCPR article 9(3).

<sup>228</sup> Indefinite pre trial detention is allowed under the PTA under Sections 7(1) and (2) with orders of remand being made by a Magistrate 'until the conclusion of the trial.' Under Section 9 of the PTA, preventive detention is allowed up to eighteen months by ministerial order extended every three months with no provision for judicial scrutiny.

<sup>229</sup> EMPPR 2005, Regulation 19 relating to preventive detention authorises detention up to a period of one year consequent to the Amendment Regulation 2008 which authorised preventive detention up to one and a half years being suspended by the Supreme Court on December 15<sup>th</sup> 2008 as aforesaid.

<sup>230</sup> While preventive detention is, as discussed in this section of the research, provided for by Regulations 19 and 21, it must be noted that detention for the purpose of investigation is not provided for in terms of the current emergency regulations unlike their predecessor regulations throughout past decades which clearly defined two types of detention; preventive and investigative. Thus, departing from this practice, Regulation 20 of EMPPR 2005 merely provides for arrest on the basis of being concerned with or having committed an offence under emergency regulations but does not provide for subsequent detention. The one stipulation re arrests under Regulation 20 is that the persons must be handed over to the nearest police station within twenty four hours (Vide Regulation 20(2)). It has been opined by some that this omission is due to a drafting error in EMPPR 2005 (see Edirisinghe S. 'Emergency Rule', in Sri Lanka; State of Human Rights Review, 2006, Law & Society Trust, March 2007, at p201)

<sup>231</sup> EMPPR 2005, Regulation 21(2)

<sup>232</sup> As affirmed by the Supreme Court in *Thanarasha vs de Alwis and others*, SC (FR) Appln No 173/08, SCM 29.07.2008

## 2.3.5. Administrative detention

### 2.3.5.1. International Guarantees

Administrative detention is not outlawed by international law, but the safeguards in ICCPR article 9(1) also applies to administrative detention.<sup>233</sup> Therefore a state is obliged to ensure that a person subjected to administrative detention has access to challenge the lawfulness of the deprivation of liberty before the courts, cf. ICCPR article 9(4).

It is a stringent safeguard in international law that suspects held in administrative detention have the same benefits as those awaiting trial. These guarantees include the application of the presumption of innocence, legal aid by a lawyer of the suspect's choice, visits by family members and medical assistance.<sup>234</sup> Access to legal counsel should be afforded within 24 hours of arrest<sup>235</sup> and regularly thereafter.<sup>236</sup>

Furthermore, the UN Human Rights Committee has stated that administrative detention must not detract from the effect of the protections provided by the Covenant and must particularly be based on procedure established by law, must be accompanied by reasons for the arrest and judicial review of the detention.<sup>237</sup>

### 2.3.5.2. Domestic Guarantees

Preventive detention currently continues to be an integral part of Sri Lanka's emergency law regime as governed by emergency regulations under the PSO as well as the provisions of the PTA. Under Regulation 19 of EMPPR 2005, the Secretary to the Ministry of Defence may order the preventive arrest and detention of a person for up to one year.<sup>238</sup> An Advisory Committee consisting of persons appointed by the President is empowered to hear objections from a person affected by such an order.<sup>239</sup> Suspects may be preventively detained under the PTA for up to 18 months without judicial scrutiny<sup>240</sup> and it is further stipulated that such a ministerial order shall be final and shall not be called into question in any court.<sup>241</sup> Prohibitive clauses seeking to shut out judicial review are common under ER as well.<sup>242</sup> To the credit of Sri Lanka's courts, 'finality clauses' in respect of the PTA and ER, have been summarily dismissed.<sup>243</sup>

Suspects preventively detained are denied the right to humane treatment, the right to be informed of the reasons for the detention and to be able to challenge the lawfulness of the detention, the right to a fair trial, the presumption of innocence, access to lawyers and the right to communicate with family and friends.

<sup>233</sup> United Nations Human Rights Committee, General Comment 8 - Right to liberty and security of persons (Article 9), adopted on 30 June 1982, at para 1.

<sup>234</sup> Rule 95 of the UN Standard Minimum Rules for the Treatment of Prisoners. Articles 9 (4) and 14 (3) ICCPR, and Principles 4, 11, 15, 16, 17, 18, 19 and 24 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

<sup>235</sup> See e.g. Report of the Special Rapporteur on Torture, A/57/173, 2 July 2002, para. 18.

<sup>236</sup> United Nations Human Rights Committee, General Comment No. 20 (on the prohibition of torture and cruel, inhuman or degrading treatment or punishment), adopted on 13 March 1992, at para. 11..

<sup>237</sup> United Nations Human Rights Committee, General Comment 8 - Right to liberty and security of persons (Article 9), adopted on 30 June 1982, at para. 4.

<sup>238</sup> The now suspended amending Regulation 2008 extended this period to a further period of six months where it appears that the release of such person would be detrimental to the interests of national security and such suspect shall be produced before a Magistrate every sixty days.

<sup>239</sup> Regulation 19 (4), EMPPR 2005.

<sup>240</sup> Section 9(1) of the PTA allows for a ministerial detention order to be made under Section 9(1) of the Act which can be extended for a period not exceeding three months at a time, up to eighteen months. No judicial scrutiny is required.

<sup>241</sup> Section 10, PTA

<sup>242</sup> Regulation 19(10) EMPPR 2005

<sup>243</sup> *Perera vs AG* [1992] 1 Sri LR 199, *Wickremabandu vs Herath* [1990] 2 Sri LR 348, *Karunatilake vs Dissanayake* [1999] 1 Sri LR 177

Both the PTA and Emergency Regulations under the PSO relating to preventive detention violate ICCPR articles 9(3) and (4). The United Nations Committee Against Torture had expressed concern that essential benefits that should be available to those kept in administrative detention are not available to suspects under emergency law in its Concluding Observations on Sri Lanka.<sup>244</sup> Similar concerns have been expressed by the UN Human Rights Committee.<sup>245</sup>

### 2.3.6. Prosecution, indictment, guarantees of fair trial, judgment, appeal and imprisonment

#### 2.3.6.1. International Guarantees

ICCPR article 14 (1) states as follows;

*'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'*

This provision also affirms that the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Subsection 2 of article 14 affirms that 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law' and states further in sub-section 3 that 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality' These guarantees include (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him'; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court and (g) Not to be compelled to testify against himself or to confess guilt.<sup>246</sup> Furthermore,

it is established that, in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation, cf. article 14 (4).

HRC has established that the right to legal assistance must be *effectively* available and detriment thereof will constitute a violation of ICCPR article 14(3)(d).<sup>247</sup> Furthermore in cases involving capital punishment HRC has stated that "...it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings."<sup>248</sup> An important guarantee is also contained in ICCPR article 14(5), namely that 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.' ICCPR article 14 (7) states that 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'

#### 2.3.6.2. Domestic Guarantees

In terms of constitutional guarantees, Article 12 (1) of the Constitution states that 'All persons are equal before the law and are entitled to the equal protection of the law.' Article 13(3) states that 'Any person charged with an offence shall be entitled to be heard in person or by an attorney-at-law at a fair trial by a competent court.

The criminal justice (trial) process and guarantees thereto are examined in the following section.

#### A. The Trial Process

In respect of categories of 'grave offences',<sup>249</sup> a non summary inquiry<sup>250</sup> is held by the Magistrate and it is on the basis of this inquiry that indictment is filed by the Attorney General in the High Court.

The CCP Act was amended in 2005 and 2007 (Code of Criminal Procedure (Special Provisions) Act No 15 of 2005 and 42 of 2007) by vesting the Attorney General with the power to forward direct indictments to the High Court without a non summary inquiry. Thus, where there are aggravating circumstances or circumstances that gives rise to public disquiet in connection with an offence specified in the Second Schedule to the Judicature Act No 2 of 1978 (as amended), the Attorney General is empowered to forward an indictment directly to the High Court, without a non summary inquiry. He can do so *ex mero motu* or upon receipt of the relevant record from the Magistrate. Further, in terms of Section 4(1) of the Act, if there are aggravating circumstances or circumstances that gave rise to public disquiet the Magistrate is under a duty, without proceeding to hold a non summary inquiry to forward the record to the Attorney General. Where the Attorney General is of the opinion that the circumstances do not warrant the forwarding of direct indictment, then he is under a duty to return the record directing the Magistrate to hold a non summary inquiry.

<sup>244</sup> United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, at paragraph 8.

<sup>245</sup> United Nations Human Rights Committee, Concluding Observations on Sri Lanka (1995), CCPR/C/79/Add.56, 27/07/1995, at para. 19.

<sup>246</sup> Also, see the following observation "The prosecutors and judges should not require conclusive proof of physical torture or ill-treatment (Much less final conviction of an accused perpetrator) before deciding not to rely on confession or information alleged to have been obtained by such treatment. Indeed, the burden of proof should be on the State to demonstrate an absence of coercion' (Special Rapporteur against Torture, Report on Turkey, E/CN.4/1999/61/Add.1, para113 (e)) "where allegation of torture or ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and ill-treatment' (Recommendation (j) of the Special Rapporteur against Torture, GA report 2001,A/56/156)"

<sup>247</sup> See HRC, Communication no. R.2/8, B. *Weismann Lanza and A. Lanza Perdomo v. Uruguay and M.A. Sequeria v. Uruguay*.

<sup>248</sup> United Nations Human Rights Committee, General Comment No. 32 on 'Right to equality before courts and tribunals and to fair trial', adopted on 23 August 2007, at para. 38.

<sup>249</sup> In terms of Section 145 of the CCP Act, the Magistrate is required to hold a non-summary where the offence/s falls within the list of offences set out in the Second Schedule to the Judicature Act No. 2 of 1978 (as amended). (hereafter the Judicature Act). These offences are (i) Offences under sections 296 (murder), 297 (culpable homicide not amounting to murder), 300 (attempted murder) and 364 (rape) of the Penal Code (ii) Offences under sections 4(2) and 4(2) read with 6(1) of the Offensive Weapons Act and (iii) Abetment and conspiracy for abetment for the commission of offences in (i) above for conspiracy for the commission of offences in (ii) above.

<sup>250</sup> Sections 182 -192 of the CCP Act relate to the trial of cases where a Magistrate has the power to try summarily, in regard to which specific protections are detailed including the particulars of the case to be stated to the accused to whom the charges are read out and the accused is asked to show why the accused should not be convicted.

In the generality of cases, once the accused is indicted, he/she can decide to be tried by a judge alone or by a judge with jury. The initial applicable provision of the CCP Act ([Section 161](#)) stated that 'subject to the provisions of the Code and any other written law', where at least one of the offences falls within the list of offences set out in the Second Schedule to the Judicature Act No. 2 of 1978 (as amended)<sup>251</sup> or where the Attorney General so determines, trial should be on indictment in the High Court by a jury. In every other case, (whether there was a preliminary inquiry or not), trial was on indictment in the High Court without a jury. Amending Act No.11 of 1988 (which revised [Section 161](#) of the CCP Act, however, has given this option to the accused, if at least one of the charges in the indictment relates to an offence in the Second Schedule of the Judicature Act.

The third mode of trial is a trial-at-bar, which is constituted under [Section 450](#) of the *CCP Act* in respect of certain stipulated penal offences, where the Chief Justice determines in the interests of justice and where information is exhibited by the Attorney General. There is no constitutional or statutory safeguard against protracted trials.

The accused is entitled to certain evidence such as the first information ([Section 444](#) of the CCP Act) as well as statements made to the police of the witnesses, who have testified before the Magistrate and the statements (if any) made by him/her to the police. The request must be made within a reasonable time before the trial and it is subject to the accused paying for them at such rate as are prescribed by the Minister by regulation.<sup>252</sup>

Every charge brought against an accused shall 'state the offence with which the accused is charged'<sup>253</sup> and the law/section of the law under which the offence, said to have been committed, is punishable.<sup>254</sup> It must also contain particulars as to time, place and *interalia*, the person against whom the offence is alleged to have been committed.<sup>255</sup> Once the trial commences in the High Court, if the accused does not plead or if he pleads not guilty, the prosecuting counsel shall state the case to the court, following which the witnesses for the prosecution shall be examined.<sup>256</sup> The accused is permitted to cross-examine all witnesses called for the prosecution.<sup>257</sup> Where the case for the prosecution is closed, the High Court has the authority to acquit without calling for the defence, where the Court is of the opinion that the evidence has failed to establish the commission of the alleged offence.<sup>258</sup> Where the Court determines that there are grounds for proceeding with the trial, the accused shall be called upon for the defence and the prosecuting counsel may thereafter call witnesses in rebuttal.<sup>259</sup> In terms of [Section 203](#) of the CCP Act, when the cases for the prosecution and defence are concluded, the Court is required forthwith or within ten days of the conclusion of the trial, to record a verdict of acquittal or conviction, giving reasons for the same and if the verdict is one of conviction, pass sentence upon the accused according to law.

Where offences of a less grave nature, which may be tried summarily are concerned, the Magistrate shall frame the charges against the person and shall ask him to show cause as to why he should not be convicted.<sup>260</sup> In such cases, where the Magistrate proceeds to try the accused, the accused shall be permitted to cross examine all witnesses<sup>261</sup>

In the case of trial under emergency law, [Section 15](#) of the PTA, as amended by Act No. 22 of 1988, provides that every offender who commits an offence under the Act is triable without a

<sup>251</sup> As detailed above.

<sup>252</sup> CCP Act, Section 158

<sup>253</sup> CCP Act, Section 164(1)

<sup>254</sup> CCP Act, Section 164(4)

<sup>255</sup> CCP Act, Section 165

<sup>256</sup> CCP Act, Sections 198 and 199(1) and (2)

<sup>257</sup> CCP Act, Section 199(5)

<sup>258</sup> CCP Act, Section 200.

<sup>259</sup> CCP Act, Sections 201 and 202.

<sup>260</sup> CCP Act, Section 182

<sup>261</sup> CCP Act, Section 182

preliminary inquiry, on an indictment before a Judge of the High Court sitting alone without a jury or before the High Court at Bar by three Judges without a jury, as may be decided by the Chief Justice.

Under Emergency Regulations, it is the Attorney General, who decides in which court, indictment will be filed in respect of the offences for which a particular accused has been charged<sup>262</sup> and there is priority given for proceedings in respect of an offence allegedly committed by any person under the Regulations.<sup>263</sup>

## **B. Presumption of Innocence/Accused should not be compelled to testify against himself or to confess guilt**

Article 13(5) of the Constitution states that "Every person shall be presumed innocent until he is proven guilty", subject to the exception that the burden of proof regarding particular facts may, by law, be placed on an accused person. This principle is also reflected in Sri Lanka's law of evidence, wherein it has been judicially noted that 'the presumption of innocence renders it necessary for the prosecution to establish all the elements, which constitute the offence, before the accused need make any endeavour to bring himself within the exception relied on.'<sup>264</sup>

The presumption of innocence has traditionally been accorded priority in the country's legal system when determining the guilt of an accused. However, Article 15(1) of the Constitution expressly declares that 'the exercise and operation of the fundamental rights declared and recognised by Articles 13(5) (ie the principle relating to the presumption of innocence) and 13(6) <sup>265</sup> shall be subject 'to such restrictions as may be prescribed by law'<sup>266</sup> in the interests of national security. For the purposes of this paragraph, 'law' includes regulations made under the law for the time being to public security.<sup>267</sup> The privileging of emergency regulations in Article 15(1) of Sri Lanka's Constitution infringes ICCPR article 14(2).

Further, a basic safeguard is that the burden of proving the voluntary nature of a confession should not be placed on an accused.

Section 4(1)(f) of the International Covenant on Civil and Political Rights Act No 56 of 2007 (the 'ICCPR Act') reproduces the prohibition set out in ICCPR Article 14(3)(g) relating to the accused not being compelled to testify against himself or to confess guilt. The CAT Act permits confessions, otherwise inadmissible in any criminal proceedings, but only for the purpose of proving the fact that such confessions were made under torture. Thus, as can be seen, the ordinary law stipulates strict conditions regarding this prohibition.

Here again however, these principles are overridden in the currently applicable provisions of emergency law in Sri Lanka. As stated earlier in Section 2.3.1.2, Article 15(1) of the Constitution

<sup>262</sup> Regulation 60 of EMPPR 2005.

<sup>263</sup> Regulation 59 of EMPPR 2005..

<sup>264</sup> *Nair vs Saundias* (1936) 37 NLR 439

<sup>265</sup> Article 13(6) states that 'No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence and no penalty shall be imposed for an offence more severe than the penalty in force at the time such offence was committed.' One instance of such *ex post facto* legislation was the Offences Against Aircraft Act, No 24 of 1982 which made the hijacking of an Alitalia aircraft by a Sri Lankan national punishable after the event but which was justified on the basis that international laws pertaining to air safety permitted *ex post facto* legislation in such instances. The UN Human Rights Committee expressed serious concerns regarding the conformity of Article 15 of Sri Lanka's Constitution with the provisions of the Covenant, see United Nations Human Rights Committee, Concluding Observations on Sri Lanka (2003), CCPR/CO/79/LKA, 01/12/2003, at paragraph 8.

<sup>266</sup> Article 170 of the Constitution defines 'law' to mean an Act of Parliament or a law enacted by any legislature prior to the commencement of the Constitution (Article 170 of the Constitution).

<sup>267</sup> In *Thavaneehan v Dayananda Disanayake Commissioner of Elections and Others* [2003] Sri LR p. 74, the Court interestingly took the view that the meaning of 'law' in Article 15(7) of the Constitution (and by necessary implication, Article 15(1) of the Constitution) to include regulations made under the PSO does not include provisions of the PTA. Thus, 'it is clear that "the law relating to public security" has been used in a narrow sense, as meaning the Public Security Ordinance and any enactment which takes its place, which contain the safeguards of Parliamentary control set out in Chapter XVIII of the Constitution. .... Other regulations and orders which are not subject to those controls, made under the PTA and other statutes, are therefore not within the extended definition of "law" per Justice MDH Fernando.

expressly declares that ‘the exercise and operation of fundamental rights declared and recognised by Articles 13(5) (ie the principle relating to the presumption of innocence) and 13(6) <sup>268</sup> shall be subject “to such restrictions as may be prescribed by law in the interests of national security”. For the purposes of this paragraph, ‘law’ includes regulations made under the law for the time being to public security.’

The PTA allows the admissibility of confessions given to police officers above the rank of an Assistant Superintendent of Police (ASP)<sup>269</sup> and further places the burden of proving that the confession is voluntary on the accused.<sup>270</sup> Currently applicable Emergency Regulations also reflect this same laxity.<sup>271</sup>

This violates international law standards, particularly ICCPR article 14(2) and 14(3)(g).

### C. Legal Assistance to the Accused

Article 13(3) of the Constitution states that, ‘every person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law at a fair trial by a competent court.’

Section 41 of the Judicature Act, which pertains to the right of representation states that ‘...every person, who is a party to or has or claims to have the right to be heard in any proceeding in any such court or other such institution, shall be entitled to be represented by an attorney-at-law’ and further states in subsection (2) of Section 41 that ‘Every person who is a party to any proceeding before any person or tribunal exercising quasi-judicial powers and every person who has or claims to have the right to be heard before any such person or tribunal shall unless otherwise expressly provided by law be entitled to be represented by an attorney-at-law.’

These provisions apply generally to trials under the CAT Act and in terms of the emergency laws as well. Section 353 of the CCP Act meanwhile provides that the Court of Appeal may assign legal representation to an appellant in any criminal case, matter or proceeding on the application of the appellant and if ‘in the opinion of the Court, it appears desirable in the interests of justice that the appellant should have legal aid’ and if the appellant has not sufficient means to obtain that aid.

### D. Protection of Witnesses

There are no current applicable systems or procedures for the protection of witnesses. A draft law has been presented to Parliament in 2008, but has been pending before the House for several months now. Its substance is critically examined in Section 4.8.D) of this Study in the context of the problems that are evidenced as a result of the lack of such protection to witnesses and victims. The government has stated that it has introduced legislation giving judges power to continue with criminal trials on a day to day basis ‘with an aim to expeditiously conclude criminal trials’ and that the Attorney General has instructed his officers to give preference to cases coming under the CAT Act.<sup>272</sup>

### E. Public Hearings

All trials are generally held in public. Article 106 of the Constitution provides that the sittings of every Court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall, subject to the provisions of the Constitution, be held in public, and all persons shall be entitled to freely attend such sittings. A judge or presiding officer of any such Court, tribunal or other institution may at his discretion, whenever he considers it desirable, exclude from the proceedings persons, who are not directly interested in them:

- (a) In proceedings relating to family relations;
- (b) In proceedings relating to sexual matters;
- (c) In the interest of national security or public safety; and
- (d) In the interest of order and security within the precincts of such Court, tribunal or other institution.

As is normally the case, trials in terms of the CAT Act are held in public in the absence of special circumstances warranting closed hearings.

Where legal proceedings in terms of the Emergency Regulations and the PTA are concerned, public hearings are the norm, but could be restricted in respect of certain proceedings before the High Court such as an inquiry into the death of any person under Regulation 57 of EMPFR 2005. Under Regulation 57(8), the proceedings are not open to the public and only those proceedings authorised by the Competent Authority could be released. However, as an exception to that Regulation, the Court of Appeal may, upon an application made decide that the proceedings or any part thereof, be made open to the public.

### F. Pronouncing of Judgments

Judgments are pronounced in open court<sup>273</sup> and shall be ‘explained to the accused affected thereby’ who shall be afforded a copy without delay if the accused asks for it.<sup>274</sup>

### G. Right of Appeal

Appeals are provided for in terms of the law.<sup>275</sup> The right of appeal against a judgment handed down by the High Court in terms of the CAT Act, lies with the Court of Appeal. Appeals against an acquittal in the High Court are filed by the Attorney General. Appeals in respect of decisions handed down in terms of the Emergency Regulations operate in the same manner as according to the ordinary law; i.e. appeals from the High Court are lodged in the Court of Appeal and from there, to the Supreme Court.

Where acquittals are concerned, the primary duty is on the Attorney General to lodge an appeal. Aggrieved parties have also lodged appeals against an acquittal, (as has been the case for example in regard to the acquittals of the accused in the *Gerald Perera Case* and the *Lalith Rajapakse Case* (discussed previously) by the High Court exercising jurisdiction in terms of the CAT Act), to the Court of Appeal in terms of Section 331 of the Code of Criminal Procedure Act and Section 14 of the Judicature Act. Such petitions of appeal (which are pending before the Court of Appeal) have asked for the following reliefs in the prayer; namely, to grant leave to appeal, to issue notice on the respondents, to set aside the order of acquittal of the relevant accused-respondents, to quash the findings of the High Court, to make order that a fresh trial be held before a different

<sup>268</sup> Supra

<sup>269</sup> Section 16(1) of the PTA.

<sup>270</sup> *ibid*, Section 16 (2) of the PTA.

<sup>271</sup> EMPFR 2005, Regulations 63 and 41(4).

<sup>272</sup> United Nations Committee against Torture: Sri Lanka, CAT/C/LKA/CO/2/Add.1 (Comments by Government of Sri Lanka on the Concluding Observations of the CAT Committee), 20/02/2007, at para. 13

<sup>273</sup> Section 279 of the CCP Act

<sup>274</sup> Section 283(5) of the CCP Act

<sup>275</sup> Sections 316 to 360 of the CCP Act. The Court of Appeal also possesses powers of revision of any order of a subordinate court (Sections 365 to 268 of the CCP Act) and may call for and examine the record of the High Court of the Magistrates’ Court to satisfy itself as to the legality or the propriety of the order passed or the proceedings relevant therein (Section 364 of the CCP Act)

judge, make order that the accused-respondents be admitted to bail until the final determination of the appeal and to grant such other and further relief that the Court of Appeal may think fit.

### 2.3.7. Minimum guarantees of prisoners

#### 2.3.7.1. International Guarantees

The UN Standard Minimum Rules for the Treatment of Prisoners (hereafter the Minimum Standard Rules) lay down standard minimum principles regarding the treatment of prisoners and others held in custody. The rules are not legally binding, but they set out what is generally accepted at the international level as being good principles and practice in the treatment of prisoners. Together with ICCPR and UNCAT the Minimum Standard Rules support the endeavour to minimise torture, cruel, inhuman or degrading treatment or punishment. Rule 8 specifies that the different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Accordingly, (a) men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate; (b) untried prisoners shall be kept separate from convicted prisoners; (c) persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence and young prisoners shall be kept separate from adults.

In relation to medical assistance Rule 22(1) establishes that every institution (prison and other places of deprivation of liberty) is required to have available medical services and have at least one medical officer with knowledge of psychiatry. Furthermore, Rule 24 requires a medical officer to see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

Further, Rule 25 states, in subsection (1) that the medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed. Sub section (2) imposes upon a medical officer the duty to report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment. Under Rule 26(2), the director shall take into consideration the reports and advice that the medical officer submits according to rules 25(2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

Furthermore, Rule 29 states that conduct constituting a disciplinary offence, the types and duration of punishment which may be inflicted and the authority competent to impose such punishment must always be determined by the law or by the regulation of the competent administrative authority. Equally important, Rule 30 affirms in subsection (1) that no prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence, in subsection (2) that no prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of

presenting his defence. The competent authority is called upon to conduct a thorough examination of the case and in subsection (3) that where necessary and practicable the prisoner shall be allowed to make his defence through an interpreter.

Rule 31 establishes that: "corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences" In addition Rule 32 states that punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it (subsection 1). In Rule 32 (2), it is stated that the same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner and that in no case may such punishment be contrary to or depart from the principle stated in rule 31. Further, Rule 32(3) requires the medical officer to daily visit prisoners undergoing such punishments and to advise the director if he considers the termination or alteration of the punishment necessary on grounds of physical or mental health.

Furthermore, Rule 33 stipulates that instruments of restraint, such as handcuffs, chains, irons and strait-jacket, shall never be applied as a punishment and that chains or irons shall not be used as restraints. This principle/rule specifies that other instruments of restraint shall not be used except, first, as a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority; secondly, on medical grounds by direction of the medical officer and thirdly by order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority. Rule 34 states that the patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.<sup>276</sup>

Rule 37 governs the right for prisoners to be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

#### 2.3.7.2. Domestic Guarantees

The provisions of the Prisons Ordinance No, 16 of 1877 (as amended) contain safeguards against abuse applicable generally to convicted prisoners as well as un-convicted prisoners. Section 48 of the Prisons Ordinance states that males shall be kept separated from females (subsection a), juvenile prisoners, whenever it is practicable, shall be separated from adults (sub section b) and that convicted prisoners, whenever practicable, shall be separated from unconvicted prisoners (subsection c). The rule that convicted prisoners should be separated from remand prisoners is reflected also in the Sri Lanka Prison Rules 177 and 178.<sup>277</sup>

Section 71 of the Prisons Ordinance allows visits to be made to prisoners and other communications from family, friends and the legal advisor, subject to rules that are made in that regard. Provision against arbitrary refusal of such visits is made by Section 72(2), which requires the jailor to record his reasons for denying admission.

<sup>276</sup> Rule 31 of the UN Standard Minimum Rules for the Treatment of Prisoners.

<sup>277</sup> Dharmadasa, HG (former Commissioner of Prisons), *Rights of Prisoners* in State of Human Rights Report 2003, Law & Society Trust, 2004, at page 195.



In regard to medical supervision, Section 18 of the Prisons Ordinance and its subsections empower the Minister to provide for regular visits of inspection by medical officers with special emphasis on the following;

- a) regularity of visits and inspection of each prisoner
- b) records to be maintained
- c) periodical inspection of every part of the prisons
- d) reports on cleanliness, drainage, warmth and ventilation
- e) reports on the provisions, water, clothing and bedding supplied to the prisoners

Section 43 stipulates that every prisoner shall, as soon as convenient after admission, be examined by a medical officer, who is required to enter the state of the prisoner's health together with any other observations as the officer thinks fit to add, in a book kept by the jailor. Under Section 19 of the Ordinance, a medical officer is also required to report cases to the Superintendent, where the officer is of the view that special attention is required as a result of a prisoner being 'injuriously affected' due to, among other things, the discipline that the prisoner has been subjected to. Section 21 meanwhile requires the medical officer to make entries as to the death of prisoners, including as to when the deceased was taken ill, when the medical officer was first informed of the illness and in instances where a post mortem examination is carried out, to record an account of the appearances after death together with any special remarks that may appear to the medical officer, to be required.

Section 27 obliges the jailor to keep a punishment book for the entry of punishments inflicted for prison offences.<sup>278</sup> The prescribed offences are specified in Section 78 of the Prisons Ordinance and the lesser offences may be inquired into and the punishment determined by the Superintendent or in his absence, a Visitor.<sup>279</sup> Grave offences are dealt with by a tribunal consisting of the Magistrate and two Visitors of the Local Visiting Committee.<sup>280</sup>

Rules of procedure that are statutorily laid down in relation to such inquiries<sup>281</sup>, do not appear however to provide for rules of natural justice, to apply to such inquiry, including importantly for the prisoner to be informed of the offence alleged against him, to be given a proper opportunity of presenting his defence and where necessary and practicable, the prisoner shall be allowed to make his defence through an interpreter. This infringes Rule 30 of the UN Standard Minimum Rules

Though the Ordinance permitted corporal punishment<sup>282</sup>, the imposition of this manner of punishment has been repealed by the Corporal Punishment (Repeal) Act, No 23 of 2005.

Sections 88 to 93 relate to the placing of restraints on prisoners, which includes placing prisoners in handcuffs in circumstances, where the prisoner is in an insecure place or outside the city walls in order to guard against commotion etc.<sup>283</sup> Permission from a medical officer is required before a prisoner is placed under mechanical restraint.<sup>284</sup> Mechanical restraint cannot be used as a punishment.<sup>285</sup> Section 53 states that female prisoners shall, in all cases, be attended to by female officers. Section 87 prescribes punishment upon any jailor or subordinate prison officer charged with *inter alia*, ill-treatment of a prisoner, if the conduct constitutes an offence and may be dealt with under regulations prescribed for that purpose. Alternately, where the matter is not dealt with

<sup>278</sup> Section 80 of the Prisons Ordinance relates to this same requirement

<sup>279</sup> Section 79 of the Prisons Ordinance.

<sup>280</sup> Section 81 of the Prisons Ordinance

<sup>281</sup> Section 81(2) to (4) of the Prisons Ordinance.

<sup>282</sup> Section 86 of the Prisons Ordinance.

<sup>283</sup> Section 89 of the Prisons Ordinance.

<sup>284</sup> Section 90 of the Prisons Ordinance. The duration of such restraint cannot be more than twenty four hours unless there is an order from the Commissioner specifying the cause and duration of such restraint – Section 91 of the Prisons Ordinance.

<sup>285</sup> Section 88 of the Prisons Ordinance.

in the discretion of the Prisons Commissioner, such an offender may be summarily punishable in the Magistrates' Court by fine and/or imprisonment.

Under Emergency Regulations, the securing of minimum guarantees while in detention are not automatic. It is the Inspector General of Police (IGP) who, (in terms of Regulation 19(3) of EMPPR 2005), has the discretion to determine, whether a person is held in a prison or in an undisclosed 'place of detention.' Where in fact, it is ordered that a person be detained in a prison, Regulation 19(3) and Regulation 21(2) of EMPPR 2005 state that all the provisions of the Prisons Ordinance may apply other than Part IX of the Ordinance, which relates to visits from and communications with relatives and others wishing to visit prisoners. However, the IGP could permit visits in cases where 'he considers it expedient to do so.'<sup>286</sup> Here again there is a further qualification; the IGP has the discretion to exclude the application of any of the provisions of the Prisons Ordinance or any rules made thereunder.<sup>287</sup> However, even at this reduced level, none of these precautions, including medical assistance and contact with the outside apply to persons held in 'places of detention.'

## 2. 4. Juveniles in detention

### 2.4.1. International Guarantees

Article 40 of the Convention on the Rights of the Child (CRC) secures the gamut of the rights of fair trial in relation to children *vis a vis* the criminal justice process. Article 40(3) requires States Parties to prescribe a minimum age below which children are presumed not to have the capacity to infringe the penal law. ICCPR article 10(b) states that "Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication." Article 37 of the (CRC) states that 'every child deprived of liberty shall be separated from adults unless it is considered in the best interests of the child not to do so' and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice states that the detention of children 'before trial shall be avoided to the extent possible and limited to exceptional circumstances.'

### 2.4.2. Domestic Guarantees

The 1978 Constitution states in Article 27(13) that children shall be protected and allows affirmative action in that context in Article 12(4). The main statutes relating to the administration of juvenile justice are the Children and Young Persons Ordinance No 48, of 1939 (as amended) (CYPO) and the Youthful Offenders' Training Schools' Ordinance (TSYO). The CYPO provides for the establishment of juvenile courts, the supervision of juvenile offenders and the protection of children and young persons. The TSYO provides for the establishment of training schools for youthful offenders for their detention, training and rehabilitation. Probation of offenders, including juvenile offenders, is governed by the Probation of Offenders' Ordinance of 1944. The Penal Code, Code of Criminal Procedure Act and the Prisons Ordinance contain special provisions applicable to juvenile offenders as well. The Corporal Punishment Ordinance of 1889 which had allowed male child offenders to be whipped was abolished by the Corporal Punishment (Repeal) Act, No 23 of 2005. In addition, Circular No 2005/17, dated 11 May 2005 issued by the Secretary to the Ministry of Education stipulated that (in Section 2) in no circumstances should a child be subjected to physical assault or corporal punishment, even with the *bona fide* intention of disciplining the child. This circular has been hailed as a 'watershed attempt by the State to guarantee the rights of children and uphold the CRC.'<sup>288</sup>

<sup>286</sup> Regulations 19 (3) proviso and 21 (2), proviso of EMPPR 2005.

<sup>287</sup> Regulations 19 (3) proviso and 21 (2), proviso of EMPPR 2005.

<sup>288</sup> Marasinghe, C. 'Children's Rights; An Overview', in Sri Lanka; State of Human Rights Review, 2006 Law & Society Trust, 2007 at p241.

In addition, the Prevention of Domestic Violence Act No 34 of 2005 protects children from domestic violence, which is broadly defined to include all forms of physical, verbal and emotional abuse between immediate family members and specified extended family members.

Section 75 of the Penal Code declares that ‘nothing is an offence which is done by a child under eight years of age’ thereby setting the age of criminal responsibility at eight years. The CYPO in the Interpretation section (Section 88) defines a ‘child’ as a person under the age of fourteen years and a ‘young person’ as a person, who has attained the age of fourteen years and is under the age of sixteen years. A “youthful offender” is defined by the TSYO as a person between 16 and 22 years.

The recently enacted ICCPR Act, 2007 guarantees the right of legal representation to every child. There is one Juvenile Justice Court established in Colombo with financial constraints hindering the establishment and functioning of other Juvenile Justice Courts.

Section 13 of the CYPO stipulates that children and young offenders should be kept separate from adults in police stations and courts etc. In 1994, the Police Department established Women’s and Children’s Desks in main police stations throughout the country with the objective of facilitating complaints procedures in respect of violence against women and children. Section 48 of the Prisons Ordinance meanwhile states, in sub section (b) that juvenile prisoners, whenever practical, shall be separated from the adults. Further, the Community Based Corrections Act, No 46 of 1999 stipulates a wide range of non custodial orders for the rehabilitation of (child) offenders including unpaid community work.

A Children’s Charter was adopted by the government in 1992 in order to monitor the protection of child rights pursuant to the ratification of the CRC in 1991. The National Child Protection Authority (the NCPA) is the primary body for the monitoring of child rights. The NCPA was established by Act No. 50 of 1998 for the purpose, *inter alia* of formulating a national policy on the prevention of child abuse, the protection and treatment of children, who are victims of such abuse and the co-ordination and monitoring of action against all forms of abuse.

The age of criminal responsibility being set at eight years has been commented on adversely by the Committee on the Rights of the Child in examining Sri Lanka’s obligations under the Convention on the Rights of the Child.<sup>289</sup> It has been recommended that Sri Lanka ensure the full implementation of juvenile justice standards (particularly articles 37, 39 and 40 of the Convention) as well as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and the UN Guidelines for the Prevention of Juvenile Delinquency.<sup>290</sup> Further, Sri Lanka has been called upon to amend the relevant statutes in order that the minimum age of criminal responsibility is raised to an internationally acceptable level and that all offenders under the age of eighteen are treated as adults.<sup>291</sup>

<sup>289</sup> United Nations Committee on the Rights of the Child, Concluding Observations on Sri Lanka, (2003), CRC/C/15/Add.207, 02/07/2003, at para. 51.

<sup>290</sup> *ibid*, at para.52(a).

<sup>291</sup> *ibid*, at para.52(b). A draft Juvenile Justice Procedure Act which was presented by a committee of experts appointed by the NCPA recommended in 2003 that no criminal proceedings should be instituted against a child under the age of ten years and that no court shall institute criminal proceedings against a child between the ages of ten and fourteen years unless the court is satisfied that such child has attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion – see Rajapakse, R. in ‘Rights of the Child’, Sri Lanka; State of Human Rights Review, 2004, Law & Society Trust, October 2004, at p38. However, it appears that these recommendations have not been incorporated into law as yet.

## 2.5. Visits to Prisons<sup>292</sup> and ‘Places of Detention’

### 2.5.1. International Guarantees

International law has specified the importance of detainees being held in recognised places of detention that are subject to rules and regulations safeguarding their rights<sup>293</sup> which shall be regularly subjected to monitoring visits by observers for the purpose of preventing abuse while in detention.

The UN Working Group on Enforced Disappearances, places of detention must be ‘officially recognized’ which means that “such places must be official - whether they are police, military or other premises - and in all cases clearly identifiable and recognized as such. Under no circumstances, including states of war or public emergency, can any State interests be invoked to justify or legitimize secret centres or places of detention which, by definition, would violate the Declaration [for the protection of all persons from enforced disappearances], without exception.”<sup>294</sup>

### 2.5.2. Domestic Guarantees

The Release of Remand Prisoners Act No. 8 of 1991 provides for monthly visits to prisons by a Magistrate, who is vested with the power to order release in appropriate cases.<sup>295</sup>

Section 39 of the Prisons Ordinance empowers judges, members of parliament and Magistrates to visit the prisons at any time and hold therein ‘any inspection, investigation or inquiry.’ There is a specified penalty for resistance offered or obstruction made to any of these persons desirous of conducting a visit in this respect.<sup>296</sup> Such Visitors are authorized to inquire into complaints of *inter alia*, ill treatment<sup>297</sup> and, if it is opined that the complaint is of a serious nature, a report could be made to the Commissioner.<sup>298</sup> If the complaint discloses the possible commission of an offence, the Visitor may immediately report the matter to the Attorney General with a copy to the Commissioner.<sup>299</sup> Thus, the range of supervisory powers of a Visitor in this regard is wide. In terms of Section 35 of the Prisons Ordinance, a Board of Prison Visitors may be constituted with the mandate of the overall supervision of all prisons.

Section 28(2) of the Human Rights Commission Act, No 21 of 1996 empowers any person authorised by the Commission in writing, to enter at any time, any place of detention, police station, prison or any other place in which any person is detained by judicial order or otherwise and to make such examinations or inquiries as may be necessary, to ascertain the conditions of detention of the persons detained therein.

<sup>292</sup> The term ‘Prisons’ is differentiated from the term ‘Places of Detention’ for specific reasons. In Sri Lanka, ‘Prisons’ refer to government institutions established under the Prisons Ordinance No 16 of 1877 (as amended) which are subject to specified rules and regulation governing the detention of persons. On the other hand, ‘Places of Detention’ are referable to *ad hoc* holding camps established under the Emergency Regulations which do not operate within a prescribed legal structure as such. This differentiation is therefore important in the Sri Lankan context.

<sup>293</sup> United Nations Human Rights Committee, General Comment No. 20 (on the prohibition of torture and cruel, inhuman or degrading treatment or punishment), adopted on 13 March 1992, at para. 11, and General Comment No. 21 (on humane treatment of persons deprived of their liberty) adopted on 10 April 1992, at para. 6; Rule 7 of the Standard Minimum Rules for the Treatment of Prisoners Article 10.1 of the Declaration on the Protection of All Persons from Enforced Disappearances, article 17 of International Convention for the Protection of All Persons from Enforced Disappearance, Principles 20 and 29 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 6 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution.

<sup>294</sup> United Nations Human Rights Committee, General Comment No. 21 (on humane treatment of persons deprived of their liberty) adopted on 10 April 1992, at para. 24.

<sup>295</sup> United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 245.

<sup>296</sup> Section 40 of the Ordinance.

<sup>297</sup> Section 41 of the Ordinance.

<sup>298</sup> Section 41 (3) (a) of the Ordinance.

<sup>299</sup> Section 41 (3) (b) of the Ordinance.

However, the regulation of ‘places of detention’ and visits thereto under emergency regulations differs qualitatively from the legal rules governing prisons outlined above. Suspects may be detained in ‘places of detention’ authorised by the Inspector General of Police (IGP) by way of Regulation 19(3) of EMPPR 2005, which may not necessarily be prisons. There is no published list of authorised ‘places of detention’ and the current EMPPR does not contain such a requirement. In useful comparative contrast, for example, emergency regulations promulgated under the PSO by the President on 6th of April 2001 *inter alia* empowered Magistrates to visit places of detention situated within their respective jurisdiction. Such visits were to be conducted without prior intimation and should be conducted at least once a month. Officers-in-Charge of detention facilities were required to submit to Magistrates a list once every 14 days, containing the names of suspects detained in their respective detention centres. The list so tendered had to be exhibited in a Notice Board located in the respective Magistrates’ Courts. This regulation has been superseded by the current EMPPR, which lacks comparable safeguards.

Similarly, Section 9 (1) of the PTA enables the Minister of Defence to order a person be detained for up to 18 months “in such place and subject to such conditions as may be determined by the Minister”. Section 15 (A) (1) of the PTA empowers the Secretary to the Minister of Defence to order that persons held on remand, after indicted or pending appeal, should be “kept in the custody of any authority, in such place and subject to such conditions as may be determined by him” having regard to national security or public order. By inference, visits to such undisclosed and secret ‘places of detention’ are not possible.

Both the ER and the PTA violate international law in this regard.

## 2.6. Redress and Reparation

### 2.6.1. International Legal Guarantees.

The right to reparation is a fundamental principle of general international law.<sup>300</sup> Reparation must be adequate and appropriate and should, as far as possible, restore the life and dignity of the victim. ICCPR article 2 provides for the right to a remedy for a violation of a human right provided by the Covenant, both procedurally and substantively.

According to the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, reparation may take the form of restitution, compensation, rehabilitation as well as satisfaction and guarantees of non-repetition. Where compensation is granted, it should exclude purely symbolic amounts of compensation.<sup>301</sup> The Inter-American Court of Human Rights has stated that “it is appropriate to fix the payment of ‘fair compensation’ in sufficiently broad terms.<sup>302</sup> Awards of compensation encompass material losses (loss of earnings, pension, medical expenses etc) as well as non-material or moral damage (pain, suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium) the later usually quantified on the basis of an equitable assessment.<sup>303</sup>

<sup>300</sup> International Court of Justice; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs the US)*, Merits, [1986] ICJ Reports 14, at p. 114, *Corfu Channel Case (UK vs Albania)* Advisory Opinion, [1949] ICJ Reports 422, at p. 184.

<sup>301</sup> Decision of the UN Human Rights Committee in *Wilson v the Philippines*, Communication No 868/199 CCPR/C/79/D/868/1999 (2003)

<sup>302</sup> *Velasquez Rodriguez case*, Judgment of 17<sup>th</sup> August 1990, Inter-Am. Ct. H.R. (Ser.C.) No 9 (1990) para. 27.

<sup>303</sup> REDRESS – Seeking Reparation for Torture Survivors – Proceedings of a conference by the REDRESS TRUST on *Enforcement of Awards for Victims of Torture and other International Crimes*, May 2006, at page 9.

Furthermore, UNCAT article 14(1) establishes that all state parties must “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation”

### 2.6.2. Domestic Law

Sri Lanka does not have a specific policy of reparations for victims of torture. Some rehabilitation camps are established under the Department of Prisons, but their purpose is towards the rehabilitation of those caught up in the penal system or persons suspected of being terrorists. A right to compensation is available to victims in some contexts. Under the prevalent law, aggrieved persons lodging a fundamental rights complaint in terms of Article 126 of the Constitution are generally ordered compensation by the Supreme Court in regard to “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.”<sup>304</sup> Responsibility to pay compensation is imposed on the State if the identity of the custodial abuser cannot be established.<sup>305</sup>

Apart from compensation being awarded for the violation of a constitutional right, there is no specific right in the penal law for compensation, particularly under the CAT Act as discussed earlier. It has been theoretically argued by the Sri Lankan Government that the courts are enabled by virtue of Section 17 (4) of the CCP Act<sup>306</sup> “to order compensation for acts of torture in terms of the penal law.”<sup>307</sup> However, the absence of a specific right to compensation under the CAT Act violates ICCPR article 9(5).

Insofar as the Penal Code is concerned, a Magistrates’ Court is empowered to award compensation, where a penal violation is found in terms of Section 321 in reference to intentionally causing harm”. Further, compensation may be awarded to a rape victim in terms of the Penal Code Amendment Act No. 22 of 1995. In civil jurisdiction, torture victims or the relatives of torture victims are conferred the right to take a damages claim before the District Court for pecuniary and non-pecuniary losses incurred as a result of torture against an individual.

Though the Human Rights Commission of Sri Lanka may recommend awards of compensation to torture victims, such orders are not enforceable and are not binding on the violators.

No specific right of compensation for a violation committed in the course of conduct under emergency law is provided.

In 2005, the CAT Committee noted as follows;

*The Committee notes with concern the absence of a reparation programme, including rehabilitation, for the many victims of torture committed in the course of the armed conflict (article 14).*

<sup>304</sup> *De Silva v. Chairman Ceylon Fertilizer Corporation*, (1989) 2 S.L.R. 393.

<sup>305</sup> *Amal Suddath Silva vs Kodithuwakku, Inspector of Police & Others*, [1987] 2 Sri LR 119, per Atukorale J

<sup>306</sup> the Court may order the person convicted or against whom the Court holds the charges to be proved to pay within such time or in such instalments as the Court may direct, such sum by way of compensation to any person affected by the offence as the Court shall seem fit”

<sup>307</sup> See for example, United Nations Committee against Torture, Second Periodic Report, Second Periodic Reports of States parties due in 1999, CAT/C/48/Add.2, 06/08/2004, at paragraphs 67 and 102.

*The State party should establish a reparation programme, including treatment of trauma and other forms of rehabilitation, and provide adequate resources to ensure its effective functioning.*<sup>308</sup>

Sri Lankan law, policy and practices under the normal law as well as under emergency are therefore not in accordance with international law.

### **3. The Institutional Framework and Separation of Powers**

There is a clear articulation of the doctrine of Separation of Powers in Sri Lanka's constitutional structure.

Articles 3 and 4 of the Constitution are as follows:

3. *In the Republic of Sri Lanka Sovereignty is in the People and is inalienable. Sovereignty includes the power of government fundamental rights and the franchise".*

4. *"The sovereignty of the People shall be exercised and enjoyed in the following manner:*

- (a) the legislative power of the People Shall be exercised by Parliament consisting of elected representative of the People and by the People at a Referendum;*
- (b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;*
- (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized by the Constitution or created and established by law, except in matters relating to the Privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;*
- (d) the fundamental rights which are by the Constitution declared and recognised shall be respected secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and*
- (e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified be an elector as hereinafter provided, has his name entered in the register of electors.*

In theory therefore, power in all spheres including the powers of Government constitutes the inalienable sovereignty of the people with a functional separation in the exercise of power derived from the sovereignty of the people by the three organs of government; namely, the executive, legislative and the judiciary. These three organs of government do not have power that transcends the Constitution and the exercise of power is accordingly circumscribed by the Constitution and written law that derive its authority from the Constitution.

<sup>308</sup> United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, at paragraph 16.

However, in practice, the separation of powers doctrine had been eroded through years of excessive politicisation of the governance process. One of the primary reasons for this was the fact that the Constitution gave the President the power to make appointments to key posts in the public and judicial service, which was used by the executive to appoint party supporters, leading to significant deterioration in the independence of all governance institutions. Attempting to correct this state of affairs, the 17<sup>th</sup> Amendment to the Constitution, which was passed by the Parliament in 2001, established a Constitutional Council (CC) with definitive authority to approve the appointment of persons to important positions in the public service. These positions include the Attorney General, the Inspector General of Police and the Chief Justice and other judges of the Court of Appeal and the Supreme Court.<sup>309</sup> Importantly, the CC is also empowered to make the nominations of members to several constitutional commissions, among others, the Judicial Service Commission (in respect of the nomination of two Supreme Court judges who, together with the Chief Justice as the Chairman constitute the Commission), the National Police Commission, the Human Rights Commission of Sri Lanka and the Public Service Commission.<sup>310</sup> It is only once the CC makes and/or approves these nominations that the President is authorised to make the appointments.<sup>311</sup>

The CC is a ten member body constituted through a process of consensual decision making by the constituent political parties in Parliament. Five members of high integrity and standing are nominated, (taking into account minority concerns), jointly to the CC by the Prime Minister and the leader of the opposition.<sup>312</sup> The sixth member is nominated by the smaller parties in the House, which do not belong to either the party of the Prime Minister or of the Leader of the Opposition.<sup>313</sup> Once the nominations are forwarded to the President, he 'shall' forthwith make the respective appointments.<sup>314</sup> The President meanwhile appoints the seventh member.<sup>315</sup> The rest of the ten member CC comprises of *ex officio* members, namely the leader of the opposition, the Prime Minister and the Speaker of the House as chairman.<sup>316</sup>

The CC functioned creditably in its first term<sup>317</sup> and recommended the nominations of members to, among others, the Public Service Commission, the Human Rights Commission and the National Police Commission, (the latter body being a new commission set up to supervise the functioning of the Police Department and the police service, as will be examined later in Section 3.5). However, after the three year period of its six nominated members expired in March 2005, the CC was allowed to lapse without new appointments being made. This was due initially, to the inability of members of the smaller political parties to agree on their nomination to the CC. Thereafter, despite consensus being reached with much difficulty among parliamentarians in regard to all the members that needed to be nominated, the President continued to refrain from making the appointments on the basis that a Parliamentary Select Committee was studying the need for overall changes to the 17<sup>th</sup> Amendment.<sup>318</sup>

Yet, the actual reason for the failure to bring the CC into being ran much deeper than mere difficulties with the process. Effectively, it was only after the 17<sup>th</sup> Amendment was being implemented during 2002-2004 that politicians realised as to how much their powers in respect of, particularly appointments of their party supporters to the public service as well as their ability to influence the functioning of the police service, had been taken away by the independent constitutional commissions. Consequently, considerable political dissatisfaction was manifest

<sup>309</sup> Article 41C of the Constitution. The President is required to submit the nominee's name to the CC for approval.

<sup>310</sup> Article 41B of the Constitution.

<sup>311</sup> Articles 41B(1) and 41C (1) of the Constitution.

<sup>312</sup> Article 41A (1)(e) of the Constitution.

<sup>313</sup> Article 41A (1)(f) of the Constitution.

<sup>314</sup> Article 41A(5) of the Constitution.

<sup>315</sup> Article 41A(1)(d) of the Constitution.

<sup>316</sup> Article 41A(1) (a), (b), (c) of the Constitution.

<sup>317</sup> The appointments to the CC in 2002 comprised, among others, of several eminent jurists nominated on parliamentary consensus.

<sup>318</sup> This Select Committee has been sitting for two years now with no visible result. Though efforts were made to evoke the authority of the courts to compel the President to make the appointments to the CC, these petitions were dismissed by the Court of Appeal on the basis that the presidential immunity conferred by Article 35 of the Constitution prevented the judges from intervening in the matter. At the time of writing this Study, the Supreme Court's intervention has been pleaded and the Court has directed the executive and the legislature to come to an agreement on the appointments within a prescribed time frame. This matter is still pending.

leading to a combined lack of will on the part of the Executive and the Legislature to give effect to the substance of the 17<sup>th</sup> Amendment. From the year 2006 onwards and in continuing default of the CC being re-activated, the President has made his own appointments unrestrained by any external scrutiny, to vacancies arising in the public service and the appellate judiciary as well as to the constitutional commissions, regardless of the fact that these appointments violate a mandatory constitutional procedure.

This has had an extremely deleterious impact on the monitoring of abuses of human rights by oversight bodies, who were deprived of their independent nature, with particularly negative consequences on the National Police Commission (NPC) and the Human Rights Commission (HRC). Currently, these commissions are functioning with unconstitutionally appointed members and to little practical effect. These are concerns that will be examined in detail in Section 6 of this Study as they remain an important reason as to the manner in which deficiencies in the institutional framework have contributed to the prevalence of torture and CIDTP in Sri Lanka. Particular changes sought to be brought about by the 17<sup>th</sup> Amendment on the functioning of the Attorney General's Department and the Police Department will meanwhile be analysed in this Section.

### 3.1. The Executive

The President of the Republic is the Head of the Executive, the Head of the State and of the Government and is the Commander-in-Chief of the Armed Forces.<sup>319</sup> He/she is elected by the people and holds office for six years.<sup>320</sup> He/she is the Head of Cabinet,<sup>321</sup> is answerable to Parliament for the 'due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security.'<sup>322</sup> The President has the power to appoint the Prime Minister and also wide ranging powers of determining the Cabinet of Ministers, their subjects and functions<sup>323</sup> and may also assign to himself/herself any such subject or function.<sup>324</sup> Vacation of office of the presidency is subject to a specified constitutional procedure<sup>325</sup> and stringent conditions are laid down, where the impeachment procedure is invoked.<sup>326</sup> It is the President who holds the power of declaring a Referendum.<sup>327</sup>

The President is conferred immunity in regard to 'anything done or omitted to be done by him either in his official or personal capacity', while he/she holds office as President.<sup>328</sup> While this immunity bar has been upheld by the courts on more than one occasion, where direct actions of the President are concerned while in office,<sup>329</sup> this immunity does not apply after a President has left office when effectively, he or she could be challenged in court for unconstitutional actions during the period of office. Neither does Presidential immunity apply where actions of subordinate officers are sought to be justified, relying on the orders of the President. Such

<sup>319</sup> Article 30 (1) of the Constitution

<sup>320</sup> Article 30(2) of the Constitution.

<sup>321</sup> Article 43 (1) of the Constitution.

<sup>322</sup> Article 42 of the Constitution.

<sup>323</sup> Article 44(1) (a) of the Constitution.

<sup>324</sup> Article 44(2) of the Constitution.

<sup>325</sup> Article 38(1) of the Constitution.

<sup>326</sup> Article 38(2)(a) to (e) of the Constitution.

<sup>327</sup> Articles 85 to 87 of the Constitution.

<sup>328</sup> Article 35 (1) of the Constitution.

<sup>329</sup> *Public Interest Law Foundation vs the Attorney General and Others*, CA Application No 1396/2003, CA Minutes of 17.12.2003. Article 35(1) of the Constitution was held to confer a 'blanket immunity' on the President from legal action in respect of anything done or omitted to be done in official or private capacity, except in limited circumstances constitutionally specified in relation to *inter alia* ministerial subjects or functions assigned to the President and election petitions. It was on this basis that petitions challenging the refusal of the President to make the appointments to the Constitutional Council that was mandated to be established under the 17<sup>th</sup> Amendment to the Constitution were dismissed by the Court of Appeal. However, in *Silva v Bandaranayake*, [1997] 1 Sri LR 92 at 95, the majority decision went on to examine the Presidential act of appointment of a Supreme Court judge despite the constitutional bar relating to presidential immunity though ultimately the appointment itself was not struck down. This indicates that the immunity principle has been inconsistently applied by the courts leading to uncertainty in the law.

reliance has long been held to be unconstitutional.<sup>330</sup> The officers declared unable to seek refuge behind such presidential directives have included the Commissioner of Elections and the Inspector General of Police (IGP).<sup>331</sup>

The end result is that a Presidential directive cannot be a defence to subordinate action if it is manifestly and obviously illegal. But where unconstitutional acts or omissions of the President are directly in issue while in office, the courts will be reluctant to intervene. This highly problematic distinction remains one of the many subversive features of the 1978 Constitution.

### 3.2. The Legislature

The Parliament, comprising of two hundred and twenty five members elected in accordance with the Constitution, continues in office for six years. However, the Legislature, though envisaged as an essential element of the constitutional checks and balances structure, is in practice largely subordinated to the Executive. This includes instances, where the President is empowered to, at his discretion, submit to the People by Referendum, any Bill, which has been rejected by Parliament<sup>332</sup> and accordingly bypass parliamentary authority by going directly to the people. The President is also authorised to summon, prorogue and dissolve Parliament subject to certain conditions.<sup>333</sup> It is mandatory that the President dissolves Parliament upon the House rejecting the Appropriation Bill on the second occasion.<sup>334</sup>

Parliament retains parliamentary supervision in respect of a proclamation of emergency under the PSO and on the passing of the emergency<sup>335</sup>, but such control has been relegated to a technicality. The one significant control that Parliament has over the Executive is by way of its full authority over public finance.<sup>336</sup>

### 3.3. The Judiciary

#### 3.3.1 Security of Tenure of Judges and the Independence of the Judiciary

Article 105(1) of the Constitution provides that the institutions for the administration of justice shall be as follows:

- (a) The Supreme Court of Sri Lanka;
- (b) The Court of Appeal of the Republic of Sri Lanka;
- (c) The High Court of the Republic of Sri Lanka; and
- (d) Such other Courts of First Instance, tribunals or such institutions as parliament may from time to time ordain and establish.

Article 105(2) provides that the "Parliament may replace or abolish or amend the powers, duties, jurisdiction and procedure of all courts, tribunals and institutions except the Supreme Court."

<sup>330</sup> See *Karmatilleke vs Dissanayake* [1999] 1 Sri LR 157, *Senasinghe vs Karmatilleke*, SC 431/2001, SCM 17/3/2003 and recently, *Perera vs Balabatabendi and Others*, SC(FR) No 27/2002, SCM 19.10.2004.

<sup>331</sup> *ibid*.

<sup>332</sup> Article 85 (2) of the Constitution. This is subject to the condition that such Bill should not be a Bill for the repeal or amendment of any provision of the Constitution or for the addition of any provision to the Constitution or for the repeal and replacement of the Constitution or which is inconsistent with any provision of the Constitution).

<sup>333</sup> Article 70 of the Constitution.

<sup>334</sup> Article 70 (1)(d) of the Constitution.

<sup>335</sup> Article 155 of the Constitution.

<sup>336</sup> Articles 148 to 154 of the Constitution.

All members of the judiciary are appointed, in consonance with other Commonwealth jurisdictions, rather than being elected, though different procedures apply in the appointments process as would be discussed hereinafter.

### 3.3.1.1. Judges of the Supreme Court and Court of Appeal

Prior to the 17<sup>th</sup> Amendment to the Constitution, which is discussed above, the President appointed the Chief Justice, the judges of the Supreme Court and the Court of Appeal at his or her sole executive discretion, though there was a practice that he/she consulted the Chief Justice on the appointments.<sup>337</sup> No criteria were specified in this regard even though the Court has, in some instances, attempted to restrain the power of the President in making such appointments.<sup>338</sup>

Consequent to the 17<sup>th</sup> Amendment, the Constitutional Council was required to approve the President's nominees to fill vacancies to the post of Chief Justice and to any higher courts for such appointment to take effect.<sup>339</sup> However, after the CC was allowed to lapse, this condition has been disregarded by the President since 2006 when making appointments to the higher judiciary and several such appointments/promotions have, in fact, been made to the Court of Appeal and to the Supreme Court. Though such appointments/promotions were largely of judicial officers who were due for promotion anyway and were not disputed on their merits, the bypassing of the constitutional procedures by the executive had an adverse impact on the perception of the independence of the judiciary.

Judges of the higher courts have a fixed tenure of office. The age of retirement of Supreme Court, and Court of Appeal judges, are 65 and 63 respectively. Their salaries cannot be reduced.

They hold office during good behavior and in terms of Article 107 (2) of the Constitution, shall not be removed except by an order of President after an address of Parliament, supported by a majority of the total number of Members of Parliament (including those not present), subsequent to a petition presented to the President on the basis of proved misbehaviour or incapacity. No such resolution for the presentation of such an address can be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out all the details of the alleged misbehaviour or incapacity. Parliament is required by law or by Standing Orders to provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative.

<sup>340</sup>

<sup>337</sup> In *Silva v Bandaranayake*, [1997] 1 Sri LR 92 at 95, the majority decision affirmed that "The power of the President to appoint judges to the Supreme Court under Article 107 is neither untrammelled nor unrestrained, and ought to be exercised within limits, for that power is discretionary and not absolute. If, for instance, the President were to appoint a person who is later found to have passed the age of retirement laid down in Article 107(5), the appointment would be flawed because it is the will of the people, which that provision manifests, that such a person cannot hold that office. Article 125 would then require this Court, in appropriate proceedings, to exercise its judicial power in order to determine those questions of age and ineligibility. Other instances which readily come to mind are the appointment of a non-citizen, a minor, a bankrupt, a person of unsound mind, a person who is not an Attorney-at-Law or who has been disbarred, or a person convicted of an offence involving moral turpitude."

<sup>338</sup>*Ibid.*

<sup>339</sup> Article 41C of the Constitution.

<sup>340</sup> Standing Order 78A stipulates that where notice of a resolution for the presentation of an address to the President for the removal of a Judge from office is given to the Speaker in accordance with Article 107, the Speaker must entertain such resolution and place it on the Order Paper of Parliament. Such resolution cannot be proceeded with until after the expiration of a period of one month from the date on which the Select Committee was appointed. Paragraph 2 of the Standing Order empowers the Speaker, to appoint a Select Committee with a minimum membership of seven Members of Parliament for this purpose. The Select Committee is required to transmit to the Judge concerned a copy of the resolution setting out the allegations of misbehaviour or incapacity made against him. The Judge is required by the Standing Order governing the functioning of the Select Committee to make a written statement of defence within a stipulated time period and has the right to appear before the Select Committee to be heard either in person or via representative and adduce evidence, oral or documentary, in disproof of the allegations against him. Upon concluding the investigation, the Select Committee is required, within one month of the commencement of its sittings, to report its findings together with minutes of evidence taken before it to Parliament together with a special report of any matters, which it may think, fit to bring to the notice of Parliament.

The impeachment procedure has been invoked on three notable occasions in Sri Lanka's judicial history, first in regard to the then government moving against then Chief Justice Neville Samarakoon during the early 1980s in respect of remarks that he had made that were critical of government policy, when making a public speech. A Parliamentary Select Committee inquired into his conduct and decided that it was not sufficiently grave as to invite impeachment. The second and third instances concerned impeachment motions being moved by the opposition against the current Chief Justice Sarath N. Silva in recent years citing specific instances of judicial misconduct and political partiality towards the government; both impeachment motions were rendered nugatory by then President Chandrika Kumaratunge dissolving Parliament which led to their automatic lapsing.

The fact that the impeachment procedure of superior court judges rests in the political domain has led to considerable concern being expressed in regard to the inevitable politicisation of the process. In examining Sri Lanka's Fourth Periodic Report in 2003, the UN Human Rights Committee observed as follows;

*The Committee expresses concern that the procedure for the removal of judges of the Supreme Court and the Courts of Appeal set out in article 107 of the Constitution, read together with Standing Orders of Parliament, is incompatible with article 14 of the Covenant, in that it allows Parliament to exercise considerable control over the procedure for removal of judges.*

*The State party should strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct.*<sup>341</sup>

### 3.3.1.2. Judges of the High Court and lower courts

Judges of the High Court are appointed by the President of the Republic on the recommendations of the Judicial Services Commissions and are subject to disciplinary control/removal by the Judicial Service Commission (JSC). The JSC is headed by the Chief Justice and two other judges of the Supreme Court. Under Section 6(3) of the Judicature Act, No. 2 of 1978, the age of retirement of High Court judges is 61 years.

Judges of the lower courts are appointed by the JSC and retire at 55 years subject to annual extensions up to 60 years. In terms of Article 137 of the Constitution, the JSC exercises the power of appointment, promotion, dismissal and disciplinary control of judges of the lower courts. However, there is no public and accountable procedure for dismissal and disciplinary control of lower court judges. This has been subjected to criticism and the JSC, particularly under the Chairmanship of the current Chief Justice, has been accused of arbitrary and unfair removal of judges of the lower courts.

The International Bar Association (IBA) Report 2001, titled "Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary" issued following an IBA mission to Sri Lanka gives specific examples of instances where original court judges were arbitrarily disciplined and dismissed by the JSC headed by Chief Justice Sarath N. Silva. The IBA Report concluded that "the perception of a lack of independence of the judiciary was in danger of becoming widespread with extremely harmful effects on the rule of law in the country."

In his report in April 2003 to the UN Commission on Human Rights, Param Coomaraswamy, then United Nations Special Rapporteur on the Independence of the Judiciary wrote,

<sup>341</sup> United Nations Human Rights Committee, Concluding Observations on Sri Lanka (2003), CCPR/CO/79/LKA, 01/12/2003, at para. 16.

178. *The Special Rapporteur continues to be concerned over the allegations of misconduct on the part of the Chief Justice Sarath Silva, the latest being the proceedings filed against him and the Judicial Service Commission in the Supreme Court by two district judges (which is set for hearing on 27 February 2003).* E/CN.4/2003/65/Add.1 25, February 2003.

In 2008, the UN Human Rights Committee determined that the removal of a High Court judge by the JSC had been arbitrary. In *Bandaranayake v Sri Lanka*<sup>342</sup>, the Committee observed that Sri Lanka's dismissal procedure of lower court judges does not adhere to the requirements of basic procedural fairness and fail to ensure that the judges benefit from the necessary guarantees to which they are entitled in their capacity as judges, thus constituting an attack on the independence of the judiciary.

Thus;

*The Committee finds that the JSC's failure to provide the author with all of the documentation necessary to ensure that he had a fair hearing, in particular its failure to inform him of the reasoning behind the Committee of Inquiry's guilty verdict, on the basis of which he was ultimately dismissed, in their combination, amounts to a dismissal procedure which did not respect the requirements of basic procedural fairness and thus was unreasonable and arbitrary. For these reasons, the Committee finds that the conduct of the dismissal procedure was conducted neither objectively nor reasonably and it failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of article 25 (c) of the Covenant.*

In recent years, the Supreme Court has also been noted for its use of contempt powers particularly in regard to criticism of judges in regard to which again, some cases have been successfully taken to the UN Human Rights Committee, which has called for the enactment of a Contempt of Court Act.<sup>343</sup> Sri Lanka lacks a Contempt of Court Act and the regulation of what amounts to contempt is subjected solely to judicial discretion.

### 3.3.2. Overview of the Judicial Structure and Powers of the respective Courts

The examination hereafter will confine itself to the courts exercising authority pertinent *inter alia*, to the violations of civil and political rights as well as the criminal justice process in Sri Lanka and will not deal with courts exercising purely civil jurisdiction.

#### 3.3.2.1. The Supreme Court of Sri Lanka

The Supreme Court consists of the Chief Justice and not less than six and not more than ten other judges.<sup>344</sup> Article 118 of the Constitution declares the Court to be the highest and final superior court of record in Sri Lanka and grants the Court jurisdiction in respect of constitutional matters, jurisdiction for the protection of fundamental rights, consultative jurisdiction, jurisdiction in presidential election petitions, jurisdiction in respect of any breach of any privileges of Parliament and jurisdiction in respect of any other matter which Parliament may by law vest or ordain.

The Supreme Court has the sole and exclusive jurisdiction to determine, whether any Bill or provision of a Bill is inconsistent with the Constitution.<sup>345</sup> This jurisdiction of the Supreme Court can be invoked by the President by a written reference to the Chief Justice or by any citizen by a petition in writing addressed to the Supreme Court.<sup>346</sup> Such reference must be made, or such

petition must be filed, within one week of the Bill being placed on the Order Paper of the Parliament.<sup>347</sup> A copy of it must at the same time be delivered to the Speaker.<sup>348</sup> When this jurisdiction of the Supreme Court is invoked no proceedings can take place in Parliament in relation to such Bill until either the determination of the Supreme Court has been made, or a period of three weeks from the date of such reference or petition has expired.<sup>349</sup> Further, the Court is required to make and communicate its decision in relation to such a petition within three weeks of the reference or the filing of the petition.<sup>350</sup> Article 123 of the Constitution obliges the Court to give reasons when delivering judgement in such instances. In the event of the Cabinet of Ministers endorsing a bill as important in the national interest the Court is compelled to deliver its judgement on the constitutional validity of such a bill within 24 hours.<sup>351</sup> The Court also has sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution<sup>352</sup> and is the final court of civil and criminal appellate jurisdiction for the correction of all errors in fact or in law, which are committed by the Court of Appeal or any court of First Instance, tribunal or such institution.<sup>353</sup>

Article 128(1) contains a right of appeal to the Supreme Court from any decision of the Court of Appeal if the Court of Appeal grants permission or at the instance of any aggrieved party. Article 128(2) provides for such a right of appeal, notwithstanding a refusal by the Court of Appeal permission to do so, if the Supreme Court grants special leave to appeal in such an instance.

The Court possesses a consultative jurisdiction by way of Article 129, where it appears to the President of the Republic that a question of fact or law has arisen from sufficient public importance, in which case, the President may refer the question to the Court, which shall after such hearing as it sees fit, within the period specified, report its opinion to the President. In terms of Article 130 of the Constitution, the Supreme Court is also empowered to adjudicate in election petitions is limited to any legal proceedings pertaining to the election of the President and any appeal from a decision of the Court of Appeal in an election petition case.

Importantly for the purposes of this analysis, Article 126(1) confers on the Supreme Court, sole and exclusive jurisdiction to adjudicate on any question pertaining to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right granted by chapters III and IV of the Constitution. Article 126(2) decrees that such petition must be filed either by the person whose rights are alleged to have been infringed or is about to be infringed or by an attorney-at-law on his behalf within one month of the occurrence of the alleged violation. When such violation of rights appears to surface during a hearing into a writ application in the Court of Appeal, this matter must also be referred to the Supreme Court in terms of Article 126(3). Article 126 (5) states that the Court shall hear and finally determine petitions or references into alleged violation of rights within two months of the making of such reference or the filing of such petition. However, time limits imposed by statutes on the determining of decisions by Courts have been interpreted by the Courts to be directory and not mandatory.<sup>354</sup>

#### 3.3.2.2. The Court of Appeal

The Court of Appeal is a superior court of record created by Article 105(1)(b) of the Constitution. According to Article 138(1) of the Constitution, the Court of Appeal has appellate jurisdiction in regard to the correction of any error in fact or in law committed by any Court of First Instance, tribunal or other institution. The Court also has sole and exclusive cognisance by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions and other

<sup>342</sup> *Soratha Bandaranayake v Sri Lanka* CPCR/C/93/D/1376/2005, adoption of views 24-7-2008

<sup>343</sup> *Vide Anthony Michael Emmanuel Fernando v Sri Lanka*, CPCR/C/83/D/1189/2003, adoption of views, 31-03-2005; *Dissanayake Mudiyanselage Sumanawera Banda v Sri Lanka* CPCR/C/95/D/1373/2005, adoption of views 22-7-2008

<sup>344</sup> Article 119 (1) of the Constitution.

<sup>345</sup> Article 120 of the Constitution.

<sup>346</sup> Article 121 of the Constitution.

<sup>347</sup> *ibid.*

<sup>348</sup> *ibid.*

<sup>349</sup> Article 121(2) of the Constitution.

<sup>350</sup> Articles 121(3) of the Constitution.

<sup>351</sup> Article 122 of the Constitution.

<sup>352</sup> Article 125 of the Constitution.

<sup>353</sup> Article 127 of the Constitution.

<sup>354</sup> *Vide Silmona v Dayalal Silva*, [1992] 1 Sri L.R 195

institution, provided that no decision of a court or tribunal shall be reversed or varied if there is no prejudice to the substantial rights of the parties or occasioned a failure of justice. For example, appeals are preferred to the Court of Appeal against decisions of the High Court in respect of prosecutions instituted under the CAT Act.

In exercising its powers of appeal according to law, the Court could affirm, reverse, correct or modify any order, judgement, decree or sentence. It could also give directions to a lower court, tribunal or institution and order a new trial or admit additional or supplementary evidence, which it considers essential to the matters at issue.

By virtue of Article 140 of the Constitution, the Court of Appeal also has full power and authority to inspect and examine the records of any Court of First Instance, tribunal or other institution and also to grant writs of certiorari, prohibition, *procedendo*, *mandamus* and *quo warranto* against any other person.

Vitaly, under Article 141 of the Constitution, the Court has the power to issue writs of *habeas corpus*, power to bring up and remove prisoners from custody. The Court of Appeal has an all island jurisdiction in this respect; the procedure is by way of petition and affidavit.

The jurisdiction to try election petitions in respect of election to the membership of parliament is exercised meanwhile by the Court in terms of Article 144 of the Constitution.

### 3.3.2.3. The High Courts

Article 111(1) of the Constitution stipulates that there shall be a High Court which shall 'exercise such jurisdiction and powers as Parliament may vest or ordain.'<sup>355</sup>

Provincial High Courts exercise original jurisdiction in respect of all prosecutions on indictment and is specifically conferred with this authority under the CAT Act in terms of Section 4 of that Act. They also possess appellate and revisionary jurisdiction in respect of convictions, sentences, orders entered or imposed by Magistrate's Courts and Primary Courts within the Province along with *interalia*, writ jurisdiction in respect of powers exercised under any law or under any statutes made by the Provincial Council of that Province, in respect of any matter set out in the Provincial Council list.<sup>356</sup> They have the powers to issue orders in the nature of writs of *habeas corpus*, in respect of persons illegally detained within the province and to issue orders in the nature of writs of certiorari, prohibition, *procedendo*, *mandamus* and *quo warranto* against any person.<sup>357</sup> The procedure, by way of petition and affidavit, is the same as that before the Court of Appeal.

### 3.3.2.4. The Magistrates' Courts

The Judicature Act, No 2 of 1978, provides that a Magistrates' Court shall have and exercise all powers and authorities, which are conferred by the provisions of the Penal Code or of the CCP Act. or of any other enactment. Magistrate's Courts have the power to hear, try, determine and dispose of, in a summary way, all suits and prosecutions for offences committed wholly or in part within its local jurisdiction and by law made cognisable by a Magistrate's Court as well as hold non-summary inquiries as stated earlier in this Study.

Among the considerable responsibilities imposed on Magistrates in this regard, they have particular duties at the very early stage of arrests. Section 36 of the CCP Act mandates production of a person arrested before a Magistrate (having jurisdiction in the case) without

<sup>355</sup> Article 154P of the Constitution provides for the establishment of Provincial High Courts to which Judges are appointed by the Chief Justice from among Judges of the High Court of Sri Lanka.

<sup>356</sup> High Court of the Provinces (Special Provisions) Act, No. 19 of 1990

<sup>357</sup>ibid.

unnecessary delay, which, as set out in Section 37, must not exceed twenty four hours (exclusive of the journey from the place of arrest to the Magistrate). Section 38 of the CCP Act also states that Officers in Charge of Police stations must report to the Magistrate's Court of their respective districts, the cases of all persons arrested without warrant by any police officer attached to their stations or brought before them and whether such persons have been admitted to bail or otherwise.

When suspects are brought before the Magistrate within twenty-four hours following initial police custody in terms of Section 36 and 37 of the CCP Act and at a later stage in regard to obtaining extension of custody, Magistrates are expected to examine a suspect for evidence of torture. This duty is equally rigorous in relation to detention under the emergency law when suspects are periodically produced before the Magistrate.

Meanwhile several other provisions also confer equally important responsibilities on Magistrates. For example, Sections 369 and 370 of the CCP Act pertain to the conduct of inquests by Magistrates. Section 371 of the CCP Act empowers Magistrates to view the body and hold an inquiry into the case of death, when any person dies while in the custody of the police or in a mental or leprosy hospital. Section 373 of the CCP Act provides for a Magistrate or an investigator empowered by the Minister to order a post-mortem examination including disinterring the body if it is buried. Section 9(b) (iii), which confers general powers on Magistrates to inquire into cases of sudden or accidental deaths in these contexts, also constitutes a good check on police abuse of suspects.

It must be noted however that current emergency regulations bypass the normal legal procedures relating to inquests and take away the ordinary powers of Magistrates. Thus, Regulations 54 to 58 of EMMPR 2005 specify the extraordinary procedure to be followed in the case of death of any person, due to any action of a police officer or any member of the armed forces. Such fact of death is required to be reported to the Inspector General of Police or the nearest Deputy Inspector General of Police. A police officer is then directed to make a report and record statements and where a body is found, to report the same to the Magistrate, who then will direct a post mortem examination to be held and thereafter direct that the dead body be handed back to the police. It is up to the discretion of the head of police to decide whether the body should be handed over to the relatives or whether 'in the interests of national security or for the maintenance and preservation of public order'<sup>358</sup> the body should be buried in accordance with such steps that he 'may deem necessary in the circumstances'<sup>359</sup> The High Court is meanwhile empowered to inquire into the death of any person only on the application of the Inspector General of Police<sup>360</sup> Inquiries therein may not be open to the public except at the express authorisation of the Court of Appeal<sup>361</sup> and the Attorney General is authorised to issue an indictment based on the findings, if they disclose the commission of any offence.<sup>362</sup>

### 3.3.3. The Jurisprudence

#### 3.3.3.1. The Supreme Court

Article 126(2) read with Article 17 of the Constitution stipulates that a petition alleging infringement of a right may be filed only by a person 'entitled to that right' or by an attorney-at-law on his behalf.<sup>363</sup> The word "person" in Article 126(2) has been interpreted broadly as to

<sup>358</sup> Proviso to Regulation 56(2) of EMMPR 2005

<sup>359</sup> ibid.

<sup>360</sup> Regulation 57 of EMMPR 2005.

<sup>361</sup> Regulation 57(8) of EMMPR 2005.

<sup>362</sup> Regulation 58 of EMMPR 2005.

<sup>363</sup> Rules of Sri Lanka's Supreme Court formulated in 1990 permit some relaxation of this strict rule. Rule 44 (2) provides that where for any reason the person whose fundamental rights or language rights has been or is about to be infringed is unable to sign a proxy appointing an Attorney-at-law to act on his behalf, any other person authorised by him (whether orally or in any other manner,



include the 'lawful heirs and/or dependants of such person<sup>364</sup> and in exceptional circumstances, the Court has even permitted public interest petitions in respect of public accountability in the governance process. However, these rules are yet not sufficiently broadened to permit, for example, a *bona fide* public interest group to file petitions on behalf of a torture victim.

Typically, the procedure is that once a petition alleging violation of fundamental right is filed (with copies and with the payment of court fees), the matter must be first listed before the Court for leave to proceed, which is the first stage of the process. Thereafter if leave is granted, then all the respondents to the petition must be noticed and copies of the petition with the affidavit and all the annexures sent to each and every one of them. The burden is then on the respondents to file their objections to the matter. Where public officers are cited as respondents, the Attorney General may appear for them, though there are instances, where private counsel is retained. Ordinarily, the Attorney General does not appear for respondent police officers in torture cases but there has been departures evidenced from this practice in recent times.

Most often, inordinate time is taken by the respondents with the deliberate intention of delaying the judicial determining of the matter. Once the objections are filed, then the petitioner is called upon to file a counter reply and it is only after that stage is reached that the Court will fix a date for the actual hearing. Article 126(5)) prescribes a time limit of two months for the determination of these petitions; however, time limits imposed by law of this nature have been judicially declared to be merely directory.<sup>365</sup>

Article 126(1) of the Constitution decrees that all petitions alleging infringement of fundamental rights must be filed within one month of the alleged violation.<sup>366</sup>

The exercise of the Supreme Court's constitutional jurisdiction in regard to complaints of torture and CIDTP in terms of Article 11 of the Constitution read with Article 126 of the Constitution has already been referred to previously. The Court has formulated a vast body of jurisprudence in more than thirty years of deciding fundamental rights petitions in terms of this jurisdiction.

Certain crucial principles have been articulated, some of which will be selected in this analysis for good illustration. For example, the Court has stated that even if individual police officers cannot be identified as the officers, who perpetrated torture or CIDTP, the State will be held liable if it is proved that the victim was abused while in official custody.<sup>367</sup> Respondent police and prisons officials have been held liable for not ensuring that persons in their custody were being treated as the law required. In other words, they are held liable by virtue of their culpable inaction including failure to monitor the activities of their subordinates that would have prevented further ill treatment of the victim and investigation of any misconduct.<sup>368</sup> The duty to afford to any suspect (even a hard core criminal) the protection of his constitutional rights of personal liberty has been particularly affirmed.<sup>369</sup>

whether directly or indirectly) to retain an Attorney-at-law to act on his behalf, may sign proxy on his behalf. Rule 44 (3) provides that an application may be made by an attorney-at-law on behalf of any person aggrieved without a proxy in his favour provided that:

(a) The petition contains an averment to the effect that such an application is made on behalf of such person who is named therein, and

(b) Either such person or such Attorney-at-law named in the petition, is signed by such Attorney-at-law or by an instructing Attorney-at-law appointed by him.

<sup>364</sup> *Sriyani Silva vs Iddamalagoda* (supra) and *Wenvalage Rani Fernando* (supra)

<sup>365</sup> *Widie Sivilinna v Dayalal Silva*, [1992] 1 Sri LR 195

<sup>366</sup> In ordinary situations, the Court has relaxed the one month time limit only in exceptional circumstances such as when a person is held *incommunicado* or without access to lawyers.

<sup>367</sup> *Amal Sudath Silva vs Koditumakken, Inspector of Police & Others*, [1987] 2 Sri LR 119, per Atukorale J. See also *Wagaachige Dayaratne vs IGP and Others* SC (FR) 337/2003 SCM 17.5.2004, per C.V. Wigneswaran J.

<sup>368</sup> *Sriyani Silva vs Iddamalagoda* [2003] 2 Sri LR 63, *Wenvalage Rani Fernando case*, SC(FR) No 700/2002, SCM 26/07/2004. As referred to above in segment 2.2., it was in these two cases that an implied right to life was inferred in a limited context as flowing from the prohibition imposed in Article 13(4) 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.' The Court, in addition, declared that dependants, next-of-kin and intestate heirs have the right to invoke the jurisdiction of the Court for relief when a family member dies due to torture at the hands of state officers.

<sup>369</sup> *Wenvalage Rani Fernando case*, SC(FR) No 700/2002, SCM 26/07/2004.; *Amal Sudath Silva vs Koditumakken* [1987] 2 Sri LR 119. Also, *Senthilnayagam vs Seneviratne* [1981] 2 Sri LR 187, *Dissanayake vs Superintendent, Mahara Prisons*, [199] 2 Sri LR 247, *Premalal de Silva vs Inspector Rodrigo* [1991] 2 Sri LR 307, *Pellawattage (A.A.L.) for Piyasena vs OIC, Wadduwa* SC Application No 433/93 SCM 31.08.1994.

Further, it has been conclusively affirmed that there need not be a strong insistence of corroboration of the victims' story in all instances nor, indeed, should there always be evidence of external injuries, though obviously, if medical evidence if forthcoming, this would support the alleged rights violation.

Thus;

*"Whilst I shall not accept each and every allegation of assault/ill-treatment against the police unless it is supported by cogent evidence, I do not consider it proper to reject such an allegation merely because the police deny it or because the aggrieved party cannot produce medical evidence of injuries. Whether any particular treatment is violative of Article 11 of the Constitution would depend on the facts of each case. The allegation can be established even in the absence of medically supported injuries."*<sup>370</sup>

In formulating such jurisprudence, the Court has used international principles very effectively. In *Sriyani Silva vs Iddamalagoda*<sup>371</sup>, the Court recognized the petitioner's right to sue and seek compensation for herself as the victim's widow and for the minor child. By doing so, in the own words of the Court, brought the "law into conformity with international obligations and standards." In this instance, Article 14.1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment<sup>372</sup> was utilised by the Court to come to its finding.<sup>373</sup> In *Wenvalage Rani Fernando (wife of deceased Lama Hewage Lal) and others vs OIC, Minor Offences, Seeduwa Police Station, Seeduwa and eight others*<sup>374</sup> the Court, in emphasizing its condemnation of the brutal treatment of the deceased by prison officials, laudably referred not only to the applicable domestic law contained in the Prisons Ordinance, but also to relevant views of the UN Human Rights Committee together with provisions of international treaties and declarations concerned with the rights of prisoners.<sup>375</sup> In *Shahul Hameed Mohammed Nilam and Others vs K. Udugampola and Others*<sup>376</sup>, the judges, in finding a violation of the right to freedom from torture, conceded that, pain of mind, provided that it is of a sufficiently aggravated degree, would suffice to prove a rights violation. Domestic, regional and international precedent articulating this principle was cited.<sup>377</sup>

Further, as discussed earlier in this Study, the Supreme Court has, in recent years, recognised the right to life as negatively implied in the existing constitutional prohibition in Article 13(4) that no one shall be deprived of life except through a court order.<sup>378</sup> However, a further judicial expansion may be appropriate in a situation, where a similarly grievous rights violation is found.<sup>379</sup> This would involve an extended interpretation of Article 11 read together with Article 126(2) as including a direct violation not only of the rights of the victim, but also the rights of his family members not to be subjected to torture or to cruel, inhuman or degrading treatment as a result of the treatment meted out to the victim. This approach would necessarily vary from the

<sup>370</sup> *Ansulini Fernando v Sarath Perera*, [1992] 1 Sri LR 411, per KMMB Kulatunge J.

<sup>371</sup> [2003] 2 Sri LR 63.

<sup>372</sup> [2003] 2 Sri LR 63. "Each State shall ensure in its legal system that, the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his dependants shall be entitled to compensation".

<sup>373</sup> As stated above, the CAT Act does not contain any provision in regard to the right of either the victim or the dependant for compensation. Reliance was placed by the Court in this case primarily on the Article in the Convention itself rather than any provision of domestic law.

<sup>374</sup> SC(FR) No 700/2002, SCM 26/07/2004.

<sup>375</sup> *Thomas vs Jamaica*, (Communication No 266/1989, views of UN-HRC, 2<sup>nd</sup> November 1993. The Court also considered General Assembly Resolution 43/174 of 9<sup>th</sup> December, 1988 and the Standard Minimum Rules for the treatment of prisoners adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955 and approved by the Economic and Social Council by its resolutions 663 C(XIV) of 31<sup>st</sup> July 1957 and 2076 (LXII) of 13<sup>th</sup> May 1977.

<sup>376</sup> SC(FR) Applications Nos: 68/2002, 73/2002, 74/2002, 75/2002, 76/2002, SCM 29.01.2004.

<sup>377</sup> Jurisprudence of the European Court of Human Rights (EUCT) was considered in this case, specifically *Tyrer vs UK* (1978, 2 EHHR, 1), *the Greek case* (127 B (1969) Com. Rep. 70, *Campbell and Cosans vs UK* (Case law of the EUCT, Vol. 1, pg 170)

<sup>378</sup> *Sriyani Silva vs Iddamalagoda* [2003] 2 Sri LR 63, *Wenvalage Rani Fernando case*, SC(FR) No 700/2002, SCM 26/07/2004. See also *Kanapathipillai Machebarallavan vs OIC, Army Camp, Plantain Point, Trincomalee and Others* (SC Appeal No 90/2003, SC (Spl) L.A. No 177/2003, SCM 31.03.2005, where the Court (per Justice Shirani Bandaranayake) imaginatively linked the remedy of habeas corpus with a disclosed violation of a fundamental right in terms of Article 13(4) of the Constitution and held the State liable in the absence of individual responsibility.

<sup>379</sup> Pinto-Jayawardena, Kishali in 'Judicial Protection of Human Rights', State of Human Rights Report, Law and Society Trust, 2005, at page 25.

upholding of a violation of the rights of the victim and the accrual or devolving of such rights to his lawful heirs and/or dependants, which latter thinking has been reflected in judicial reasoning so far.

The violation of the rights of family members arising out of the violation of the rights of the victim has been acknowledged, for example, in the jurisprudence of the United Nations Human Rights Committee in the exercise of its jurisdiction to individual complaints submitted against States in terms of the Optional Protocol to the ICCPR. The Committee has stated that, in the specific context of disappearances, the family of the disappeared were also victims of all the violations suffered by the disappeared, including ICCPR Articles 9 (the right to liberty and security of person), and 10 (1) (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).<sup>380</sup> In *Sarma vs Sri Lanka*<sup>381</sup> for example, the Committee held that:

*'(the Committee) recognizes the degree of suffering involved in being held indefinitely without any contact with the outside world and observes that, in the present case, the author appears to have accidentally seen his son some 15 months after the initial detention. He must, accordingly, be considered a victim of a violation of article 7 (the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment).*

Moreover, noting the anguish and stress caused to the author's family by the disappearance of his son and by the continuing uncertainty concerning his fate and whereabouts, the Committee considered that the author and his wife are also victims of violation of article 7 of the Covenant. The Committee was therefore of the opinion that the facts before it reveal a violation of Article 7 of the Covenant both with regard to the author's son and with regard to the author's family.<sup>382</sup>

It may be argued that this same reasoning is applicable in cases where the victim dies in consequence of grievous torture and his family members' file an application in the Supreme Court. This is so particularly in view of the now well articulated reasoning of the Court that the right to life underlies Article 11 and Article 13(4) and that the word "person" in Article 126(2) must be interpreted broadly as to include the 'lawful heirs and/or dependants of such person'.<sup>383</sup> Consequently, a violation of rights, not only of the disappeared person, but also of the family members of such a person should also be found. Such an advance is however yet to be reflected in the Court's jurisprudence.

Significant strides have meanwhile been made by the Court in this implicit recognition of the right to life in other contexts as for example in *habeas corpus* applications, namely in the *Machchavallan Case*.<sup>384</sup> In this instance, a *habeas corpus* application had been lodged in the Court of Appeal by a father who had, along with his two sons, been arrested in a cordon and search operation conducted at the Plantain Point Army camp in 1990. While the father was released thereafter, his sons continued to be kept in the custody of the army camp and thereafter 'disappeared.' The father's *habeas corpus* application was dismissed by the Court of Appeal on the basis that he had not succeeded in discharging the burden of proof laid on him to show that the army officer cited in his petition was in fact, responsible for the arrest and detention of his sons.

Yet, on his appeal to the Supreme Court, leave to appeal was granted on the following grounds; Did the matter disclose a violation of a fundamental right under Article 13(4) of the Constitution ("no person shall be punished with death or imprisonment except by an order of a competent Court?"), by a state officer for whose act the State was liable during the hearing of his application

<sup>380</sup> *Quinteros v. Uruguay*, Case No. 107/1981, Views adopted on 21 July 1983.

<sup>381</sup> *Jegatheeswaran Sarma v Sri Lanka*, Case No 950/2000, Views adopted on 31, July, 2003.

<sup>382</sup> *ibid*.

<sup>383</sup> Relevantly in this regard, the Court, in *Sriyani Silva vs Iddamalgeda* (supra) and in *Wenvalage Rani Fernando* (supra), recognised the linkage between Article 126(2) and Article 17 of the Constitution which entitles each person to make an application under Article 126 in respect of the infringement of a right.

<sup>384</sup> *Kanapathipillai Machchavallan vs OIC, Army Camp, Plantain Point, Trinomalee and Others* (SC Appeal No 90/2003, SC (Spl) L.A. No 177/2003, SCM 31.03.2005, per Justice Shiranee Bandaranayake.

before the Court of Appeal? Consequently, the question arose as to whether the entire matter should have been referred to the Supreme Court for determination under Article 126(3) of the Constitution?<sup>385</sup>

In ruling that there should, indeed, be such a referral, the Court, (quoting its earlier decisions that had declared an implied right to life as contained in Article 13(4)), held that this was constitutionally called for as it was 'beyond doubt' that there had been an infringement of Article 13(4) of the Constitution by some state officers at the time that the Court of Appeal made its order.<sup>386</sup>

In certain other instances, the Court has been conservative in its articulation of rights. International law has clearly laid down the principle that even if a commander does not order his subordinates to commit the unlawful acts, he/she is liable if he knew, or ought to have known, of them and failed to take steps to prevent them.<sup>387</sup> However, "a high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed."<sup>388</sup> There must be an unlawful act by the commander or a failure to supervise his subordinates constituting a dereliction of duty on his part.

Within certain limitations, a commander is entitled to assume that orders issued by his superiors and the state which he serves are issued in conformity with international law. "He cannot be held criminally responsible for a mere error of judgment as to disputable legal questions." To be held criminally responsible in respect of orders, which he passes on to the intermediate commander, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal.<sup>389</sup> This is not confirmation of the availability of the defence of superior orders; the defence is based on the lack of criminal intent. However, though the Supreme Court has been willing to enforce the doctrine of the vicarious liability of superior officers in regard to abuses committed during 'normal' situations as discussed above, there has been a greater degree of reluctance manifested in regard to applying this concept to army officers to enforce accountability during times of conflict.<sup>390</sup> In another decision of particular importance, namely the *Embilpitiya case*,<sup>391</sup> a senior army officer was the officer in charge of the camp, where more than fifty schoolchildren had been held and tortured. However, he was acquitted by the High Court on the basis that there was no direct evidence linking him to the crimes.

He later brought a fundamental rights petition in the Supreme Court claiming that he had a right to be promoted to the rank of Major General as he had been acquitted of all charges in the High Court prosecution.<sup>392</sup> This right was, in fact, upheld by the Court<sup>393</sup> in a decision that has since

<sup>385</sup> Article 126(3) mandates that where, in the course of hearing writ applications in the Court of Appeal, there is prima facie evidence of an infringement of a fundamental right, the Court should refer such matter for determination to the Supreme Court.

<sup>386</sup> "...it is reasonable to conclude that the corpora were kept in the Army Camp with the knowledge and connivance of the Army officers. Hence, Army authorities are responsible to account for the whereabouts of the two sons of the appellant..." at page 10 of the judgment. Since there was however, no evidence that the first respondent officer was responsible for the arrest and detention of the corpora, the State was held responsible for the disappearance of the corpora and ordered to pay compensation and costs. The applicability of the time bar, (yet again another of the many obstacles placed by the framers of the Constitution impeding an effective working of the rights chapter), to the instant case was dismissed by court.

<sup>387</sup> The *Yamashita Trial*, IV WCR 35 as confirmed by GP I, Art. 86, para. 2.

<sup>388</sup> *High Command Trial*, XII WCR 76.

<sup>389</sup> *ibid*, p. 74.

<sup>390</sup> This reluctance has been manifested by the prosecuting authorities as well. In *Wijesuriya vs the State* (77 NLR, 25) the accuser's commanding officer, Colonel Nugawela who had purportedly issued the directive to the accused to "bump off" any prisoner taken into custody, was not indicted. He was instead taken as a witness for the prosecution and testified to the factual situation that existed on the day in question.

<sup>391</sup> *Ratnapura High Court*, Case No 121/94. Judgment delivered on 23/02/1999.

<sup>392</sup> His defence was that he had performed as Commanding Officer of Ratnapura during a time when the entire civil administration had broken down due to insurgent terror. The area had twenty two detachments with four Battery Commanders each directly commanding such detachments. He himself operated from three different locations in the area with his permanent office at the Army Camp in Kuruwita. In Embilpitiya, his coordinating office was at the Mahaweli Circuit Bungalow which was different from the Sevana Army Camp where the abducted children were kept. Due to difficult geographical conditions and the activities of the insurgents, it was humanly impossible for him to monitor everything that was happening in the detachments and each junior officer had been given direct responsibility in this respect. It was however contended by the State that Brigadier Liyanage was denied his

been heavily critiqued.<sup>394</sup> The Court acknowledged that Brigadier Liyanage did occupy a place in the chain of command regarding the Embilipitiya “disappearances.” However, this, by itself, was held not to justify Brigadier Liyanage’s non-promotion. Other officers below and above him in that chain of command had been promoted, examples being Provincial Commander Brigadier Vajira Wijeratne and Battery Commander Capt. K.V.V. Chamarasinghe.<sup>395</sup> No rational reason was held to exist as to why Brigadier Liyanage should have been singled out from those who might have been held accountable, because of their positions in the chain of command. The Court opined as follows;

*“this makes the failure of the respondents to treat the petitioner in an even handed manner, arbitrary and capricious. The petitioner, as we have seen, was acquitted and in the eyes of the law, is in no worse position than those other persons who were in the chain of command.”*<sup>396</sup>

Brigadier Liyanage’s “blameworthiness was held to be neither more nor less than that which was attributable to all those in the chain of command.”<sup>397</sup> However, this reasoning is liable to be critiqued given the proximity that (then) Lt Col. Liyanage had to the events in question as borne out by the evidence before the High Court<sup>398</sup> and also, that he was the commanding officer of the camp.

To judicially maintain the fact that the promotion of other officers, who had been indicted and convicted for the Embilipitiya disappearances, as a justifiable reason as to why Brigadier Liyanage should be promoted, is to depart from the articulated precedent that a right cannot be urged in one case on the basis of a wrong occurring in another case. In any event, the promotion of the other officers had been granted by the Army Commander. In contrast, Brigadier Liyanage’s promotion, given that it was on a much higher level, was at the discretion of the Executive president, who was governed by different considerations and with a greater level of civil and political accountability than the Army Commander. Indeed, even after the Court’s judgment declaring Brigadier Liyanage entitled to the promotion, then President Chandrika Kumaratunge still refused to promote him. Though this decision was again challenged in the Supreme Court, the Court refused to intervene, pointing to the constitutional immunity afforded to the acts of the President which precluded any further judicial review.

The *Parry Liyanage Case* leads us to a paradox in the Sri Lankan legal process; where violations occur in normal times, a police officer or a prisons officer could be vicariously held liable in terms of the constitutional guarantees against torture or other grave human rights violations committed by his or her subordinates as illustrated in several decisions examined earlier. Yet, that same rationale will not apply to army officers in the services when prosecutions are brought against them in terms of the criminal law or indeed, when fundamental rights petitions are filed on the basis of command responsibility during conflict. Addressing this paradox is imperative if

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promotion due to the fact that such a promotion would not be in the best interests of the Army as he had “exercised insufficient control over his subordinates while serving in his commanding post as Ratnapura.

<sup>393</sup> *de Silva vs Liyanage* [2000] 1 Sri LR 21.

<sup>394</sup> Pinto-Jayawardena, Kishali; ‘Rights Accountability at stake; the difficult dilemma of the non-promoted brigadier’ Moot Point, Centre for Policy Alternatives, Legal Review, 2000, at page 45.

<sup>395</sup> While Wijeratne was not indicted in the Ratnapura case, Capt. K.V.V. Chamarasinghe, a key figure in the disappearances, was indicted and was found guilty at the conclusion of the trial.

<sup>396</sup> *de Silva vs Liyanage*, supra.

<sup>397</sup> *ibid*.

<sup>398</sup> There was substantial evidence before the High Court that the senior army officer, later Brigadier Parry Liyanage had done nothing despite the parents of the abducted and tortured schoolchildren bringing their pleas to him. For example, at page 24 of the judgment of the high Court, there is reference to the fact that he had prevaricated when questioned by one parent as to whether her son was being kept at the camp. At page 475, it is conceded that the father of one abductee testified that his son had been brought by him to the Sevana army camp on the express direction of Lt. Col. Liyanage, that he had been kept in the camp for about a week, that thereafter he had observed his son to be very weak and that upon his pleas, he had been allowed to take his son for medical treatment and that upon doing so, had been informed by the doctors that his son had passed keys, sponges and pieces of glass along with his feces, that he had been directed to bring his son back to the camp for further interrogation and that after doing so, his son had been ‘disappeared’ just outside the army camp and that he had made a specific appeal to Lt Col Liyanage to return his son, which had been disregarded. There is no way however of noting the extent to which the Attorney General’s Department which opposed the promotion in the Supreme Court, placed the evidence/proceedings of the High Court before their justices of the Supreme Court.

we are to effectively tackle the question of military command responsibility for human rights abuses such as torture and CIDTP.

### 3.3.3.2. The Court of Appeal

The procedure is that, upon a *habeas corpus* application being filed in the Court, the matter is ordinarily sent to the Magistrate’s Court to hold a preliminary inquiry consequent to which, the findings are referred back to the Court of Appeal for a finding.

Judgements of the Court of Appeal in *habeas corpus* applications have proceeded on a *cursum curiae* (established legal norm) of court, that a bare refusal of the knowledge and whereabouts of persons, who have disappeared at the hands of officers of the State, who have taken them into custody and thereafter tortured them in such a manner as to cause their deaths, cannot suffice to shift responsibility away from the State. Thus, where it is established that a person, who has been disappeared and who was last seen in the custody of state officers, the State has to bear responsibility. This principle was most notably established in the now commonly known *Dickenella Case*<sup>399</sup> where the Court of Appeal held that;

*“The Rule of Law, freedom and the safety of the subject would be completely nullified, if any person in authority can cause the disappearance of an individual who has been taken into custody and then blandly deny to this Court having jurisdiction to safeguard the liberty of the subject, any knowledge of the whereabouts of such individual. The process of habeas corpus.....cannot be reduced to a cipher by a person in authority, who yet continues to wield authority by falsely denying the arrest and custody of an individual whose freedom the writ is intended to ensure.”*

In the *Dickenella Case*, the Court of Appeal specifically referred to the fact that the Supreme Court, in an earlier application, had authoritatively ruled against restrictive interpretations of the power of the Court of Appeal to refer a disappearance for inquiry to a court of the first instance. In this Supreme Court ruling, the judges decided that this power cannot be said to lie only, where the Court is satisfied that the individual is in the custody or within the control of any of the respondents. Instead, the power of referral can be exercised, despite the respondents denying taking an individual into custody or having such person in their custody or control. In the view of the Supreme Court, the constitutional provisions giving the Court of Appeal jurisdiction in respect of *habeas corpus* applications was intended to “safeguard the liberty of the citizen” and thus demanded a liberal construction.

Indian case law was considered as well as jurisprudence of the Inter American Court of Human Rights and the thinking of the UN Human Rights Committee to articulate rights based principles in the issuance of writs of *habeas corpus*. Some affirmative action was judicially asserted to be necessary, where an obvious disappearance of a person in custody is met by a false denial of such custody by a person in authority. In this context, the petitioners, in the *Dickenella Case*, were awarded exemplary costs of Rs 100,000/= each. Costs were ordered to be paid personally by the Respondent, non payment of which would result in contempt of court. The Inspector General of Police (IGP) was directed to consider the proceedings as information of the commission of cognizable offences and to take necessary steps to conduct proper investigations and take steps according to the law.

### 3.3.3.3. The High Court

#### A. Jurisdiction in respect of the CAT Act

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<sup>399</sup>K. *Lzeda Violet and Others v OIC, Dickenella Police Station*, HCA 164/89, CA Minutes 02/12/1994; order of Court of Appeal justice Sarah N. Silva as he then was.

High Court judges exercise a particularly important role in respect of criminal prosecutions under the CAT Act in the High Court. There is some discrepancy regarding the statistics afforded by the government concerning the nature of decisions handed down by the CAT Act. For example, in the February 2008 Report to the UN General Assembly by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, it is stated, (based on information afforded to the Special Rapporteur by the Government), at paragraph 51 that ‘eight cases have been concluded with acquittals’<sup>400</sup>

However, confidential data obtained for the purpose of this Study from court registries with great difficulty indicates that, in fact, as of June 2008, there have been more than seventeen acquittals handed down by the relevant High Courts in reference to indictments filed under the CAT Act.<sup>401</sup> Of these seventeen acquittals, five acquittals have been obtained for the purposes of this research analysis.<sup>402</sup> Strenuous efforts were made to gain access to the remaining orders by making applications to the relevant High Courts and requesting assistance from the Attorney General’s Department. However, these efforts proved to be futile.<sup>403</sup> Lack of *bona fide* access to public records, including judgments of courts, available as of right to citizens, has been identified as a major drawback in Sri Lanka in the absence of a Right to Information law.<sup>404</sup>

There have been convictions only in three cases under the CAT Act so far.<sup>405</sup> This, by itself, casts doubt on the efficacy of the CAT Act. Moreover, all three cases of convictions involved fairly easy factual contexts leading to convictions. In the *Edirisinghe Case*,<sup>406</sup> the facts were perhaps the most contested where a conviction was sustained despite serious injuries not being caused to the torture victim. All three cases involved incidents of suspected petty theft<sup>407</sup> or victims being treated roughly after being ‘too smart’ in talking back to police officers.<sup>408</sup>

Analysis of five decisions relating to acquittals<sup>409</sup> indicates judicial minds reluctant to convict.

<sup>400</sup> Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at paragraph 51.

<sup>401</sup> *Republic of Sri Lanka v Suresh Gunaseena and Others*, HC Case No 326/2003, High Court of Negombo, HC Minutes 02.04.2008; *Republic of Sri Lanka v Nanda Warnakulasuriya and Others*, Case No 119/2003, High Court of Kurunegala, HC Minutes 25.06.2007; *Republic of Sri Lanka v Havabandi Garwin Premalal Silva*, HC Case No. 444/2005 (HC), High Court of Kalutara, HC Minutes, 19.10.2006; *Republic of Sri Lanka v Senaka Abeysinghe Samarasinghe*, HC Case No 276/03, High Court of Kalutara, HC Minutes 22.08.2006; *Republic of Sri Lanka v Warnakulasuriya Mahawaduge Rohan Prasanga Pieris*, HC Case No 259/2003, High Court of Negombo, HC Minutes 09.10.2008; *Republic of Sri Lanka v Priyadarshana*, HC Case No;294/03, High Court of Kalutara, HC Minutes 18.01.2006; *Republic of Sri Lanka v Sathibgamuge and others*, HC Case No;(Indistinet), High Court of Galle, High Court Minutes 04.05.2007; *Republic of Sri Lanka v Mohammed Jiffry*, HC Case No; 1789/03, High Court of Vavuniya, High Court Minutes 29.05.2006; *Republic of Sri Lanka v Sanidu Lebe Mohammed Sanoon*, HC Case No 798/03, High Court of Ampara, HC Minutes 05.10.2004; *Republic of Sri Lanka v Gunewardene and others*, HC Case No801/03, High Court of Ampara, HC Minutes 05.10.2004; *Republic of Sri Lanka v Sanidu Lebe Mohammed Sanoon*, HC Case No;848/04, HC Minutes 13.12.2005; *Republic of Sri Lanka v Fernando and others*, HC Case N;849/04, High Court of Ampara, HC Minutes 25.07.2005; *Republic of Sri Lanka v Wijegunawardene and another*, HC Case No; 464/05, High Court of Kalutara. HC Minutes 18.01.2006; *Republic of Sri Lanka v Udugama*, HC Case No;843/05, High Court of Balapitiya, HC Minutes 24.07.2006; *Republic of Sri Lanka v Antony*, HC Case No;173/04, High Court of Chilaw, HC Minutes 28.11.2006; *Republic of Sri Lanka v Prasanna Hearath and others*, HC Case No; 342/06, High Court of Polonnaruwa, HC Minutes 28.09.2006; *Republic of Sri Lanka v Ramyasiri and others*, HC case No; 2854/06, High Court of Galle, HC Minutes 10.12.2007.

<sup>402</sup> *Republic of Sri Lanka v Suresh Gunaseena and Others*, HC Case No 326/2003, HC Minutes 02.04.2008; *Republic of Sri Lanka v NandaWarnakulasuriya and Others*, Case No 119/2003, HC Minutes 25/06/2007; *Republic of Sri Lanka v Havabandi Garwin Premalal Silva*, HC Case No. 444/2005 (HC), High Court of Kalutara, HC Minutes, 19.10.2006; *Republic of Sri Lanka v Senaka Abeysinghe Samarasinghe*, HC Case No 276/03, High Court of Kalutara, HC Minutes 22.08.2006; *Republic of Sri Lanka v Warnakulasuriya Mahawaduge Rohan Prasanga Pieris*, HC Case No 259/2003, High Court of Negombo, HC Minutes 09.10.2008

<sup>403</sup>This demonstrates the lacunae in the maintenance of public records.

<sup>404</sup> see Pinto-Jayawardena, Kishali and Kois, Lisa ‘Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response’, Law & Society Trust, June 2008, at page xxxi of the Preface.

<sup>405</sup> *Republic of Sri Lanka v Madilayawatte Jayalathge Thilakarathna Jayalath* HC Case No: H.C. 9775/99, Colombo High Court, HC Minutes, 19.01.2004; *Republic of Sri Lanka v Edirisinghe* HC Case No; 1392/2003, Colombo High Court, HC Minutes 20.08.2004; *Republic of Sri Lanka v Selvin Sella and Another* HC No; 966/2002, Colombo High Court HC Minutes 20.07.2007.

<sup>406</sup> *Republic of Sri Lanka v Edirisinghe* HC Case No; 1392/2003, Colombo High Court, HC Minutes 20.08.2004. The accused in this case was a police officer who had a faultless record during his thirty one years of service.

<sup>407</sup> *Republic of Sri Lanka v Madilayawatte Jayalathge Thilakarathna Jayalath* HC Case No: H.C. 9775/99, Colombo High Court, HC Minutes, 19.01.2004; *Republic of Sri Lanka v Selvin Sella and Another* HC No; 966/2002, Colombo High Court HC Minutes 20.07.2007.

<sup>408</sup> *Republic of Sri Lanka v Edirisinghe* HC Case No; 1392/2003, Colombo High Court, HC Minutes 20.08.2004.

<sup>409</sup> *Republic of Sri Lanka v Suresh Gunaseena and Others*, HC Case No 326/2003, Negombo High Court, HC Minutes 02.04.2008; *Republic of Sri Lanka v NandaWarnakulasuriya and Others*, Case No 119/2003, HC Minutes 25/06/2007; *Republic of Sri Lanka v Havabandi Garwin Premalal Silva*, HC Case No. 444/2005 (HC), High Court of Kalutara, HC Minutes, 19.10.2006; *Republic of Sri Lanka v Senaka Abeysinghe Samarasinghe*, HC Case No 276/03, High Court of Kalutara, HC Minutes 22.08.2006; *Republic of Sri Lanka v Warnakulasuriya Mahawaduge Rohan Prasanga Pieris*, HC Case No 259/2003, High Court of Negombo, HC Minutes 09.10.2008

For example, one acquittal concerned the alleged torture of an artisan, arrested for being suspected in a robbery and for possession of a bomb. He was assaulted after arrest and also experienced tremendous mental trauma by having a tuberculosis patient being told to spit into his mouth by the accused police officer.<sup>410</sup> In acquitting the accused, the High Court judge treats minute contradictions in the victim’s evidence as going to the root of his credibility, makes a factually incorrect assertion regarding an earlier fundamental rights petition filed by the victim and engages in numerous *ad hoc* criticisms of non-governmental organizations from the Bench.<sup>411</sup>

The acquittal<sup>412</sup> of the torturers of Gerald Perera, a worker at the Colombo dockyard, who was tortured to the point of renal failure by officers attached to the Wattala Police Station with the ‘consent and acquiescence’ of the officer in charge, as judicially held by the Supreme Court,<sup>413</sup> is another troubling case. A major reason for this acquittal was the lack of direct evidence testifying to the acts of torture being committed by the particular police officers, who were indicted, even though the Court accepted the fact that Gerald Perera was a hale and healthy man when brought into the police station, but that he had suffered multiple injuries, when taken out of the station.<sup>414</sup>

However, it is inherent in the very act of torture that it will not be committed on a public thoroughfare and with onlookers nearby. Rather, torture is committed in secret and in hidden places. In the circumstances, a judicial insistence on direct eye witness evidence of torture practices is clearly problematic and defeats the very intent and objective of the CAT Act. Further, the High Court failed to direct its mind to the applicability of the Ellenborough dictum<sup>415</sup> to the facts of this case, despite the prosecution case resting mainly on this basis. This dictum has been applied in many cases in Sri Lanka, where a strong *prima facie* case has been made out against the accused.<sup>416</sup>

Problems with a lack of clear judicial understanding of the objective and purpose of the CAT Act have also emerged from analysis of the relevant judicial decisions. Thus, in one acquittal,<sup>417</sup> the High Court judge concludes as follows;

*“Even though it appears that when considering the number of injuries, the accused has used some force beyond that which was necessary, that does not prove the charge against the accused in the case.”*

Reprimands delivered by the judges in respect of perceived drawbacks in the prosecutorial process are also common as was the case in the Gerald Perera case, where the High Court faulted the Attorney General for first indicting the officer-in-charge of the relevant police station and then withdrawing his name from the indictment and further, for failing to call witnesses, whose

<sup>410</sup> *Republic of Sri Lanka v Havabandi Garwin Premalal Silva* Case No. 444/2005 (HC), High Court of Kalutara, High Court Minutes, 19.10.2006. This decision is being appealed against to the Court of Appeal.

<sup>411</sup> All three acquittals had been cases monitored by NGOs throughout.

<sup>412</sup> *Republic of Sri Lanka v Suresh Gunaseena and Others*, HC Case No 326/2003, Negombo High Court, HC Minutes 02.04.2008.

<sup>413</sup> *Sanjeewa v Saraweera*, [2003] 1 Sri LR 317.

<sup>414</sup> The High Court’s insistence that no direct evidence of witnesses regarding the torture by the accused of Gerald had been placed before the Court contrasts with the Supreme Court’s finding in response to evidence in relation to the main accused in the criminal indictment, also named as a respondent in the fundamental rights application. On the facts themselves therefore, there appears to be a fundamental discrepancy between the evidence adduced in the High Court as contrasted to the Supreme Court. The High Court faults the Attorney General for failure to adequately prosecute the case which is an aspect that will be examined later on in this Study.

<sup>415</sup> 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.” Statement by Lord Ellenborough, in *Rev vs. Cochrane* (1814 Gurney Report 499).

<sup>416</sup> Recently, the Supreme Court declined to uphold the convictions of the accused police officers in the Bindunuwewa rehabilitation centre massacre (SCM June 1<sup>st</sup> 2005) on the application of this dictum after consideration of all the circumstances of the case and concluding that the requisite *prima facie* case had not been made out. However, there is no doubt that the factual circumstances in the Gerald Perera torture prosecution was vastly different to what prevailed in relation to Bindunuwewa. In the circumstances, the High Court should have addressed its mind to a full examination of the doctrine.

<sup>417</sup> *Republic of Sri Lanka v Havabandi Garwin Premalal Silva* Case No. 444/2005 (HC), High Court of Kalutara, High Court Minutes, 19.10.2006. This decision is being appealed against to the Court of Appeal.

evidence may have been vital for proving the case.<sup>418</sup> In both the *Gerald Perera Case*<sup>419</sup>, and the more recent *Lalith Rajapakse Case*<sup>420</sup>, the Attorney General declined to file an appeal to the Court of Appeal against the acquittal.

In the latter instance, Rajapakse's complaint was that he had been arbitrarily arrested by several police officers, beaten and dragged into a jeep. During his detention, he was subjected to torture for the purposes of obtaining a confession which caused serious injuries. A medical report issued by the National Hospital stated that the "most likely diagnosis alleged to assault due to traumatic encephalitis." Here again, the judicial assessment of the evidence appears to be faulty, when evaluated against the actual evidence, particularly relating to the clear testimony that the victim was fit and healthy before being arrested by the police officers and that he sustained grievous injuries while inside the police station and indeed, the evidence of the accused himself that the victim was taken in a virtually unconscious state to the hospital from the police station and that he had used minimum force in hitting the victim with a pole purportedly in order to prevent the victim from assaulting another policeman and other inaccuracies demonstrates the lack of credibility in the evidence of the accused.

Many trials in the High Court are also delayed for many years and there is no time limit imposed in this regard. Analysing the confidential data obtained for the purpose of this research, it was seen that out of the more than fifty eight cases filed under the CAT Act as of June 2008,<sup>421</sup> thirty-five cases were still pending in trial before the relevant High Court.

## B. Jurisdiction in respect of Habeas Corpus applications

The procedure here is similar to that of the Court of Appeal. Though it is empowered to hold inquiry into a *habeas corpus* application itself, the High Court ordinarily directs the Magistrates' Court to hold a preliminary inquiry and thereafter takes the matter up for hearing.

### 3.3.3.4. The Magistrates' Court

The duties vested in Magistrates to examine suspects or detainees when produced before them both under the normal law in terms of Section 36 and 37 of the CCP Act as well as under emergency law as explained earlier in order to ensure that suspects or detainees have not been subjected to torture or CIDTP, are generally performed without much thought to the serious nature of the responsibility therein. Judicial failure in this regard has been commented upon adversely by the High Court<sup>422</sup> as well as by the Supreme Court.<sup>423</sup>

Similarly, Magistrates are empowered with a particular role in regard to inquests<sup>424</sup> as explained earlier but do not assume a very pro-active role in these circumstances in the stringent questioning of police actions in this regard.

<sup>418</sup> *Republic of Sri Lanka vs Sunsh Ganasena and Others*, HC Case No 326/2003, Negombo High Court, HC Minutes 02.04.2008.

<sup>419</sup> *Republic of Sri Lanka vs Sunsh Ganasena and Others*, HC Case No 326/2003, Negombo High Court, HC Minutes 02.04.2008.

<sup>420</sup> *Republic of Sri Lanka vs Wanmakulasuriya Mahavuduge Rohan Prasanga Pieris*, HC Case No 259/2003, High Court of Negombo, HC Minutes 09.10.2008.

<sup>421</sup> According to statistics submitted by the Government of Sri Lanka to the United Nations Committee Against Torture in February 2007, it was stated that the Attorney-General has forwarded indictments in 40 cases under the CAT Act to the relevant High Courts but the number of those cases pending to date was not specified – see United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2, 06/08/2004, at para. 59.

<sup>422</sup> *Republic of Sri Lanka vs Madilayawatte Jayalathge Thilakarathna Jayalath* HC Case No: H.C. 9775/99, Colombo High Court, HC Minutes, 19.01.2004.

<sup>423</sup> In *Wierawansa v Attorney General*, [2000] 1 Sri LR 387 remand orders had been made even though the Magistrate or the acting Magistrate did not visit or communicate with the suspect. The Court observed that this violated a basic constitutional safeguard in Article 13(2), that judge and suspect must be brought face to face before liberty is curtailed, which safeguard was not an obligation that could be circumvented by producing reports from the police. An earlier view of the Court (*Farooq v Raymond* [1996] 1 Sri LR 217 that remand orders, where they concern a patent want of jurisdiction, cannot be safeguarded under the cover of being 'judicial acts' with consequent immunity from fundamental rights challenge, was agreed with.

<sup>424</sup> Sections 369, 370 and Section 371 of the CCP Act in particular.

Magistrates are also empowered to hold preliminary inquiries in respect of *habeas corpus* applications on the direction of the relevant High Court or the Court of Appeal as the case may be, which are thereafter forwarded to the appropriate superior court which made the direction.

## 3.4. The Prosecution – the Office of the Attorney General

### 3.4.1. Structure of the Office of the Attorney General

The historical predecessor to Sri Lanka's Attorney General was the Advocate Fiscal, later changed to 'Kings Advocate' and then to 'Queen's Advocate.' Ordinance No 1 of 1883 made the formal title change to the Attorney General of Ceylon with the change taking effect from 1884. At this time, the Attorney General was a member of the inner Cabinet and was responsible for the drafting of legislation as well as having supervisory authority over the minor judiciary and also practiced law in the courts. However, the Report of the Special Commission on the Constitution (1928) shifted the Attorney General out of the 'inner cabinet' and consequently out of active political involvement. The institution of criminal prosecutions and civil proceedings on behalf of the Crown was the duty of the Attorney General's Department while the Legal Secretary was assigned *interalia*, the tasks of the administration of justice and the drafting of legislation.

In the Soulbury Reforms<sup>425</sup> thereafter, the Commissioners recommended as follows;

*'...the Attorney General should be charged with the duties now carried out by the Legal Secretary under this heading. We envisage that, under the Constitution we recommended, Ministers will require legal assistance in:*

*the day to day running of their departments*

*the passage of Bills through Parliament, specially at the Committee stage*

*the interpretation of existing law and in departmental matters which may involve legal proceedings, and matters of high constitutional policy, on which the Cabinet as such may require advice.'*

The Commissioners recommended the appointment of a Minister of Justice to deal with the subjects then allocated to the Legal Secretary and also recommended that under the new Constitution, the Attorney General and the Solicitor General should not lose their status as public servants and become Ministers. They also recommended that the provision of legal advice to the Governor General should, in future, be a duty of the Attorney General.<sup>426</sup>

Further observations of the Soulbury Commission were as follows;

*"We would therefore make it amply clear that in recommending the establishment of a Ministry of Justice, we intend no more than to secure that a Minister shall be responsible for the administrative side of legal business for obtaining from the Legislature financial provisions for the administration of justice and for answering in the Legislature on matters arising out of it. There can, of course, be no question of the Minister of justice having any power of interference in or control over the performance of any quasi-judicial function or the institution or supervision of prosecutions."<sup>427</sup>*

The Commissioners further recommended that the question relating to the interpretation of existing law and departmental matters which may involve legal proceedings would continue to be

<sup>425</sup> Due to the continuing agitation of the country's political leadership for independence from its British colonial rulers, Lord Soulbury was appointed head of a commission charged with the task of examining a new constitutional draft in 1944. This draft had been proposed by the Sri Lankan ministers. Lord Soulbury's proposals, (known popularly as the Soulbury proposals) based on British constitutional principles and the Westminster style of government, resulted in a new Constitution which gave Sri Lanka, independence or Dominion status. This Constitution was thereafter known variously as the Soulbury or the Independence Constitution of 1948. The Soulbury Constitution combined a parliamentary system with a bicameral legislature, electing Members of the first House of Representatives by popular vote, while Members of the Senate, or upper house, were elected partly by members of the House and partly by the Governor General. The political executive in this system was the Prime Minister while the Governor General was a figurehead, appointed by the British monarch on the advice of the Prime Minister.

<sup>426</sup> Soulbury Report, at p. 105.

<sup>427</sup> *ibid*, at p. 106.

referred to the Attorney General or the Solicitor General. Advice on matters of high constitutional policy, on which the Cabinet as such may require advice, could be given by the Attorney General, provided that the recommendation as to his non-political status was accepted.

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*“..... in view of the ease with which the duty of advising the Governor General in these matters may be turned on political ends, we would express the hope that the Minister would hesitate to tender to the Governor General advice contrary to the recommendations he had received from the Attorney General, the Permanent Secretary and other non-political advisors.”*<sup>429</sup>

Though the safeguarding of the office of the Attorney General from political interference was an objective of the early constitutional reforms and particularly of the Soulbury Constitution (Sri Lanka's Independence Constitution), this changed in later years. The 1972 Constitution deliberately subordinated the judiciary and the public service to Parliament and also negated the office of the Attorney General by situating it under the Ministry of Justice.

The 1978 Constitution restored the post of the Attorney General of Sri Lanka to its former position as a separate Department. However, several deficiencies remained regarding the appointment and removal procedure. The 1978 Constitution authorised the appointment of the Attorney General to be at the President's sole discretion<sup>430</sup> and did not sufficiently safeguard the security of tenure of the holder of the post with the removal of the Attorney General also being left to executive discretion.

The 17<sup>th</sup> Amendment to the Constitution further elevated the post of Attorney General to a wholly independent position in terms of appointments and removals. First, an appointment to the post of the Attorney General now has to be approved by the apolitical Constitutional Council (CC) on a recommendation made to the Council by the President and it is only consequent to approval thereof, that the appointment can be made by the President.<sup>431</sup> However, with the failure to reactivate the CC from 2005 as discussed previously, the President has reverted to the pre-17<sup>th</sup> Amendment situation and has made appointments to the post of Attorney General at his own and unfettered discretion.

The second change brought about by the 17<sup>th</sup> Amendment was in regard to security of tenure. While earlier, the removal of the Attorney General was not attended with many safeguards against unjust or arbitrary removal, legislation passed consequent to the 17<sup>th</sup> Amendment made the removal process far more stringent.<sup>432</sup> Where the attempted removal is on grounds of misconduct or corruption, abuse of power, gross neglect of duty or gross partiality in office, the removal takes effect only after the presentation of an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) for the appointment of a Committee of Inquiry. The Committee thus constituted consists of the Chief Justice (as the Chairman) and two other persons appointed from among persons, who have previously held the office of Attorney General or persons who have reached eminence in the field of law, appointed by the Speaker with the concurrence of the Prime Minister and the Leader of the Opposition. It has wide powers of inquiry including the authority to summon persons before it. Its function is to inquire into and investigate the alleged grounds on which removal is sought and to arrive at appropriate findings in respect of the same.

Once its findings are communicated to the Speaker and where there is a finding of guilt, a resolution will be placed in the Order Paper of Parliament. Once the resolution so placed is voted in favour of by a majority of the parliamentarians, the holder of the office to whom such resolution relates shall be forthwith removed from office by the President.<sup>433</sup> This law remains in

<sup>428</sup> *ibid*, at p. 107.

<sup>429</sup> *ibid*, at p. 108.

<sup>430</sup> Article 54 of the Constitution

<sup>431</sup> Article 41C of the Constitution.

<sup>432</sup> *Vide* Removal of Officers (Procedure), Act, No 5 of 2002.

<sup>433</sup> *ibid*, at section 17.

effect, currently though being relatively recent in origin, its provisions have not been tested in relation to the removal of an Attorney General as yet.

### 3.4.2. Powers and Responsibilities

The Attorney General's powers are considerable. In terms of the Constitution, these include duties with regard to published bills (Article 77); the right to be heard in all proceedings in the Supreme Court in the exercise of the Supreme Court's jurisdiction in respect of constitutional matters, of bills both ordinary and urgent, of the interpretation of the constitutional provisions relating to fundamental rights, of the expressions of opinions at the request of the President of the Republic and of the Speaker and of election petitions. (Article 134)

In practice, the Attorney General appears for the State and state officers before superior courts at the hearing of appeals and applications for the issue of writs. The powers of the Attorney General in civil and criminal law are considerable. In civil law, all actions by or against the State are filed by or against the Attorney General. Section 461 of the Civil Procedure Code requires that before any action is filed against the Attorney General, a Minister, Secretary or a public officer; a month's notice of action should be given. This is to give the Attorney General the opportunity of considering whether the claim is justified, if so, whether a litigant may be granted relief without the necessity of his having to resort to litigation.

In criminal law, the Attorney General has several powers under the CCP Act, which, *inter alia*, are as follows;

- a) the power in respect of summary offences to either forward an indictment directly to the High Court or to direct the Magistrate to hold a preliminary inquiry under Chapter XV (Section 393 (7) as introduced by Act No 52 of 1980),
- b) the power to exhibit information for a Trial at Bar by three judges of the High Court sitting without a jury (section 450 (4) as amended by Act No 21 of 1988 and Section 393),
- c) the power to grant sanction to institute certain prosecutions (Section 135(i)),
- d) the power to decide the Magistrate's Court having jurisdiction to try a case in case of doubt (Section 135),
- e) the power to transfer criminal proceedings by fiat in writing from one Court or place to another at his discretion (Section 47(i) of the Judicature Act,
- f) the power to prosecute offenders in both the High Courts and the Magistrate's Courts except in the case of purely private cases instituted under Section 136(i)(e) (Section 193, Section 191(I), Section 400(I),
- g) the power to tender pardon to an accomplice (Section 256(1), 257,
- h) the power to call for the record from the High Court or the Magistrate's Court in any case whether pending or concluded (Section 398(1)),
- i) the power in the case of concluded non-summary inquiries (Sections 395(1), 396, 399, 397(1),
- j) the power to terminate proceedings in the High Court by entering a '*nolle prosequi*', (Section 194(I),
- k) the power to sanction an appeal from an acquittal in the Magistrate's Court (Section 318),
- l) the power to appear for the State in all criminal appeals (section 360),
- m) the power to direct and assist investigation.

The framing of indictments is by the officers of the Attorney General's Department<sup>434</sup> as well as the prosecution of offences. In the case of offences triable in the Magistrates' Court, the police

<sup>434</sup> Sections 393 to 400 of the CCP Act. In certain instances as in reference to Section 193 of the CCP Act relating to trials before the High Court and in Section 400 relating to prosecution before a Magistrate, the prosecution could also be conducted by a pleader 'generally or specially authorised by the Attorney General in that behalf. Chapter XVII of the CCP Act also allows the prosecution of offences that are triable summarily by the Magistrates' Court to be conducted by the complainant on occasion that the Attorney

have the authority to frame charges and conduct the prosecution with the sanction of the Attorney General.<sup>435</sup> However, the Attorney General has the power to intervene in any of these prosecutions at any stage. Indictments under the CAT Act are filed by the Attorney General directly in the High Court.<sup>436</sup>

Prosecutions in terms of the Emergency Regulations (ER) under the PSO and under the PTA are generally in the hands of the Attorney General. The Attorney General has the power to consent or refuse bail to an accused indicted and remanded under the PTA.<sup>437</sup>

The prevalent ER specify for particular circumstances such as in respect of offences against movable or immovable property, which carry penalties extending to death or life imprisonment of either description,<sup>438</sup> that the Attorney General may forward indictment if 'he is satisfied that the offence was committed in furtherance of or in connection with or in the court of, a civil disturbance prevailing at or about the time of the commission' and may authorise the Inspector General of Police (IGP) to institute proceedings in respect of such case.<sup>439</sup> Similarly, by virtue of Regulation 41 of EMPPR 2005, trial of the offence of *inter alia*, printing or publishing material, which amounts to a death threat or bodily harm, in a variety of circumstances specified in that Regulation, may under Regulation 41(2), commence upon the filing of a report in the High Court by the IGP to the effect that an offence has been committed and upon the production of the accused in court.

### 3.4.3. The Role of the Attorney General

When prosecuting, the Attorney General is vested with a special duty to assist the Court by balancing the rights of the State and the public interest. The function of an officer of the Attorney General's Department is different from members of the unofficial Bar.

*"A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. Crown Counsel is a representative of the State; his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind or try to shut out any legal evidence that would be important to the interest of the person accused. It is not his duty to obtain a conviction by all means but simply to lay before the jury the whole of the facts which comprise the case and to make these perfectly intelligible and to see that the jury are instructed with regard to the law and are able to apply the law to the facts."*<sup>440</sup>

As far back as in 1969, commenting on the role of the English Attorney General, it was perceptively observed that;

*"the basic requirement of our constitutional arrangements are that however much of a political animal he may be when dealing with political matters, he must not allow political considerations to affect his actions in those matters in which he has to act impartially and even in a quasi-judicial way"*<sup>441</sup>

The "hybrid" nature of the chief law officer of the State in accommodating these qualities of judicial detachment and political partisanship has been the subject of much discussion in Sri

General or his officers or a pleader authorised by the Attorney General does not appear. Sections 164 to 181 of the CCP Act detail *inter alia*, the manner in which charges must be framed, an important part of which relates to the requirement that an accused must be informed of the precise particulars of the offence that the accused is charged with.

<sup>435</sup> Sections 135 and 136 of the CCP Act. Certain specific statutes such as the Excise Ordinance also give prosecutorial powers to police officers.

<sup>436</sup> Section 4, CAT Act. An offence under this Act is a non-bailable and cognizable offence according to 2(5) of the CAT Act.

<sup>437</sup> Section 7(1) of the PTA.

<sup>438</sup> Regulation 25(1) of EMPPR 2005

<sup>439</sup> Regulation 25(3) of EMPPR 2005

<sup>440</sup> Vide. *The Legal Profession and the Law*, Journal of the International Commission of Jurists, Vol. 1, Autumn, 1957.

<sup>441</sup> Sir Elwyn Jones, "The Office of the Attorney General", 1969, C.L.J. 50

Lanka. This question came under scrutiny in two judgements of the Court of Appeal<sup>442</sup> and of the Supreme Court<sup>443</sup> in 1981 in the now well known cases of *Land Reform Commission vs Grand Central Limited*, which analysed the right of the Attorney General and State Counsel to appear in court for litigants in their private capacity and concluded that there was no such right. In the Supreme Court, Samarakoon CJ pointed out that the Attorney General is the Chief Legal Officer and adviser to the State and thereby to the sovereign and is in that sense an officer of the public. He is the Leader of the Bar and the highest Legal Officer of the State and as such, has a duty to the Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth. It was observed that, this image will certainly be tarnished if he takes part in private litigation arising out of private disputes. No Attorney-General can serve both the State and private litigant.

Thus;

*"(the Attorney General) cannot shed his office as and when the circumstances suit him. The law does not permit the Attorney General to play Jekyll and Hyde. He had taken his oath of office as required by the provisions of the Constitution. Once an Attorney-General, always an Attorney-General until he relinquishes office" (per Samarakoon C.J. in the Supreme Court)*

The Attorney General is one of the very few, if not the only one of officers appointed under the Constitution, who in the exercise of the functions and duties attached to the office, comes into direct contact with all three organs of government, the Parliament, the President and the courts.

A former Attorney General in Sri Lanka, Mr. Siva Pasupathi has observed as follows;<sup>444</sup>

*"The entire state and administrative machinery has to depend on the advice and the guidance of the Attorney General on all legal matters... what is perhaps more significant is the total absence for any agitation for reforms and changes in so far as the functions, powers and the duties of the Attorney - General are concerned. This probably indicates the extent to which the successive holders of the post of Attorney-General have been able to adapt this institution to meet the changing circumstances of the society and the needs of the citizens."*<sup>445</sup>

On the issue of balance between the public and social interest on the one hand and the individual interests on the other, Mr. Pasupathi stated:

*"In the decision making process legal, equitable and policy considerations come into play and the ultimate decision of the Attorney General is based on a harmonious blend of all these considerations which is in consonance with principles of justice and equity,"*<sup>446</sup>

### 3.4.4. Are actions of the Attorney General subject to Public Accountability and to Judicial Review?

The nature of the prosecutorial discretion of the Attorney General was considered by the Supreme Court in *Victor Ivan vs Sarath N. Silva*<sup>447</sup> in 1998. The editor of the 'Ravaya' (a Sinhala weekly newspaper engaging in critical reporting on government misconduct and corruption) had alleged that he had been successively indicted for criminal defamation by the Attorney General indiscriminately, arbitrarily and for collateral purposes and without proper assessment of the facts.<sup>448</sup> In the circumstances, he pleaded that his fundamental right to equality (Article 12(1), his

<sup>442</sup> [1981] 2 Sri LR 147

<sup>443</sup> [1981] 1 Sri LR 250

<sup>444</sup> He held the office of Sri Lanka's Attorney General for 14 years, until 1988.

<sup>445</sup> Pasupathi, Siva *A Brief Description of The Court's Defence of State Administration and the Role of The Attorney - General in Sri Lanka*, at pages 1 and 2 (undated, unpublished manuscript)

<sup>446</sup> *ibid*, at page 10

<sup>447</sup> *Victor Ivan Vs Sarath N. Silva, Attorney General*, [1998] 1 Sri LR 340; order by Justice Mark Fernando.

<sup>448</sup> In terms of Section 479 of the Penal Code, criminal defamation was punishable under Section 480 and triable summarily by the Magistrates' Court or directly by the High Court. Section 135(1) (f) of the Criminal Procedure Code mandated that no prosecution

fundamental right to freedom of speech and expression including publication (Article 141(a)) and the fundamental right to engage in his lawful profession (Article 14(10)(g)) had been violated. The Supreme Court did not grant leave to proceed in this case.

The key question was whether a decision of the Attorney General to grant sanction to prosecute or to file an indictment or the refusal to do so, could be reviewed. Answering this question in the affirmative, the Court concluded that it could review the exercise of discretion of the Attorney General, where the evidence was plainly insufficient, where there was no investigation and where the decision was based on constitutionally impermissible factors and so on.

Similarly, the discretion of the Attorney General to file indictment in terms of Section 393(7) of the Criminal Procedure Code given "...the nature of the offence or any other circumstance" had to be duly considered. In other words, the decision of the Attorney General had to be guided by statutory criteria and could not be arbitrary. Moreover, there must be some distinct public interest and benefit as for instance where the alleged defamatory statement is likely to disrupt racial or religious harmony or to prejudice Sri Lanka's international relations or to erode public confidence in the maintenance of law and order or in the administration of justice.

Among the general principles judicially articulated was the principle that the Attorney General's power to file (or not to file) indictment for criminal defamation is a discretionary power that is neither absolute nor unfettered. It is similar to other powers vested in law in public functionaries. They are held in trust for the public, to be exercised for the purpose for which they are conferred and not otherwise. Where such power or discretion is exercised in violation of a fundamental right, it can be reviewed by the Supreme Court under the exercise of its fundamental rights jurisdiction. It is relevant also that the Court stated that the pendency of proceedings in another court, would not bar the exercise of this constitutional jurisdiction of the Supreme Court, but would be a circumstance that would make the Court act with greater caution and circumspection.

Despite this affirmation in principle, of judicial review of the Attorney General's statutory powers, relief was not afforded to the petitioner in practical terms. The Attorney General objecting to the petition, argued that one indictment against the petitioner was justified, as the impugned publication affected public confidence in the law enforcement process by alleging that the Inspector General of Police had abused his authority by interfering with the investigations into a case of sexual abuse of children. This argument was accepted by the judges. In regard to another indictment, the Court found a lack of proper investigation and certain lapses on the part of the officers of the Attorney General. However, this was held to be a lapse on the part of those responsible for the investigation and not on the part of the Attorney General. The investigators had not been made parties. Neither was the Petitioner's case presented on the basis of a defective investigation. It was held therefore that the Attorney General could not be held to be accountable in this instance as well.

This judgment of the Supreme Court is useful in terms of the general principles that the judges laid down, which remain applicable to instances, where for example, the Attorney General unjustifiably refuses to indict police officers accused of torture and CIDTP. However, it is evident that the Court preferred to apply the "exceptional circumstances" test in actually intervening to set aside the decision of the Attorney General. This is seen in the extreme examples drawn by the Court as illustrating instances, where interference with the discretion of the Attorney General in granting sanction could be justified. In addition, judicial reasoning

for criminal defamation could be instituted except with the sanction of the Attorney General. However, a later section (section 393(7)) allowed the Attorney General an alternative procedure of directly filing indictment in the High Court and directing the institution of non-summary proceedings "having regard to the nature of the offence or any other circumstances." Criminal defamation was removed from the statute books in mid 2002 by Penal Code Amendment Act No 12 of 2002 which repealed Chapter 19 of the Penal Code and made consequential procedural amendments to Section 135 (f) of the Criminal Procedure Code. Press Council Amendment Act No 13 of 2002 also repealed Section 135 (f) of the Criminal Procedure Code. Press Council Amendment Act No 13 of 2002 repealed paragraph (b) of subsection (1) of Section 15 of the Press Council Law No 5 of 1973, this removing this offence from the Press Council Law as well.

proceeded on the basis that the faulty investigations on the part of the officers of the State, could not be visited on the Attorney General. However, the contra argument to this would be that in cases involving violations of fundamental rights, the liability would be that of the State, regardless of whether blame could be laid at the door of the investigating officers or the prosecuting officers. If a wrong prosecution had been launched, the primary responsibility remained with the State, as represented in the instant case by the Attorney General. Such an approach, (which would have been clearly in consonance with judicial reasoning in earlier decisions), was however not adopted by the Court in this case.

In *Victor Ivan vs Sarath N. Silva*, the fact that the Court preferred not to proceed this far, follows the Court Directive of laying down of very high standards of "culpable ignorance or negligence" on the part of the Attorney General in order to justify intervention by court. This is reinforced by the assertion of the judges that errors and omissions by the Attorney General cannot themselves be proof of discrimination or a breach of the freedom of expression. Whether such high standards ought to be maintained or more liberality adopted in this regard remains a moot point, where the accountability of the Attorney General is concerned in Sri Lanka

### 3.4.5. Practical Functioning of the Office

In practical terms, apart from the Attorney General himself or herself, in ranking order of seniority, the officers of the Attorney General comprise the Solicitor General (SG), several Additional Solicitor Generals (ASGs), several Deputy Solicitor Generals (DSGs), several Senior State Counsel (SSCs) and several State Counsel (SCs). The Department is broadly divided into the civil and criminal branch each supervised by senior officers. In terms of the officers in the criminal branch, they are generally referred to as 'prosecutors'.

Where prosecutions specifically relevant to torture cases are concerned, the Government has repeatedly claimed that the prosecutorial responsibility in this regard is handled by a special team of state law officers comprising the Prosecution of Torture Perpetrators Unit (PTP Unit) headed by a Deputy Solicitor General.<sup>449</sup>

*On the completion of the criminal investigation, the CID submits to the PTP unit the corresponding notes of investigations. The initial duty of the Unit is to consider the institution of criminal proceedings against the alleged perpetrators of torture. In doing so, consideration is given to the availability of material disclosing the commission of offences, adequacy of such material, their reliability and admissibility in court. Consequent to a decision being taken to indict the alleged perpetrators of torture, the CID is advised to cause the arrest of the suspect(s) and produce the suspect(s) before a Magistrate. Thereafter, the indictment is prepared and forwarded to the relevant High Court. It is customary that a State Counsel representing the Attorney General leads the prosecution of such a case.*<sup>450</sup>

Yet, in actual terms, interviews conducted with the officers of the Attorney General from as far back as 2004 have revealed that there is no separate Unit dealing with torture cases, physically in existence in the department. Instead, the 'PTPU' is only an administrative convenience (or international convenience) with neither specially assigned staff nor separate premises.<sup>451</sup> There is only a separate file category called 'AGT files' for torture cases, which come within the scope of the Criminal Branch under the Solicitor General. The torture cases are distributed among a few State Counsel, who also handle other criminal cases.<sup>452</sup> Efforts to obtain concrete data on the current state of the torture cases in more recent years have not been successful, due to the heightened secrecy prevalent at government departments including the Attorney General's

<sup>449</sup> United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 175.

<sup>450</sup> *ibid*, at para. 177.

<sup>451</sup> Interviews conducted by project officer, South Asia Treaty Bodies Programme of the Law & Society Trust, Shyamali Puvimanasinghe during 2004 for the 'Follow-Up Report' to the Concluding Observations of the UN Human Rights Committee to Sri Lanka's Combined Fourth and Fifth Periodic Report, 2003, published in *LST Review*, Law & Society Trust, Volume 15, Joint Issue, 208 & 209 February & March 2005.

<sup>452</sup> *ibid*.



Department and their reluctance to provide information regarding the prosecution of grave human rights violations. However, anecdotal evidence is to the firm effect that there has been no change in this situation.

Then again, the Government has affirmed that the CID is required to report the progress of investigations relevant to the cases to the PTP Unit.<sup>453</sup> However, here too, contrary to the Government Report, the officers of the AG's Department do not appear to consistently monitor investigations conducted by the police and neither is the progress of an investigation reported to the Department.<sup>454</sup> On the contrary, the practice appears to be that the law officers 'lose track' of the investigation until it is completed and the file is returned to the Department.<sup>455</sup> Upon receiving a case file from the CID or the Special Investigation Unit (SIU) of the Police Department., the State Counsel in charge of the case may request the SIU or the CID to conduct further investigations, record statements or obtain ancillary documents. In view however of the tremendous workload assigned to each State Counsel, it is clear that 'personal monitoring' of investigations is not taking place.

### 3.5. The Sri Lanka Police

#### 3.5.1. Powers and division of responsibilities

The powers and division of responsibilities of the police are laid down in the Police Ordinance No 16 of 1865 (as amended). The duties of the Police, as set out in Section 56, are;

- a) to use best endeavours and ability to prevent all crimes, offences, and public nuisance;
- b) to preserve the peace;
- c) to apprehend disorderly and suspicious characters;
- d) to detect and bring offenders to justice;
- e) to collect and communicate intelligence affecting the public peace; and
- f) promptly to obey and execute all orders and warrants lawfully issued and directed to him by any competent authority".

There are also several Police Departmental Orders made under this Ordinance, some of which have been referred to previously in this Study. Taken cumulatively with other laws such as the CPC Act, the responsibilities of the police force includes the following;

- (a) to ensure the security of the State,
- (b) to enforce law and order,
- (c) to preserve the public peace,
- (d) to protect public and private property,
- (e) to safeguard the life and liberty of the citizen,
- (f) to prevent crime and breaches of the law, and
- (g) to prosecute offenders in the Magistrate's Court.<sup>456</sup>

Towards these ends, police officers are vested with a plethora of powers including powers of arrest, detention and investigation, prosecution of particular cases in the lower courts, power to give directions prohibiting or regulating processions and powers of intervention to prevent breaches of the peace. While general duties in respect of good conduct of police officers are referred to in the Police Ordinance, Police Departmental Order A7<sup>457</sup> provides for disciplinary inquiries in respect of offences committed by police officers, including neglect of duty,

<sup>453</sup> United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 178.

<sup>454</sup> Interviews conducted by research officers of the Law & Society Trust during 2004 for the 'Follow-Up Report' to the Concluding Observations of the UN Human Rights Committee to Sri Lanka's Combined Fourth and Fifth Periodic Report, 2003, supra

<sup>455</sup> *ibid.*

<sup>456</sup> See Sessional Paper XXI-1970, Final Report of the Police Commission of 1970, at page 26, available at [www.rulcoflawsrilanka.org](http://www.rulcoflawsrilanka.org).

<sup>457</sup> Issued by the Department of Police.

discreditable conduct, falsehood, breach of confidence and also prescribed procedures in respect of the holding of such inquiries.

#### 3.5.2. General Structure

##### 3.5.2.1. Hierarchy and Strength

- a) Headquarters - the Inspector General of Police (IGP) formulates policy and over looks the effective functioning of the entire Police Force. He is assisted by a number of Deputies and other staff.
- b) Territorial Ranges- the police stations maintain law and order throughout the country ;the whole Island today is policed, unlike in the past. The police stations are grouped into districts, which in turn have been grouped into divisions.
- c) Functional divisions, such as the Criminal Investigations Bureau (CID), located mostly in Colombo. In addition to performing their own specialised function, they provide the expertise and logistical and other support to the police stations to help them to function more effectively.<sup>458</sup>

There are 36 Territorial Divisions, 61 Functional Divisions and 401 Police Stations.<sup>459</sup> In terms of the permanent cadre, the ranking order of seniority and the strength of the Police<sup>460</sup> is as follows;

##### A. Senior Gazetted Officer Ranks

Inspector General of Police (1); Senior Deputy Inspector General of Police (6); Deputy Inspector General of Police (28);

##### B. Superintendent Ranks

Senior Superintendent of Police (83); Superintendent of Police (144), W/Superintendent of Police (11); Assistant Superintendent of Police (197), W/Assistant Superintendent of Police(9)

##### C. Gazetted Officer Ranks

Chief Inspector of Police (1691); W/Inspector of Police (52); Sub Inspector of Police (41830); W/Sub Inspector of Police (562)

##### D. Non Gazetted Officer Ranks

Police Sergeant Major (68); W/Police Sergeant (811); Police Constable (42378); W/Police Constable (4247)

The total strength of the Police Force is estimated to be at 63, 797 with a greater number being made up of police reservists rather than the regular force.<sup>461</sup> The significance of this on law enforcement will be commented upon in Section 5 of this Study.

##### 3.5.2.2. Functional Divisions

Functional Divisions of the Police Department include *inter alia*, the Criminal Investigation Department (CID), whose key function is to investigate major crimes and security related crimes; the Police Narcotics Bureau, which handles and co-ordinates all police work in terms of drugs related crimes and the Women and Children Bureau which in 1994, was expanded into a separate division under a Senior Superintendent of Police (SSP) in order to set-up a Bureau at each and very police station in the country.<sup>462</sup> Insofar as this latter Bureau is concerned, most of the units

<sup>458</sup> Police Service Report 1995, at page 4, available at [www.rulcoflawsrilanka.org](http://www.rulcoflawsrilanka.org).

<sup>459</sup> [www.police.lk](http://www.police.lk).

<sup>460</sup> Data as at 01.1.2005, obtained from the Personnel and Records Division of the Police Department.

<sup>461</sup> "More than two thirds of today's police officers belong to the 'reserve' rather than the regular force" – Vide the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 50.

<sup>462</sup> IG Circular No 1172/94 and Crimes Division Circular No 13/94 both dated 1<sup>st</sup> November 1994; IGs Circular No 1416/98 dated 04.08.1998.

are run by women officers, who have undergone specialised training. 36 Children and Women Bureau Desks have been set up, supervised by 36 Assistant Superintendents of Police (ASPs).<sup>463</sup> There is also the Police Human Rights Division, which comes directly under the IGP. Activities of this Division include, attendance to the Human Rights related matters referred to the Division by the Inter Ministerial Human Rights Working Group through the Inspector General of Police, promotion of Human Rights awareness amongst local Police Officers, liaising with the local and international Human Rights Organizations and maintaining records of local human rights violations.<sup>464</sup> Other divisions of the Police Department include the Crime Prevention and Police Public Relations Bureau, the Police Special Task Force (STF) and the Home Guard. Out of these, the STF (which came into being in 1983) merits particular mention as it is the 'paramilitary' arm of the Sri Lanka Police, utilised for counter terrorism operations and in regard to the provision of security for institutions, installations and important local as well as visiting political figures. Initially, policemen recruited to the STF were trained by the Army; later, the STF provided specialised training in counter insurgency operations through special training centres. Currently STF camps are situated in various parts of the country and particularly in the conflict areas.

The Terrorist Investigation Division (TID) is another key functional Division of the Sri Lanka Police. Its genesis was the Counter Subversive Unit which was established during the eighties to deal with mainly Sinhalese radicalised youth during the second uprising by the Janatha Vimukthi Peramuna (National Liberation Front). After the uprising was subdued in the nineties, elements of the CSU were converted into the TID to handle counter terrorism operations against the Liberation Tigers of Tamil Eelam (LTTE). Currently it is the TID which initiates action against suspects in terms of the emergency laws, namely the ER (under the PSO) as well as under the PTA as discussed previously.

The Special Investigations Unit (SIU) is (curiously) not formally named as a functional Unit of the Sri Lanka Police Department on their official website.<sup>465</sup> The SIU is situated directly under the IGP<sup>466</sup> and its duties are to investigate not only cases of alleged torture, but also other cases that may be referred to it by the IGP, which involve questions of discipline against police officers. When vacancies arise in the SIU, the practice is that the IGP calls for applications and holds interviews. The main criteria applicable for selection are that the applicant should not have any charge or court record against him/her.<sup>467</sup> According to information obtained in 2004 by the Law & Society Trust, a non governmental organisation, the cadre of the SIU as well as its allocated office space (2-3 cubicles) was insufficient considering the workload entrusted to the SIU. Police officers attached to the SIU are transferable and consequently, any specialised training provided to them is often of little account as they may be transferred thereafter to a Division in which these skills are not as crucial.

It was not possible to obtain more up to date information for the purpose of this Study, due to an absolute bar imposed by the Police Department on public information relating to the working of the police force in recent times.

### 3.5.2.3. Training

<sup>463</sup> www.police.lk.

<sup>464</sup> ibid.

<sup>465</sup> ibid, [http://www.police.lk/divisions/email\\_funcdivision.asp](http://www.police.lk/divisions/email_funcdivision.asp)

<sup>466</sup> there were about 80 officers including 3 ASPs attached to the SIU during 2004 according to interviews conducted by project officer, South Asia Treaty Bodies Programme, Law & Society Trust, Shyamalie Puvimanasinghe, AAL with the head of the SIU during 2004 for the 'Follow-Up Report' to the Concluding Observations of the UN Human Rights Committee to Sri Lanka's Combined Fourth and Fifth Periodic Report, 2003 submitted by the Law & Society Trust, to the United Nations Human Rights Committee, published in 'The United Nations Treaty Body System and South Asia' LST Review, Law & Society Trust, Volume 15 Joint Issue 208 & 209 February & March 2005.

<sup>467</sup> ibid.

Apart from basic training, the general areas of training include Crime Investigation, Motor Traffic, Fingerprint, Mounted Police, Narcotics, VIP security, Communication, Transport (mechanical), Information Technology, Multi-media, Police Band (musical), Special Task Force. Para Military, Medical Services, Marine Services, Life Saving Unit, Police Kennels Division, Legal Division etc. <sup>468</sup>

The Police Training School situated at Kalutara with three affiliates at Elpitiya, Nikeweratiya and Vehera train police officers at the junior levels and every constable is given an initial training including language training. The Police Higher Training Unit trains all officers above the ranks of Sub Inspectors of Police and every officer is given a two month induction course and after confirmation, is trained in administration, law and the handling of petty complaints. The courses include training content on Human Rights, Women's Rights, Children's Rights, Principles of Law, Property Rights, Information Technology and Intellectual Property.<sup>469</sup> Human rights education, which was introduced into police training in the early 1980s, is a part of the curricula at the Sri Lanka Police Training School as well as at the Police Higher Training Institute, where promotional and refresher courses are provided and at Divisional Training Centers, where in-service training is provided.<sup>470</sup>

These courses are currently conducted in Sinhala and English. However, the absence of such training in the Tamil language has been identified as a significant lacuna in training procedures.<sup>471</sup>

### 3.5.3. Discipline of the Police Service

#### 3.5.3.1. General Background

There is a lack of basic discipline in the police force and deficiencies in the structure thereof as well as excessive militarization of the police, due to decades of internal conflict and emergency rule.<sup>472</sup>

One of the earliest Commissions on the Sri Lanka Police (commonly referred to as the Soertsz Commission as it was headed by Justice Francis J. Soertsz)<sup>473</sup> remains an important reference point. This Police Commission of 1946 (The Soertsz Commission) was appointed by the then Governor General and tasked with the following objectives; inquire into, and report upon the organisation, administration and discipline of the Police Force, and to make recommendations as to the ways and means of enhancing the efficiency of the Force and securing a greater measure of public co-operation and confidence and, in particular, recommendations relating to, *inter alia*, the procedure for the investigation of complaints made by the public against the Force and the powers and duties of the Police, especially in relation to the preliminary investigation of offences, the arrest and custody of accused or suspected persons and the institution of prosecutions in Court and the expeditious conduct thereof.

<sup>468</sup> www.police.lk.

<sup>469</sup> Administration Report of the Inspector General of Police (IGP) for 1998, Government Publications Bureau, Colombo, 2003.

<sup>470</sup> United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 188.

<sup>471</sup> 'An Pursuit of Absolute Integrity' – Identifying Causes for Police Corruption' Transparency International, Sri Lanka, Colombo 2006, at page 20

<sup>472</sup> The 1946 Soertsz Commission on the Sri Lanka Police gives us a reminder that a police force should be, as according to Blackstone's classic conception - 'Legal custodians appointed to preserve the peace, to keep watch and ward in the districts, and to bring criminals to justice' – still remains true today. Unfortunately, the Soertsz Commission's lament that the Sri Lanka police had, even during that time, fallen away from this ideal definition to a less than ideal force 'shaped and trained mainly to meet the emergency of riots' is even more pertinent in present times. See also the Report of the Select Committee to inquire into and Report on the Allegations against the Sri Lanka Police, Parliamentary Series No 44, July 6, 1982 as well as the Report of the Sansoni Presidential Commission of Inquiry (Sessional Paper No VII-July 1980), for a good discussion on the militarization of the police service due to internal war during the 1970's and 1980's. Indeed, the communal violence during 13<sup>th</sup> August and 15<sup>th</sup> September, 1977 apparently started after a false message was radioed from the Police Station, Jaffna on 7<sup>th</sup> August 1977 purporting to be from the Superintendent of Police to the Inspector General of Police stating that government buses were being set on fire and crowds had gathered to attack incoming passengers. Though a second message was sent fifteen minutes later, cancelling the first message as a false message, the damage had been done and communal attacks had started on Tamils in other parts of the country.

<sup>473</sup> A former Chief Justice of Sri Lanka. The Commission also comprised members P Saravanamuttu and H. Sri Nissanka.. The Soertsz Commission Report is available at [www.ruleoflawsrilanka.org](http://www.ruleoflawsrilanka.org).

Among the comprehensive recommendations towards improving the police service that were detailed by this Commission, several recommendations related to the welfare conditions of police officers, judged to be lacking at the time. Importantly, the Commissioners recommended a Discipline Code for the Police Force, to be drafted by senior officers. This recommendation provided an impetus for the regularising of Police Departmental Orders in the years thereafter.

The extent and nature of the problems facing the Sri Lanka police even in 1946 appear to have a great deal of similarity to the present. For example, the partiality of heads of police to the political executive of the day was manifest even then.<sup>474</sup> Equally, the tendency to disregard judicial findings as to the misconduct of a police officer and effect reinstatement or promotions was pronounced.<sup>475</sup> The practicality of some Commission recommendations was however later disproved in actual practice. For example, one recommendation by the Soertsz Commission was in regard to investigations of complaints against the police. It was pointed out that 'however impartial the investigation made by a Police Officer, unsuccessful complainants will be left with a feeling that the result might well have been different if the investigations had been made by some independent person. It is a trite observation that trials of cases and investigations of this kind should not only be impartial but should also appear to be impartial.'<sup>476</sup> It was recommended that a Board consisting of the Superintendent of the Province, the Assistant Superintendent of the District in which the policeman complained against is stationed, and a prominent resident of the particular area should inquire into such complaints.<sup>477</sup> These Boards were later judged by another Commission appointed to inquire into the functioning of the police force, to have been manifestly unsatisfactory in addressing the problem.<sup>478</sup>

The second seminal Government Commission Report was in 1970.<sup>479</sup> Here, an equally distinguished body of Commissioners<sup>480</sup> passed strictures on the police service, particularly in terms of torture perpetrated by police officers;

*The Police do not enjoy the goodwill of the public. The public image of the Police is not at all what it should be. The fear of battery by the Police is in every citizen. Several cases of torture have come to light in the Courts.*<sup>481</sup>

The Basnayaka Commission recommended the establishment of a Police Service Commission to govern appointments, transfers and disciplinary control of police officers.<sup>482</sup> Appropriate security of tenure for the Inspector General of Police (IGP) was identified to be a major concern; as observed, otherwise, the office would be vulnerable to political pressures.<sup>483</sup> A Police

<sup>474</sup> *In re Mark Antony Lyster Bracegirdle*, (1937 [39] NLR 193) was a particularly important point defining relations during the police and the public during this time. Bracegirdle had been arrested for ostensibly trying to stir unrest among the plantation workers in the country. He was a strong critic of imperialism and his remarks about the living conditions of the estate workers outraged the elite planting community. The then Governor of Ceylon, Edward Stubbs issued a deportation order on Bracegirdle who then went into hiding, helped by the leftist parties, which openly protested against the order. Two days after a mass protest in his favour, Bracegirdle was arrested by the Inspector-General of Police (Respondent) on the order issued by the Governor. Thereafter, an application for a writ of habeas corpus was filed for the production of the body of Bracegirdle. The contentious question was whether the Governor acting under an order in council could have Bracegirdle arrested and removed from the colony. It was argued on Bracegirdle's behalf that the Governor could exercise his powers only in times of emergency and that the courts have the power to inquire whether such a situation of emergency had, in fact, arisen or not. The Court upheld this argument, referring to the fundamental principle of law enshrined in the Magna Carta that no person can be deprived of his liberty except by judicial process. The Governor's power is not absolute and that the power may be exercised only under condition and even if the order was issued on the basis of a state of emergency, the Court nevertheless had the power and the duty to inquire whether in fact such a condition existed. It was held that the Governor's order was made without authority and that Bracegirdle's arrest and detention was illegal.

<sup>475</sup> The Soertsz Commission refers to such instances in its Report, particularly at page 8.

<sup>476</sup> *ibid.*, at page 29.

<sup>477</sup> *ibid.*

<sup>478</sup> Sessional Paper XXI-1970, Final Report of the Police Commission of 1970, at page 35. available at [www.rulcoflawsrilanka.org](http://www.rulcoflawsrilanka.org)

<sup>479</sup> Sessional Paper XXI-1970, Final Report of the Police Commission of 1970.

<sup>480</sup> The Police Commission of 1970 (referred to as the Basnayaka Commission) was headed by a former Chief Justice of Sri Lanka, Hema Basnayake. The other members were Messers N.J.L. Jansz, D.B. Ellepola and S.A. Wijayatillake. The Commission's mandate was similar to the Soertsz Commission. The Basnayaka Commission also drafted a Police Act incorporating the Commission's recommendations which never saw the light of day.

<sup>481</sup> *ibid.*, at page 34.

<sup>482</sup> This recommendation was echoed in the Police Service Report of 1995, at page 50.

<sup>483</sup> *ibid.*, at pages 29 and 30.

Ombudsman vested with the authority to inquire into complaints against the police (in place of the unsatisfactory Boards) was also recommended.<sup>484</sup>

Though there were sporadic attempts to implement the Basnayaka Commission's recommendations, in regard to the establishing of an independent body to oversee the police in later years,<sup>485</sup> concrete measures were taken only in consequence of the 17th Amendment to Sri Lanka's Constitution, certified by the Speaker of Sri Lanka's Parliament on 3<sup>rd</sup> October 2001. By this amendment, a nominee for appointment to the office of the Inspector General of Police had to be approved<sup>486</sup> by the Constitutional Council (CC). However, this amendment, as discussed earlier, was negated by the failure of the political establishment to put the CC into place in its second term. Subsidiary legislation to the 17<sup>th</sup> Amendment also strengthened the security of tenure of the IGP by providing that his/her removal would be subject to similar safeguards as applicable to appellate court judges.<sup>487</sup> This legislation is currently in force and would test a future removal of an IGP.

### 3.5.3.2. Disciplinary Action of the Police

The 17<sup>th</sup> Amendment established a National Police Commission (hereafter NPC) which was given the powers of appointment, promotion, transfer, disciplinary control and dismissal of all officers other than the Inspector General of Police (IGP).<sup>488</sup> The NPC whose security of tenure is explicitly provided for,<sup>489</sup> was also compulsorily required ("*shall*") to establish procedures to entertain and investigate public complaints and complaints from any aggrieved person made against a police officer or the police service...[italics added]"<sup>490</sup> By Article 155], the NPC is empowered to delegate to the IGP, the powers of disciplinary control and dismissal of any category of police officer, subject to such conditions and procedures as may be prescribed by the NPC. Article 155K states that any police officer aggrieved by such a decision, may appeal such a decision to the NPC, which shall have the power to alter, vary, rescind or confirm such an order on appeal. Once such powers are delegated, the NPC cannot exercise any authority in respect of the matter unless on appeal.

Appeals may be also be preferred against orders of the NPC by aggrieved police officers to the Administrative Appeals Tribunal, established by Act No 4 of 2002. Moreover, police officers have the option of filing fundamental rights petitions in the Supreme Court.

In so far as the second mandate is concerned, Article 155G(2) of the Constitution requires the mandatory establishing of meticulous procedures regarding the manner of lodging public complaints against police officers and the police service. The NPC also has a duty to recommend appropriate action in law against police officers found culpable in the absence of the enactment of a specific law, whereby the NPC can itself provide redress.

Prescribing such Procedures was meant to hold accountable both the concerned police officer as well as officers of the NPC, so that both act in strict compliance with their constitutional and statutory duties. This is important, where officers of monitoring bodies, including the National Human Rights Commission, at one time, have been accused of colluding with the perpetrators of

<sup>484</sup> *ibid.*, at page 31.

<sup>485</sup> The 13<sup>th</sup> Amendment to the Sri Lanka's Constitution (1987) first provided for the establishment of a National Police Commission. However, this Commission was bereft of its independent nature by having the IGP as a member along with a nominee of the Public Service Commission in consultation with the President and a nominee of the Chief Justice. It was made responsible for the promotions, transfers and disciplinary control of members of each national division of the police other than the IGP. The 13<sup>th</sup> Amendment, in addition, provided for the establishing of a Provincial Police Commission. This part of the 13<sup>th</sup> Amendment was never implemented. Though a Police Commission Act, No 1 of 1990 was certified by law by Parliament on 23<sup>rd</sup> January 1990, it was thereafter never brought into effect. These provisions have cumulatively constituted a dead letter in the law.

<sup>486</sup> *ibid.* 17<sup>th</sup> Amendment, Article 41C.

<sup>487</sup> Removal of Officers (Procedure) Act, No 5 of 2002.

<sup>488</sup> *ibid.* 17<sup>th</sup> Amendment, Article 155G(1)(a).

<sup>489</sup> *ibid.* 17<sup>th</sup> Amendment, Article 155A.

<sup>490</sup> *ibid.* 17<sup>th</sup> Amendment, Article 155G(2).

human rights violations. Acts of collusion include settling with victims in torture cases involving small sums of money and in extreme cases, collaborating with the police to cover up the incidents. These Procedures would include detailing the persons, who can complain, the way it is recorded and archived and the way in which it is inquired and investigated. Quick responses need to be manifested in terms of not only documentation, but also ensuring medical attention and victim protection. Similar procedures in other countries require the OIC and his superior officers to automatically report categories of grave incidents to the monitoring body, whether a complaint is made or not.<sup>491</sup>

Rules of Procedure (Public Complaints) were put into place in January 2007,<sup>492</sup> the substance of which took in elements from a draft submitted by independent consultants to the NPC (in its first term) in 2006.<sup>493</sup> These Rules of Procedure are wide ranging in their ambit. Complaints may be lodged against police officers to the Public Complaints Investigation Division (PCID), which is a special Division established under the ambit of the NPC. Such complaints may be made by not only an aggrieved person, but also a social organisation, public organisation or non-governmental organisation or by an attorney-at-law on behalf of an aggrieved person.<sup>494</sup> The basis on which complaints may be submitted against police officers, as set out in Schedule One of the Rules of Procedure is extensive and there are different processes of inquiry in respect of the categories of complaints.

Segment A. of Schedule One details for example, acts in violation of human rights, allegations of torture and CIDTP, death of a person in police care or custody, fabrication of cases and making false reports and statements to court, any allegation which attract public interest and where wide publicity is given through the mass media demanding independent investigations into such allegations, interference and intimidation of witnesses, gross abuse of power, illegal arrest and detention and refusal to record complaints. These alleged offences are investigated by a team of investigating officers with the assistance of police officers attached to the PCID.<sup>495</sup> Findings are thereafter forwarded to the NPC.

The offences listed in Segment B of the Schedule relate to complaints that are referred for inquiry by the NPC to the IGP, who is deemed to 'cause an impartial inquiry by independent officer/s' by virtue of Section 15 of the Rules of Procedure. These complaints relate *inter alia* to assault/intimidation/abuse/threat, refusal/postponement to record a statement required to be made to the police, making deliberate distortions in statements recorded and miscarriage of justice resulting from misconduct by a police officer. In this case as well, the findings of the IGP are forwarded to the NPC.

Offences listed in Segment C of Schedule One include undue delay in making available certified copies of statements made to the police, discouraging complainants and witnesses from making statements, use of abusive words, threats or intimidation to complainants and witnesses and inaction and partiality by the police in taking action on complaints made. These allegations are specified to be, in terms of Section 16 of the Rules of Procedure, referred to a DIG or SSP of a Division in the provinces for 'impartial investigation' by one or more 'independent officers.'

<sup>491</sup> A good example is the United Kingdom's Independent Police Complaints Commission (IPCC). The IPCC, established by the Police Reform Act of 2002, is a non-departmental public body which is government funded but operates completely independently. Apart from its chair and deputy chair, it has fifteen commissioners all of whom, (except one), work full time in supervising a staff of four hundred 400 investigators, caseworkers and support staff. It has separate and independent investigators, (not police officers 'released' from the police service), and can decide either to supervise police investigations into serious complaints or independently investigate them itself. The independent quality of its investigative staff and the direct disciplinary control that it has exercised over offending police officers are two primary factors that have secured its credibility.

<sup>492</sup> Gazette No 1480/8 – 2007 January 17, 2007 (hereafter referred to as the Rules of Procedure).

<sup>493</sup> The consultant comprised Kishali Pinto-Jayawardena, senior legal consultant and attorney-at-law, Dr J de Almeida Guneratne, President's Counsel, Basil Fernando, attorney-at-law and Executive Director, Asian Human Rights Commission and Ali Saleem, then Programme Officer, Asian Human Rights Commission. The team had several meetings with the then Chairman of the NPC Mr Ranjith Abeysuriya President's Counsel prior to the finalisation of the Procedures.

<sup>494</sup> Sections 2 and 3 of the Rules of Procedures.

<sup>495</sup> Section 14 of the Rules of Procedures.

At the conclusion of all investigations, if it is recommended that disciplinary action or prosecution against a police officer shall be instituted, Section 17 of the Rules of Procedure stipulates that the IGP or the relevant senior officer may initiate such action. Rule 18 stipulates that the charge sheet or other relevant documents should be furnished to the Director, PCID.

Importantly, Section 19 states that the Commission, after receipt of the final order following the disciplinary inquiry or case, is authorised to 'grant whatever redress possible, according to the law, to the complainant.' Further, Section 20 grants *suo moto* powers to the Director, Deputy Director and Provincial Directors of the PCID to initiate investigations against police officers or the police service on their own through disclosure received from any source, including the print or electronic media.

There are time limits specified for the investigation of the complaints. Investigations in terms of complaints under Segment A. must be completed within thirty days and under Segments B. and C, within sixty days.<sup>496</sup> All complainants have the right to be acknowledged of their complaint within seven days of the receipt thereof. All records in this regard need to be maintained at the respective offices.<sup>497</sup> All police officers are required to give assistance to the investigating officers in this context<sup>498</sup> and the NPC, in consultation with the IGP, may empower the relevant officers of the PCID to visit police stations, inspect the cells and, among other things, question the relevant persons and obtain copies of relevant documents.

One flaw in these Rules of Procedure is the provision regarding the referral of complaints in Segment B. and C. for inquiry to the police officers themselves, as there is the danger that the investigations into such complaints not being conducted satisfactorily, since the complaints are against the police themselves. This provision is therefore susceptible to critique even though by Section 13, the Director, PCID may take over an inquiry if it is found that this is not conducted satisfactorily. The various categories of offences specified in the Rules of Procedure are also somewhat imprecise; for example, one offence specified under category A (and consequently are supposed to be investigated by the PCID itself) is 'acts in violation of human rights' which is a vague definition that could encompass within its reach, almost the entire gamut of rights violations.

The actual performance of the PCID in this respect, in recent years is examined in Section 6.5.2.2. below.

### 3.5.4. Investigations by the Police

Under the ordinary law and in terms of the CCP Act, all investigative authority vests with the Police Department. By Section 109 of the CCP Act, the first information of any offence either orally or in writing, must be given to a police officer. This has been interpreted by the Court in recent times, to mean that a first information cannot be lodged at the police headquarters, but must at all times, be lodged at a police station in the country (apparently) in order to minimise the risk of abuse and that 'trumped up' cases may be lodged at the police headquarters.<sup>499</sup>

Subsequent sub-sections (2) to (6) of Section 109 of the CPC Act direct that meticulous care should be taken in entering such first information in the Information Book, to be kept by the officer in charge of the relevant police station. There is moreover an obligation on the part 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 (Article 147 of the CCP Act).

<sup>496</sup> Section 5 of the Rules of Procedures.

<sup>497</sup> Section 4 of the Rules of Procedures.

<sup>498</sup> Section 9 of the Rules of Procedures.

<sup>499</sup> *Rajapakse v Chandra Fernando, IGP and others* (SC:FR) No 387/2005, SCM 27/03/2006, judgment of Chief Justice Sarath Nanda Silva. The judicial rationale is however confusing given that the risk of 'trumped up' cases being lodged at ordinary police stations would indeed, be far more than at the police headquarters where a higher degree of accountability would surely be expected?

Meanwhile a police officer investigating into an offence under any emergency regulation is vested with extensive powers in terms of Regulation 20 and Regulation 47 of EMPPR 2005. Such powers, in terms of Regulation 51 of EMPPR 2005, shall be in addition to and not in derogation of, his powers under any other written law. These powers include powers of search and seizure, inspection and taking into custody documents and books (with the prior written permission of a police officer not below the rank of an Assistant Superintendent of Police (proviso to Regulation 47(e)) of EMPPR 2005) and the right to make inquiries and to take persons in detention from place to place (Regulation 49 of EMPPR 2005). Disturbingly, the powers of a police officer under any emergency regulation may also be exercised by 'any person authorised by the President in that behalf.' (Regulation 52(2) of EMPPR 2005). Scant safeguards are imposed against police officers, army officers or other 'authorised persons', who violate the law while carrying out these investigations. Regulation 20 (1) of EMPPR 2005 imposes penalties up to imprisonment for two years in respect of a person, who makes an arrest for the purpose of investigation under Regulation 20(1) and who wilfully fails to issue a document acknowledging the fact of arrest as required under Regulation 20(9). Then again, Regulation 53 of EMPPR 2005 authorises detention of any police officer or army officer, who causes the death of any person. However, Regulation 73 of EMPPR 2005 undercuts whatever protections that may have been offered to persons at the risk of abusive investigation officers by providing immunity for acts done in 'good faith'; prosecutions or any other action may only be with the written consent of the Attorney General.

### 3.6. The Army

#### 3.6.1. Brief Description of the Structure

The Army Act regulates the functioning of the armed forces.<sup>500</sup> Its Headquarters functions as the main administrative and the operational headquarters and is divided into a number of branches, including the General Staff (GS) branch (responsible for coordination of operations and training), the Adjutant General's (AGs) branch (responsible for personal administration, welfare, medical services and rehabilitation), the Quarter Master General's (QMGs) branch (responsible for feeding, transport, movement and construction and maintenance), the Master General of Ordnance's (MGOs) branch (responsible for procurement and maintenance of vehicles and special equipment) and the Military Secretary's Branch (responsible for handling all matters pertaining to officers such as promotions, postings and discipline). Headed by an officer in the rank of Major General, who is directly responsible to the Commander of the Army, each Branch has several Directorates headed, in turn, by a Brigadier.

One of these Directorates, functioning since 1997<sup>501</sup>, deals with International Humanitarian Law. The Directorate oversees implementation of IHL and the Law of War by the armed forces, planning and implementing a dissemination programme on a regular basis for all ranks in operational areas and in training institutions. It also includes, working out syllabuses for IHL and the Laws of War to be taught to Army personnel ranging from recruit to captain level.

Special "Human Rights Cells" have been established within the army to ensure the adherence of military personnel to international human rights norms and directives have been issued by the Commander of the Army regarding observance of human rights by army personnel in all aspects.

#### 3.6.2. Training

<sup>500</sup> Its strength stands at 120,000 strong, including 2,960 women plus an additional 10,000 personal in reserve. (Vide "Sri Lanka" Nations Encyclopaedia; accessed on 2007-11-04). Recent newspaper reports have put the number at a much higher level as exceeding 150,000 in strength.

<sup>501</sup> United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 190.

There is a somewhat intricate structure established for defence training. The General Sir John Kotelawala Defence University (KDU), formed in 1981 and situated in a Colombo suburb, specializes in defence studies and cadets participate in a three-year program of academic work and basic training. In addition, officer training (up to about two years)<sup>502</sup> takes place at the Sri Lanka Military Academy (SLMA), (formally the Army Training Center), which is located at Diyatalawa, in the Badulla District. The course for officer cadets comprises training in military as well as academic subjects. Officer cadets who graduate from the academy are commissioned as officers in the regular and volunteer forces. Due to the lack of officers within the lower levels, the training process was quickened in the 1980s by developing a short commission course, running to about fifty-six weeks.

Training for new recruits takes place at the Infantry Training School in Minneriya, the Combat Training School in Ampara and the Army Training School in Maduru Oya. Non commissioned officers undergo training at the Non-Commissioned Officers Training School at Kala Oya. These training centres are under the administrative control of the Army Headquarters.

Human rights and humanitarian law forms part of the curricula in the training courses at all levels and some courses are supplemented by training programmes conducted by the Human Rights Commission of Sri Lanka, the International Committee of the Red Cross (ICRC), non-governmental organisations and university institutions.

#### 3.6.3. Internal Disciplinary Action and Prosecutions

The Army Act governs the internal disciplinary control of army officers. Army Disciplinary Regulations also form part of the rules of conduct in this regard. For example, it has been affirmed that;

*"The doctrine of command responsibility is embodied in the Army Disciplinary Regulations with several sections stating that military leaders must act speedily but only according to standing operational procedures and their actions must be legitimate. Soldiers are informed that it is their duty only to obey lawful orders and not any order."*<sup>503</sup>

Offences created under the Act include mutiny and insubordination, desertion, and fraudulent enlistment and absence without leave; disgraceful conduct; drunkenness; offences in relation to persons in custody and offences in relation to property. Such erring officer may be tried before a court-martial, which may be either established by the President or an officer of rank authorised to do so under the relevant Acts and may consist of the relevant minimum number of members prescribed in respect of the specific offence in question.<sup>504</sup>

Ordinary rules of the Evidence Ordinance apply in such inquiries. The accused is entitled to object on a reasonable ground, to any member of a court-martial. Other entitlements include the right to obtain a copy of the summary of evidence and the charge sheet under which he was charged, at least 24 hours prior to the trial, enabling him to prepare for his defence and to retain his lawyer. In the event of the accused being financially unable to do so, an officer must be appointed to defend him or a friend of the accused must be allowed to act on his behalf. All the

<sup>502</sup> [www.army.lk](http://www.army.lk)

<sup>503</sup> Observations made by Brigadier Mohanthe Peiris, then head, Legal Division of the Sri Lanka Army at the National Workshop of the South Asian Treaty Bodies Programme organized by the Law and Society Trust, August 2004, Sri Lanka. In Sri Lanka case law, the Court of Criminal Appeal (in interpreting Section 100 of the Army Act which states that every person subject to military law who disobeys any lawful command given by a superior officer, commits an offence), has declared that the term 'lawful' was emphasized by the court to mean that a soldier cannot be penalised when he disobeys an order which is manifestly and obviously illegal such as shooting a helpless and unarmed person – Vide *Wijesuriya v the State*, 77 NLR, 25.

<sup>504</sup> United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at paragraph 285, ie, where a court-martial is convened to try a person for the offence of treason, murder or rape, it must consist of not less than five members. In an instance where it has been convened to a person for a civil offence it must consist of not less than three members. In order to ensure the impartiality of the membership of the tribunal, the prosecutor, any witness for the prosecution, the commanding officer of the accused; and the officer who investigated the charge on which the accused is arraigned, cannot be members of the court-martial.

necessary facilities to prepare his defence must be afforded to the accused including the right of communication with counsel and witnesses.

Punishment imposed by the court-martial includes death (*interalia*, for the offence of treason), rigorous imprisonment, simple imprisonment, cashiering, dismissal, forfeiture in seniority, severe reprimand and penal deductions from pay. As is discussed below, army officers accused of gross human rights violations have been tried before a court martial rather than brought before a court on criminal charges.<sup>505</sup> Indemnity clauses and legislation have also framed an environment of impunity in this regard despite international law norms, which affirm that “[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.”<sup>506</sup>

In 1988, the Indemnity (Amendment) Act, 1988 provided immunity from prosecution to all members of the security forces, members of the government and government servants involved in enforcing law and order between 1 August 1977 and 16 December 1988, provided that their actions were carried out "in good faith" and in the public interest, remains on the statute book. Though this law has not been practically used by accused army officers to deny liability, it has contributed to a sense of impunity.

In addition, Section 26 of the PTA provides for immunity from prosecution for "any officer or person for any act or thing in good faith done or purported to be done in pursuance or supposed pursuance of any order made or direction given under this Act" remains in force.

Sections 9 and 23 of the PSO confer similar immunity. Section 19 of the Emergency Regulations 2006 states that:

“No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties.”

Regulation 73 of EMPPR 2005 also confers immunity of like nature.

### 3.7. Militarisation of police functions and conferral of police powers on the Army

In general, the police has been significantly militarized due to the prevalence of conflict. The Police Department has been brought under the Ministry of Defence. Further, the police have been conferred with military powers under emergency law, allowing fundamental departures from the restrictions imposed by the CCP Act in respect of arrests and detentions as previously observed. Regulations allow for arrests without warrants on evidence of terrorist involvement and permit detention without charge for up to 90 days.<sup>507</sup> An immunity clause is also afforded for officials, who commit wrongful acts in the implementation of the regulations.<sup>508</sup>

<sup>505</sup>If special or military courts have jurisdiction over serious human rights violations where these are rife, it is extremely unlikely that the perpetrators will be brought to trial or – if brought to trial – that they will be convicted. Such courts often use truncated procedures and lack the professional competence and independence of the civilian courts. Military courts tend to lack independence and impartiality because they are under the military command structure – often the same structure which is suspected on carrying out human rights violations’ in *‘Disappearances and Political Killings. Human Rights Crisis of the 1990’s, A Manual for Action’, Amnesty International, (1994)* (abbreviated version published by the Nadesan Centre, Colombo), at page 27

<sup>506</sup>Vide United Nations Human Rights Committee, General Comment No. 20 (on the prohibition of torture and cruel, inhuman or degrading treatment or punishment), adopted on 13 March 1992, at para. 15. Also Principle 19, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65, 24 May 1989.

<sup>507</sup> Regulation 21(2), EMPPR 2005.

<sup>508</sup> Regulation 73, EMPPR 2005; “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.”

On the other hand, emergency provisions have conferred police powers on the army, thus blurring the distinction between the two. The President is empowered, under Section 5 of the PSO, to make emergency regulations conferring police powers on the armed forces, or any other person. Currently, Regulations 19 and 20 of the EMPPR 2005 confer powers of: search and seizure, and arrest and detention without warrant on the armed forces<sup>509</sup> with the condition however that such person has to be handed over to the nearest police station within 24 hours. In addition, police powers in dealing with prisoners;<sup>510</sup> the powers of a police officer under any emergency regulation;<sup>511</sup> and the power to question a person in detention and take such person into the custody of the authorized member of the armed forces for a period not exceeding seven days at a time<sup>512</sup> are also conferred upon army personnel.

Relevantly, Section 12 (1) of the PSO gives the President the special power to call out the armed forces to maintain public order, where he believes circumstances endangering public security have arisen in any area or is imminent, and he believes the police are inadequate to deal with the situation. Where such an order is made, published in the Gazette and is communicated to Parliament, the armed forces have the same powers as the police, and this expressly includes powers of search and arrest, dispersal of unlawful assemblies; seizure and removal of offensive weapons and substances from unauthorized persons in public places; seizure and removal of guns and explosives (when written authority is granted by the President or an authorized person. The power of exercising some of these powers is limited to armed forces personnel above a certain rank. Section 12 (1) orders are currently in operation, applicable for one month at a time and are regularly renewed.

Army officers are not required to have a police officer accompany them when making arrests.

### 3.8. The Prisons

The regulation of penitentiary institutions in Sri Lanka is under the terms of the Prisons Ordinance). The various types of such institutions include, closed prisons for convicted persons (03), remand prisons (14), work camps (05), open prison camps (02), training schools for youthful offenders (01), correctional centres for youthful offenders (02), drug rehabilitation centres (01) work release centres(01) and lock-ups(28).<sup>513</sup>

Rehabilitation institutions in Sri Lanka<sup>514</sup>

Category	Number
Closed prisons for Convicted persons	03
Remand prisons	14
Work camps	05
Open prison camps	02
Training school for youthful offenders	01
Correctional centres for youthful offenders	02
Drug rehabilitation centre	01
Work release centre	01
Lock-ups	28

<sup>509</sup> Regulations 19 (2) and 20 (1), EMPPR 2005.

<sup>510</sup> Regulation 24, EMPPR 2005.

<sup>511</sup> Regulation 52 (1), EMPPR 2005.

<sup>512</sup> Regulation 68 (1), EMPPR 2005.

<sup>513</sup> Statistics are provided as at 2002; see United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 234. Efforts to obtain more recent statistics from the Department of Prisons were to no avail.

<sup>514</sup> United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 234.

All these institutions come within the administrative purview of the Prisons Department. According to data obtained in 2008 for the purpose of this Study, the number of closed prisons for convicted prisoners had increased to three, the number of remand prisons had increased to eighteen and the number of work camps had increased to eight. Additions include a new open prison camp located at Kuruwita in the Ratnapura District, the conversion of a work camp at Veeravila to a detention centre for terrorist suspects and the establishing of a prison in Jaffna.

The estimated daily population at prison institutions (2001) stood at 17, 982. persons, comprising convicted, un-convicted, detainees and condemned prisoners as well as prisoners on appeal and those remanded under PTA. Out of this number, 76.9% prisoners were serving their sentences for non-payment of fines; the majority of prisoners were male and were under 40 years of age; a total percentage of 63% of the convicted offenders were first time offenders; 75.4% of the remandees were short term remandees (ie; in prison for a period extending from under 14 days to 6 months and overcrowding of prisons was at the estimated rate of 461.7% for remand prisoners.<sup>515</sup> The number of prisoners has steadily increased throughout the years, thus in 2002, unpublished prison statistics revealed that the daily average number of prisoners was at 18,000.<sup>516</sup> Currently, the prisons are estimated to hold more than 28,000 prisoners.<sup>517</sup>

It was observed in a 2001 Report on Prison Reforms by a non governmental organisation that, out of the un-convicted prisoners, only about 25% were ultimately convicted which means that about 75% of the persons serving their time in prisons were persons, who will not be punished by courts. A primary reason for the remand of these prisoners was their inability to pay bail as directed by courts or to fulfil the conditions of bail set by the judge.<sup>518</sup>

The resultant impact of overcrowding in such a manner as to amount to cruel, inhuman and degrading treatment is examined in Section 5.5. below.

In most instances, studies have found that the remandees are not provided with the most basic facilities such as mats, pillows, clothes, plates, cups and buckets etc., due to lack of funds.<sup>519</sup> Remand prisoners complained, during a visit to the Welikada prisons in 2002 by a former Commissioner General of Prisons that there was lack of ventilation and the prisons were infested with bugs and cockroaches.<sup>520</sup>

There were complaints that there were no electric light bulbs in good working order in the cells, there was inadequate water for drinking and washing purposes. Meanwhile, sanitation facilities were also extremely inadequate. During this visit, it was observed that there were only eight functioning toilets for the entire population of 1,400 remand prisoners in the Welikada prisons.<sup>521</sup>

Insofar as convicted prisoners were concerned, the lack of facilities was equally bad. Prison food was adequate, but of poor quality and was not prepared in a sanitised environment. It was also observed that prisoners complained about the inadequate medical facilities at the Welikada Prisons, where a medical officer attended the prisoner for only two hours per day with insufficient time to examine the prisoners.<sup>522</sup>

Reports of the International Committee of the Red Cross (ICRC) regarding the state of Sri Lanka's prisons in general reflect a similarly dismal reality in regard to *inter alia*, the personal security of prisoners, sanitation, medical facilities and the issue of clothes. In one visit made by

<sup>515</sup>Dias, Priyadarshini in 'Prison Reform: Aspects to be considered', Law & Society Trust, unpublished Report, 2001, at page 8.

<sup>516</sup>Dharmadasa, HG, in 'Rights of Prisoners'; State of Human Rights 2003, Law & Society Trust, 2004, at page 204.

<sup>517</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at para. 83.

<sup>518</sup>Dias, Priyadarshini in 'Prison Reform: Aspects to be considered', Law & Society Trust, unpublished Report, 2001, at pages 15 and 16 of the Report.

<sup>519</sup>*ibid*, at page 8.

<sup>520</sup>Dharmadasa, HG, in 'Rights of Prisoners'; State of Human Rights 2003, Law & Society Trust, 2004, at page 207.

<sup>521</sup>*ibid*.

<sup>522</sup>*ibid*, at page 210.

the ICRC to the Kuruwita Remand Prison in 2002, it was stated that prisoners had to, in fact, sleep in the toilet areas and water tanks, due to lack of space; during a visit to the Kalutara prisons, it was observed that the toilet areas in one section of the prison was regularly blocked, there were shortages of essential drugs and clothing was in short supply.<sup>523</sup>

#### 4. Basic Legal Guarantees in Practice

The legal guarantees and safeguards in regards to Arrest, Detention and Interrogation are dealt with in section 2.3.1. This section examines the criminal justice process from the moment that a person is arrested until release to assess, whether international as well as whatever domestic legal safeguards are met in actual fact. Also discussed are several decisions by the Sri Lankan courts during the past decades, which sought to impose safeguards against abuse. Judicial reasoning has been that emergency provisions cannot override the Constitution itself. Accordingly, the fundamental rights guarantees have been used on many occasions to strike down the abusive application of emergency law and indeed, in some instances, to declare that the impugned emergency regulation itself is unconstitutional.<sup>524</sup>

However, it must also be said that while the decisions discussed have had considerable impact on individual petitioners, the jurisprudence of the Court has not led to a reining in of the use of emergency powers by the executive. Public interest litigation asserting the rights of detainees under emergency is not possible within the restrictive provisions of Sri Lanka's Constitution<sup>525</sup>, unlike in the Indian constitutional context. Many of the detainees themselves, once freed from the shackles of unjustified detention, refrain from agitating the issues further in the public forum, due to fear of individual retaliation. Thus, decisions of the Court awarding relief have remained limited to the facts of each case and there has been no collective momentum for overall legal reform. Such a campaign has, in any event, been hampered by the fact that, (as stated earlier) the PTA and the PSO themselves cannot be legally challenged, due to the constitutional protection specifically afforded to laws that were enacted prior to the 1978 Constitution even if they offend rights protections.<sup>526</sup>

#### 4.1. Arrest, Detention and Interrogation

Extrajudicial executions and deaths in custody are commonly manifested in Sri Lanka today.

*“Custodial deaths in Sri Lanka have increased dramatically during 2006. There are two types of extrajudicial killings taking place, mainly through the police and these are extrajudicial killings after the arrest of criminals. In this first category, there are reports of several deaths; almost every week in the newspapers, with a short announcement that a person had been arrested and kept in police custody had been killed as a result of an ensuing conflict. The AHRC has reported a policy line that has been growing gradually in Sri Lanka where the police are in some way encouraged to get rid of alleged criminals by the use of such methods. The former Inspector General of Police defended such a position even in radio interviews and described an alleged criminal who had a previous conviction and continued to*

<sup>523</sup>*ibid*, at page 213.

<sup>524</sup> *Joseph Perera vs The Attorney General* [1992] 1 Sri LR 199, 230. While Article 15 (7) of the Constitution gave the executive the power to make emergency regulations restricting the right to free speech in the interests of national security or public order, this provision was counterbalanced by Article 155 (2) of the Constitution which placed a limitation on the President to make regulations inconsistent with fundamental rights. Therefore, whatever regulations made by virtue of Article 15(7) must be *intra vires* regulations. For a regulation to be *intra vires*, it must show a proximate or reasonable connection between the nature of the action prohibited and the ground on which it is prohibited. (i.e. any of the restrictions enumerated in Articles 15(2) &(7)). Any indirect or far-fetched connection between the two would make the regulation invalid. See also *Shanathi Chandrasekera v D.B. Wijetunge and Others* (1992) 2 Sri L.R. 293, *Subash Chandra Fernando v Kapilaratne* [1992] 1 Sri L.R. 305, *Channa Peiris v AG* [1994] 1 Sri LR 1 at p 51 and particularly, *Sunil Rodrigo v De Silva* [1997] 3 Sri LR 265.

<sup>525</sup>The 1978 Constitution gives the right to relief only to a person alleging the infringement of any right 'relating to such person', with only that person or an attorney at law on his behalf being able to petition court, (Article 126(2)). Though the Sri Lankan Supreme Court has relaxed standing in some exceptional cases in recent times, the Court has been noticeably cautious in asserting this principle in regard to rights involving detainees particularly in conflict situations where abuse by army officers are involved.

<sup>526</sup> Article 16(1) of the Constitution states that all existing written law and unwritten law shall be valid and operative, notwithstanding any inconsistency with the Constitution.

*engage in further crimes. Such discourse on the permissible limits on extrajudicial killings ridicules the entire discourse of the rule of law and blurs all the lines around which law enforcement officials are permitted to carry out their functions.”<sup>527</sup>*

For example, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, in his 2006 Mission Report, documented that the police shot at least 22 criminal suspects after taking them into custody during the period, November 2004–October 2005.<sup>528</sup> Further, this Report observes as follows;

*“It is alleged that the use of force became necessary when, after having been arrested, presumably searched and (in most cases) handcuffed by the police, the suspects attempted either to escape or to attack the officers. In all cases, the shooting was fatal and in none was a police officer injured. The Government confirmed that in none of these cases had an internal police inquiry been opened. The reason proffered was that no complaints had been received. The pattern of summary executions that emerges, demands a systematic official response that brings those responsible to justice and discourages future violations.”<sup>529</sup>*

The other main cause of death is torture in police custody. Official statistics are illustrative in this regard; for example, between 1 January and 30 October 2003, the National Police Commission had received 221 complaints concerning assault and torture by the police, six of which resulted in deaths.<sup>530</sup>

*“One high-ranking official acknowledged to me that torture was widespread and problematic but then proceeded to note that while he could understand why police tortured “in the line of duty”, he felt it was completely inexcusable for police to torture in pursuit of private ends. This casual acceptance of torture is highly problematic. It also downplays the systemic nature of the problem. There is a nationwide pattern of custodial torture in Sri Lanka, and the Government has a legal responsibility to take measures to bring that pattern to an end.”<sup>531</sup>*

The Special Rapporteur on Torture had, in another illustrative example, recorded 52 allegations in 2003<sup>532</sup> and 76 allegations in 2004.<sup>533</sup>

## A. Right to be informed of the reasons of arrest

The legal guarantee that reasons should be given for arrest is not observed in practice in a vast majority of the documented cases.<sup>534</sup> *Gerald Perera’s Case* is one such illustrative case regarding an arrest under the normal law that reflected the general pattern; here, the victim was arrested on the basis of mistaken identity as a result of the police believing that he was a known criminal in the area, who also went by the name of ‘Gerald.’ When the matter was taken to the Supreme Court, the Court ruled that the information that “a Gerald had committed murder” was not sufficient to justify the arrest of any person believed to be “that Gerald”, particularly where the suspect’s statement had not been recorded promptly.<sup>535</sup> The Court pointed out that even when taken subjectively, there was no basis to believe that the person arrested had committed murder, which showed that the police were simply hoping that something would turn up.

<sup>527</sup> *Human Rights Report for 2006*, Chapter on the Human Rights situation in Sri Lanka at part 3, Asian Human Rights Commission November 2006.

<sup>528</sup> UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at paragraph 53.

<sup>529</sup> *ibid.*

<sup>530</sup> However, data provided by the National Police Commission in recent years regarding deaths in custody do not provide an accurate picture as is discussed in Section 6.5.2.2. below.

<sup>531</sup> At para. 54 of the Report.

<sup>532</sup> E/CN.4/2004/56/Add.1

<sup>533</sup> E/CN.4/2005/62/Add.1. As noted above, the CAT Committee at paragraph 12 of its 2005 Concluding Observations (CAT/C/LKA/CO/2, 15/12/2005) had referred to the “continued well-documented allegations of widespread torture and ill-treatment [...] mainly by the State’s police forces”

<sup>534</sup> AHRG Third Special Report on Torture; *An X-Ray of the Sri Lankan policing system and torture of the poor*, (eds. Basil Fernando and Shyamalie Puvimanasinghe) 2005 at pp 28 to 51 and at pp 69 to 155.

<sup>535</sup> *Sunjiewu v. Sarawera* [2003] 1 Sri LR 317.

In certain instances, the failure to observe the rule that reasons must be given for arrest has been manifested against police officers themselves. Thus, in one case, a reserve police constable was illegally arrested and assaulted by a Reserve Sub Inspector without giving any reasons for arrest. This was ruled by the Supreme Court to be in violation of the petitioner’s fundamental rights in terms of Article 11 of the Constitution, which confers *inter alia*, the right to be informed of the reasons for arrest.<sup>536</sup>

The fate that befell Nandini Herath, arrested on 8<sup>th</sup> March 2001 by police officers attached to the Wariyapola police station is symptomatic of these cases. Though the victim was brought from her home on the pretext of recording a statement, she was illegally detained at the Wariyapola police station for three days, where she was raped and subjected to severe torture, cruel, inhuman and degrading treatment.<sup>537</sup> The manner in which the victim was arrested was in complete disregard of due procedure and the law. There was no female officer present.<sup>538</sup> The police officers were in plain clothes. The victim was not informed as to why she was arrested or even the fact that she was going to be arrested. Her mother was prevented from accompanying her to the police station. Her family was not informed of the reason as to why she was taken to the station, thus preventing them from seeking legal assistance at an early stage, which may have prevented the later abuse. Further, her family was not allowed to see or visit her at the police station.

Arbitrary arrests meanwhile also take place in a context, where the police file fabricated cases against victims of police torture, in an attempt to intimidate them into withdrawing cases that they have lodged in respect of the torture that they have been subjected to. Reasons are not given for arrests and it is only later that the victim finds the nature of the fabricated charge against him/her. Such cases are considerable in number and have been dealt with in a recent publication of the Asian Human Rights Commission. The following are some of the documented instances of victims of police torture, who have been threatened with fabricated cases and/or have had fabricated cases actually lodged against them.

- R. Sathasivam, a casual attendant at Pollonaruwa General Hospital, was arrested and assaulted on 24.11.2001 by police officers from Methirigiriya police station. Later she was handed over to the CID personnel of Polonaruwa Police Station, where she was further tortured and raped repeatedly by twelve CID personnel. She was forced to admit that she belonged to the LTTE and was planning to bomb Minister Maithripala. Out of fear of further torture she admitted the fabricated allegations and she was forced to sign a statement without reading its content to her. On 25.11 2001 she was handed over to the Kaduruwela Police, where she was verbally abused and was kept in solitary confinement for one month. Finally, on 14.03.2002 she was presented before the Polonaruwa Magistrate, where she was sent to the Anuradhapura Prison. Police fabricated and filed three cases against her in the High Courts. Even subsequent to her release harassment by the police continued.<sup>539</sup>
- A.R.L. Ananda, a farmer, was questioned at gun point on 03.06.2002 by two police officers of the Deniyaya Police Station, who came to his home and was beaten in the presence of his wife, brothers and six children. He was then arrested and taken to the police station, where his signature was obtained on a blank document. Though he was released later that night, a false charge was filed against him in the Morawaka Magistrate’s Court for illegal possession of 80 drums of toddy by OIC Deniyaya. He

<sup>536</sup> *Ekanayake (R.P.C.) vs. Reserve S.I. Wewanasum* [2003] 1 Sri LR, 209

<sup>537</sup> Pinto-Jayawardena, Kishali and Kois, Lisa in ‘Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response’, Law & Society Trust, 2008, at p. 61.

<sup>538</sup> *ibid.* The woman police constable who recorded the victim’s statement assaulted her with a baton.

<sup>539</sup> Fernando, Basil, ‘Recovering the authority of public institutions’ Asian Human Rights Commission, 2009, at p.295



filed a fundamental rights application in the Supreme Court and was granted leave to proceed.<sup>540</sup>

- H.K. Sampath, a vegetable seller, who was the sole breadwinner of a six-member family, was arrested on 01.08.2002 by police officers dressed in civilian clothes from the Panadura Police Station. Then he was assaulted and questioned as to the identity of persons who broke into a neighbouring house. He was released after forcibly taking his signature to a statement at about 5.45 p.m. Again on 03.08.2002 he was arrested, assaulted and threatened saying that he will be implicated for false charges. His aunt complained to the HRCSL and the HRCSL staff contacted the OIC Panadura who released him on bail. He has lodged a fundamental rights petition in the Supreme Court.<sup>541</sup>
- Dodampe Gamage Asantha Aravinda and Thusara Chaminda were riding on a motorbike on 28.02.2008 when the rear view mirror of the motorbike accidentally slightly touched the hand of a truck driver, who was crossing the road. The truck driver pursued them and struck the motorbike injuring Chaminda. Later they were assaulted and subjected to inhuman treatment by police officers of the Pitabaddara Police Station, who were instigated by the truck driver at which point acid was thrown on Aravinda's face. Then they were arrested and taken to the Police Station, where they were further assaulted. They were not taken for medical treatment and the family members were not allowed to meet them. After keeping in police custody for about two weeks they were admitted to the Matara Hospital and Aravinda who lost the sight of one eye completely is still taking treatment at the Colombo eye hospital. Meanwhile, they were falsely charged for possessing a fire arm, attempting to shoot a person and attempting to engage in a robbery.<sup>542</sup>
- Sarath Kumara Naidos, was arrested on 05.07.2008 by police officers from Moratuwa Police Station, while he was working at a house in Panadura, which is under the jurisdiction of Panadura South (Keselwatta) Police Station. However, he was taken to the Moratuwa Police Station, where it was alleged he had committed theft and was assaulted. Though he was presented to superior officials, he was never produced before the Court nor released. Despite the case being reported to the ASP Moratuwa, no measures have been taken to inquire into this incident.<sup>543</sup>
- P. Koralaliyanage, a thirty one year old artisan, was arrested on 03.02.2004 by police officers of the Welipenna Police Station. He was questioned on a false accusation of some robberies and was subjected to brutal torture. Later his thumbprint was forcibly taken and placed on a grenade and two charges were fabricated against him for possession of a grenade and for robbery. He has filed a fundamental rights petition in the Supreme Court.<sup>544</sup>
- M.Riswan, S. Ravichandran and A. Latief were arrested on 30.08.2003 by police officers from Wattala Police Station. They were questioned on an alleged robbery and severely assaulted. Later due to the sole reason that they have made a compliant to the HRCSL, they were implicated for possession of narcotic drugs, which they were never accused or questioned of at the time of torture. They were also charged with theft. Latief and Riswan have lodged fundamental rights applications in the Supreme Court.<sup>545</sup>

<sup>540</sup> *ibid*, at p. 304

<sup>541</sup> *ibid*, at p. 316

<sup>542</sup> *ibid*, at p. 472

<sup>543</sup> *ibid*, at p. 506

<sup>544</sup> *ibid*, at p. 346

<sup>545</sup> *ibid*, at p. 331

In this regard, a legal opinion submitted by REDRESS<sup>546</sup> comments as follows;

*The practice of fabricating charges in order to justify arrest and/or detention and/or to dissuade persons from pursuing complaints about police misconduct, in particular torture, constitutes an abuse of power that violates internationally recognised standards of policing. It is also pointed out that prosecutors have a duty to act when they become aware that charges may be the result of fabrication; thus, the Guidelines on the Rules of Prosecutors stipulate that he or she should seek to establish the methods used to obtain evidence against suspects and other forms of misconduct and should investigate and prosecute those responsible.*<sup>547</sup>

However, in Sri Lanka, not even a single case of fabrication of false charges has been pursued against responsible police officers.

Arrests under emergency have disclosed even more complicated judicial approaches to protection of rights. In early cases of arrests under emergency law during the late eighties and early nineties, some judges held that persons arrested under emergency, could not expect to be told the reasons for arrest. However, a more consistently liberal interpretation of the constitutional provisions has become evident in later years. Explicit in this change was the understanding that though the government may be obliged to take extraordinary measures to safeguard national security in times of grave national crisis, these measures cannot be more stringent than necessary. The Court professed itself to be vigilant of its role as guardian of the rights of the people, especially during times of emergency, to the extent of striking down regulations that were unconstitutional.<sup>548</sup> The Defence Secretary was required to do more than merely plead national security as reason for arrest. He had to place material before the Court, which would show that his decision to arrest and detain had been taken on reasonable grounds. Where an arrest was clearly unreasonable, the Court released the victim on the basis that there was lack of sufficient material for the detention or that the Defence Secretary had misdirected himself in law. The judicial principle was laid down that the discretion given to the Defence Secretary is not unfettered. It must be exercised reasonably, in good faith and on proper grounds.<sup>549</sup>

In one particular instance concerning arrest under emergency provisions relating to preventive detention<sup>550</sup>, where reasons for arrest had not been given and the arrest itself had taken place based only on general suspicion that 'something may turn up' after arrest, Justice ARB Amerasinghe writing for the Court stated that;

*'In the matter before us, the Secretary in my view, abdicated his authority and signed the detention orders mechanically.....his decision was not reasonable in the sense that it was not supported with good reason and therefore it was not a decision that a reasonable person might have reasonably reached. His decision was not only wrong, but in my view, unreasonably wrong'*

Though the Court declared itself to be very much aware of the difficulties inherent in the investigation and prosecution of certain offences, such as terrorist crimes and conspiracies to assassinate political leaders and the need for acting quickly, where national security or public order is involved, it was pointed out that, 'the exigencies of dealing with such crimes cannot justify switching the notion of reasonableness to the point where the essence of the safeguard secured by Article 13 (1) of the Constitution is abrogated.'<sup>551</sup> It was stressed that the suspect must be given the reasons, that is, all the material and pertinent facts and particulars that go to

<sup>546</sup> a registered charity in the United Kingdom engaged in securing the right to redress and reparation of torture victims

<sup>547</sup> *ibid*, at pp. 542-543.

<sup>548</sup> *Joseph Perera vs AG* [1992] 1 Sri LR 199

<sup>549</sup> *Shanthi Chandrasekaram vs D.B. Wijetunge and Others* [1992] 2 Sri LR 293, *Subash Chandra Fernando vs Kapilaratne* [1992] 1 Sri LR. 305, *Channa Peiris vs AG* [1994] 1 Sri LR 1 at p51

<sup>550</sup> *Sunil Rodrigo vs De Silva* [1997] 3 Sri LR 265. Under ER 17(1), the Secretary was authorised to arrest and detain a person upon material submitted to him or upon such further additional material as may be called for by him, where he is satisfied that such a step is necessary in order to prevent such person from acting in any manner prejudicial to national security or to the maintenance of public order.

<sup>551</sup> *ibid*. The Supreme Court quoted jurisprudence of the European Court of Human Rights (*Cf. Bragan Vs UK. 29 Nov 1988 Ser. No.145B; Fox, Campbell & Hartley Vs UK 30 August 1990 Ser. A No 182*) in support of its reasoning.

make the mind of the Secretary regarding the arrest and not merely the inferences arrived at. Reasons for arrest must be given, if not at the time of arrest, then at the first reasonable opportunity.<sup>552</sup>

However, dealing with arrests under emergency law has proved at times to be problematic for the Court. This is well seen in two contrasting decisions relatively recently. In the first case,<sup>553</sup> the petitioner, who was a labourer, was arrested without the reason for such arrest being disclosed, and kept in army detention for over a month. During this period, he was assaulted and thereafter further detained at the Vavuniya Police Station for another month. On being tortured during interrogation, he admitted that he was a member of the Liberation Tigers of Tamil Eelam (LTTE) but there was no other evidence to support this claim. He was only then produced before a Magistrate, who committed him to remand custody. The Court held *inter alia*, a violation of his Article 13(1) rights in that he had not been given reasons for his arrest and moreover, the Emergency Regulations under which he had been arrested had been issued on a date subsequent to the arrest.

Yet, in the second case<sup>554</sup>, the Court took the view that the arrest of a cleaner, who travelled from Pesalai to Mannar in the conflict areas and who had been had been arrested without reasons being disclosed, but on suspicion that he had LTTE connections, (in regard to which, credible evidence was placed before Court) was justified and that no violation of Article 13(1) rights were occasioned.

This decision has been critiqued by one analyst on the following basis;

*“(the decision) may be interpreted as implied by laying down the proposition that, where there is credible information as to involvement of an arrested person who poses a threat to national security, there is no requirement for such person to be informed of the reason for the arrest. Instead, it is enough for the person carrying out the arrest to be in a position to disclose the reasons for the arrest, whether or not they do so. This approach may be open to a critique that it could weaken fundamental rights under the Constitution and permit greater laxity among law enforcement officers.”<sup>555</sup>*

## **B. Right to be brought promptly before a judge and notification of arrest/detention to independent authority**

*“The period when the suspected person was held in police custody waiting to be produced before a Magistrate was most dangerous. Police used third degree methods to extract confessions in this period. The next problem was that the police detained suspects more than the stipulated 72 hours. When the suspect was brought then before the Magistrate, however, the police said he/she was being produced within the stipulated time period.*

*In the event the law enforcement authorities were of the view that the arrested person was guilty, a detention order (D.O.) was served on the accused person. Here again, though the legal provisions maintained that the Minister in charge of Defense had to order the detention of a suspect, in reality, each police station had several D.O. forms. They were served on the suspect by the police officers. The police routinely abused this provision by holding the suspects in police station and torturing them before a D.O. was served after which the suspects were removed to Boosa, Kalutara or any other detention centre. Therefore, the D.O. was not complied with satisfactorily.”<sup>556</sup>*

As early as in 1946, the Soertz Commission observed that the practice of taking a suspect directly to a police station and keeping the suspect in extended detention without magisterial supervision was an encouragement to torture and CIDTP. Its observation was as follows;

*‘we were given instances in which arrested persons had been taken to Police Stations in such cases with ulterior motives. The Matara Police Station killing case was one such instance. We should wish to see this temptation taken away from the Police as far as possible and we would, accordingly, recommend that in cases in which the identity and address of an arrested person are reasonably, certain, provision should be made to enable such a person to be enlarged on bail or on a bond, at or near the place of arrest.’<sup>557</sup>*

In many instances, arrest takes place on a Friday, as a result of which the twenty four hour time limit is infringed and the person is brought before a Magistrate only on Monday. In addition, the extended period of detention allowed by the Criminal Procedure (Special Provisions) Act, last extended in 2007<sup>558</sup> upon a certificate filed by a police officer not below the rank of the Assistant Superintendent of Police in respect of certain offences, has also relaxed this earlier inflexible rule.

One problematic development is the production of a suspect at the home of a Magistrate or an acting Magistrate, where in many cases, decoys or impersonators are produced.<sup>559</sup>

A recent observation by a senior police officer in respect of police practices that negate the rule regarding magisterial supervision within twenty four hours of arrest is as follows;

*“In the case of the less privileged, not only is physical intimidation the norm during questioning, but specially where injuries have been inflicted upon suspects during such investigations, the injured suspects are held incommunicado and produced before the Magistrate not in open court, but in the Magistrate’s bungalow, after adjournment of court. This is done because if Magistrates are produced in open court, the suspects have the opportunity to complain directly, or through a lawyer, of the trauma and the physical abuse that they have been subjected to and the Magistrate could also note the injuries and call upon the police to explain. ... moreover, when suspects are taken to the Magistrates’ bungalows, the Magistrates’ are understandably disinclined to have suspects who are mostly with criminal backgrounds, to be brought into their private dwellings. The police use this opportunity to their advantage, and leaving the suspects in vehicles on the road, only take the reports before the Magistrate and obtain the magisterial orders thereon.”<sup>560</sup>*

Thus, the norm that suspects ought to be taken before a Magistrate within twenty hours of arrest is almost uniformly disregarded. In *Gerald Perera’s Case* for example, he had been kept in detention beyond the upper limit of 24 hours at the Wattala police station without being produced before a Magistrate. In ruling a violation of Article 13(2) rights, the Court observed that;

*“Reason for speedy production before a Magistrate is that continued detention at police stations creates opportunities for ill treatment as well as false allegations of ill treatment.”<sup>561</sup>*

Out of the many other cases illustrating police detention beyond the permitted period of fourteen days, *MKP Chandralal vs Kodituvakkai*<sup>562</sup> indicates the general trend. Here, the petitioner’s allegation that he had been assaulted and detained *incommunicado* for a period of three days, while being handcuffed to a bed and without food, water or toilet facilities and that he had been tortured resulting in, *inter alia*, the loss of one eye, was accepted by the Court on the evidence.

<sup>557</sup> Report of the Soertz Commission, at page 43.

<sup>558</sup> Code of Criminal Procedure (Special Provisions) Act No 15 of 2005 and 42 of 2007.

<sup>559</sup> AHRC Third Special Report on Torture; *An X-Ray of the Sri Lankan policing system and torture of the poor*, 2005, at p. 12.

<sup>560</sup> Thangavelu, Jayakumar, ‘Equal Access to Justice: Where Should it begin to ensure Human Rights’, AHRC Third Special Report on Torture; *An X-Ray of the Sri Lankan policing system and torture of the poor*, 2005 at pp 54 and 55

<sup>561</sup> Sanjewa, *Attorney-at-Law (on behalf of Gerald Morvin Perera) v. Saranwera, Officer-in-Charge, Police Station, Wattala and others* [2003] 1 Sri LR 317.

<sup>562</sup> *MKP Prasanna Chandralal, AAL on behalf of Dalkadura Arachchige Nimal Silva v ASP Ranmal Kodituvakkai and Others*, SC (FR) Application No 565/2000, SCM 16.11.2006; judgment of Jayasinghe J.

<sup>552</sup> *ibid.*

<sup>553</sup> *Konesalingam vs. Major Mutalif SC (FR) No. 555/2001, S.C. Minutes of 10<sup>th</sup> February, 2003.*

<sup>554</sup> *Shanmugarajah vs. Ditrak, S.I. Vavuniya and others SC (FR) No. 47/2002, S.C. Minutes of 10<sup>th</sup> February, 2003*

<sup>555</sup> de Almeida Guneratne, Jayantha, (Dr), P.C. “Judicial Protection of Human Rights” in Sri Lanka: State of Human Rights Report 2004, Law & Society Trust, 2005 p113, at p129

<sup>556</sup> Abeykoon, D.W., P.C. in an observation published in *Seminar: Twenty Years after*, Sentinel, The Centre for Human Rights and Development (CHRD), 1999, p 13

The police defence that the petitioner was a notorious underworld figure and had been apprehended after attempting to run away, during which a scuffle and the injuries had resulted, was dismissed by the Court and a violation of rights found. In this case, the evidence of an independent witness, who had also been in police custody at the same time, as well as the evidence of an investigating officer, was utilised by the Court to support its finding.

In most cases that come before the Supreme Court, which involve a pattern of unlawful arrest and detention, (respectively violations of Article 13(1) and (2)), one constitutional violation follows the other. However, there have been instances, where even though arrest was ruled to be lawful, due to the existence of a reasonable suspicion based on objective criteria, detention has been judicially decided to be unlawful based on the failure of the police to engage in proper investigations and subsequently the suspect is released, when it is found that there is no involvement in an offence.<sup>563</sup>

Where arrests under emergency law are concerned, suspects are not produced before a Magistrate in open court even after the extended period of permissible police detention has lapsed. In certain cases, where the initial arrest itself is unlawful, the subsequent detention will also be unlawful. Thus, in *Konesalingam vs. Major Mutalif*<sup>564</sup> a labourer had been arrested on suspicion of being linked to the Liberation Tigers of Tamil Eelam (LTTE) and kept for two months respectively in army detention and thereafter, at a police station under emergency regulations during which period he was repeatedly tortured. It was ruled by the Supreme Court that he had been unlawfully detained thereby occasioning a violation of Article 13(2)).

In *Weerawansa vs AG*<sup>565</sup>, which concerned a case of preventive detention in terms of PTA Section 9(1) by ministerial order, the Court used the Directive Principles of State Policy to bring in provisions of the International Covenant on Civil and Political Rights (ICCPR), to which Sri Lanka is a signatory), to restrict abuse of rights under emergency. Thus, it was pointed out that though a person may be arrested under Section 9 (1) of the PTA or any other provision, which specifically dispenses with production before a judicial officer before the making of a detention order, there was an obligation to produce such a person after the making of such an order. Such a production was not merely cosmetic. On the contrary, the judicial officer would then be able to make his or her own observations about the ill treatment of the detainee or the conditions of detention and so on. In this case, the petitioner had not been brought before a judicial officer during his entire period of detention, thus violating his constitutional rights.

Despite such progressive judicial decisions, there is however no observance of these principles in practice.

There is also no notification of arrests and detentions to an independent authority. What ordinarily happens is that if the family members of a suspect taken into custody, informs the Human Rights Commission (HRC), the officers of the HRC merely 'ring around various camps and police stations to trace the whereabouts of people taken into custody.'<sup>566</sup>

### C. Access to a lawyer and to inform members of the family upon arrest

<sup>563</sup> In *Channa Pieris v Attorney General*, [1994] 1 Sri LR, 1, it was observed that though there is an inextricably linked relationship between Article 13(1) and Article 13(2), each has a separate rationale in the scheme of constitutional rights.

<sup>564</sup> SC (FR) No. 555/2001, S.C. Minutes of 10<sup>th</sup> February, 2003.

<sup>565</sup>[2000] 1 Sri LR 387. Justice Mark Fernando writing for the Court, took the view that the later remand orders by the Magistrate, Harbour Court made under the ordinary law, was also in violation of the petitioner's rights. Several such orders of remand had been made even though the Magistrate or the acting Magistrate did not visit or communicate with him. This offended a basic constitutional safeguard in Article 13(2), that judge and suspect must be brought face to face before liberty is curtailed, which was not an obligation that could be circumvented by producing reports from the police. Justice Fernando agreed with the previous view expressed in *Varnok v Raymond* [1996] 1 Sri LR 217 that such remand orders, where they concern a patent want of jurisdiction, cannot be safeguarded under the cover of being 'judicial acts' with consequent immunity from fundamental rights challenge. It was the executive which had the custody of Mr Weerawansa from 3rd October, 1996 and so his detention was by unlawful executive or administrative action.

<sup>566</sup>*Sri Lanka: Wavering commitment to human rights* Amnesty International, AI Index ASA 37/08/96, at page 28.

Family members are not informed of arrests and are often denied access; a text book illustration of this was in Nandini Herath's case referred to above<sup>567</sup> The family is unable to obtain legal representation for the suspect due to financial difficulties in retaining lawyers. Sometimes, linkages between the police and criminal lawyers prevent a suspect from being represented adequately.<sup>568</sup>

In recent times, lawyers who have visited police stations along with their clients have themselves been assaulted; in one such illustration, attorney-at-law D.W.C. Mohotti, who accompanied his client to the Bambalipitiya Police Station, was abused by the Headquarters Inspector, who then threatened to assault him. Mr Mohotti's identity card (ID) was taken from him and it was only after senior lawyers had contacted the Deputy Inspector General (Legal) of the Police Department that the ID card was returned.<sup>569</sup> Besides filing a fundamental rights petition before the Supreme Court, which is pending, the victimised lawyer complained to the Police headquarters as well as to the National Police Commission and an inquiry is now underway.

The succinct opinion meanwhile of one senior police officer with experience of thirty seven years in the Police Department (of which more than twenty years had been as a CID investigator) is that one of the principal causes for torture is the absence of legal representation, when a suspect is produced before a Magistrate at the very first instance.<sup>570</sup> His observation is that this privilege is afforded, if at all, only to the elite.

Where emergency law is concerned, the situation is far worse.

*Since lawyers do not visit army camps or STF camps, they do not receive legal assistance. Prior written permission from IGP is necessary to visit the detainee at the police and in most occasions, the presence of a police officer at the table where a lawyer interviews the client, prevents the exchange of confidential information.*

*In the case of Yogalingam Vijitha who was held at the Terrorist Investigation Division she could not disclose information of being tortured to her lawyer since there were five police personnel seated with her. She was presented with the opportunity to file a fundamental rights application only after her transfer to a prison.*<sup>571</sup>

In a case from 1981<sup>572</sup>, the Court directed that the persons being detained under the PTA should have access to their lawyers. This was in the context of the PTA making no provision for access to a lawyer soon after arrest. Indeed, at one point, the government policy was that withholding the access of detainees to lawyers and family members was one of the important and necessary aspects of detention in terms of the PTA. In the 1980s detainees were often held under the PTA *incommunicado*, in army camps, without access to lawyers and relatives, and in some cases were tortured and even killed, while held in custody.<sup>573</sup>

<sup>567</sup>Pinto-Jayawardena, Kishali and Kois, Lisa in *'Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response'*, Law & Society Trust, 2008, at p. 61

<sup>568</sup> In *Gnanamattu vs Military Officer, Ananda and Others*, [1999]2 Sri LR, 213. a long term Tamil resident of Colombo was arrested and detained for failure to produce a document of registration at the relevant police station despite his protestations that he did not need to produce such a document as he had not come to Colombo from outside and he had his identity card with him at all times. The arrest was on the basis that as he was of Tamil ethnicity and that the identity card was not sufficient to prove his bona fides. The arrest as well as detention was ruled to be unconstitutional by the Supreme Court. It was disclosed during the hearing that when the suspect was taken to courts, his identity card which he had been compelled to surrender to the police previously was found to be in the possession of a lawyer who had then demanded money from the suspect to appear for him. This case is one of many that demonstrates a commonly known nexus between some lawyers practicing in the Magistrates' Court and the police, rendering non-existent the possibility of good legal representation in these cases.

<sup>569</sup>Fernando, Basil, *'Recovering the authority of public institutions'*, Asian Human Rights Commission, 2009, at p.265.

<sup>570</sup> Thangavelu, Jayakumar, *'Equal Access to Justice: Where Should it begin to ensure Human Rights'*, AHRC Third Special Report on Torture; *An X-Ray of the Sri Lankan policing system and torture of the poor*, 2005, at pp 53 and 54

<sup>571</sup> Ganesalingam V.S., *'PTA violates international human rights standards'*, Beyond the Wall, Home for Human Rights, 2002, p 27

<sup>572</sup>*Senbilanayagam and others v. Senewiratne and another* [1981] 2 Sri LR 187

<sup>573</sup> Amnesty International Annual Report 1984, at p.258.

In case from 1997 the Court held that a suspect held under emergency should be allowed access to legal counsel<sup>574</sup>. But this reasoning has not constituted part of the binding ratio in the decisions of the Court in such a manner as to constitute a deterrent to police officers, who refuse to allow suspects detained under emergency to confer confidentially with their lawyers.

Indeed, this refusal has been upheld by the Human Rights Commission of Sri Lanka, which, in a highly criticised order dated 31/01/2008, found that no violation of rights had occurred as a result of police officers insisting that they should be within earshot of two lawyers who had attempted to confer privately with their clients at the Boosa detention camp. The relevant order states *inter alia* that no violation of rights had been occasioned and that ‘still some international laws and standards have not been incorporated into our law....further it should be noted that the Sri Lankan government is not bound to follow all international laws and standards.’ This reasoning is directly contrary to the ICCPR guarantees and Sri Lanka’s obligations thereto.

#### D. Independent medical examination upon arrest

Medical examination of detainees is frequently attended by fundamental irregularities in procedure and is often delayed. Thus;

*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.* <sup>575</sup>

Further, a significant obstacle for obtaining convictions under the CAT Act is the lack of access to independent medical examinations for the detainees, while still detained.<sup>576</sup> In fact, a common trend in prosecutions under the CAT Act is the delay in the medical examination afforded to an accused. For example, in the acquittal of the torturers of Gerald Perera, the High Court commented as follows;

*The most important evidence regarding his (Gerald Perera’s) health condition is the evidence given to Court by the Assistant Judicial Medical Officer Wijewardena. This doctor has not examined Gerard Meryn 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.*<sup>577</sup>

In the instant case, the victim was examined by the Judicial Medical Officer one month and ten days after the incident.<sup>578</sup> In *Nandini Herath’s Case*, which is examined earlier, she was consistently deprived of medical attention.<sup>579</sup> Yet, the medical officer, who examined the suspect had reported that she had neither internal injuries nor external injuries. The prison authorities at the Kandy Remand Prison referred her to the Judicial Medical Officer (JMO) at Kandy General Hospital who merely recorded two contusions and a fracture.<sup>580</sup> Even though the torture was committed after she was arrested on 8 March 2001, it was only as late as 8 October 2002 that an authoritative medical report was issued by a forensic medical professional<sup>581</sup>, testifying that the

genital injuries were consistent with the victim’s version of the manner in which the injuries occurred.

One good illustration of the deficient procedure in this respect is shown in the testimony of a senior police officer, who observed that, upon being asked by the Attorney General, to interview and re-record the statements of five doctors in relation to a torture victim, he had found significant irregularities in the process. In this case, one of the doctors had not found any injuries even though the other four doctors had found grievous injuries. However, on interviewing this one doctor, he had found that this doctor was not at all sure as to whether the identity of the youth, whom he had examined was the same as that of the torture victim for the reason that the identity card of the suspect had not been checked. Neither had his fingerprints been taken on the Medico Legal Form. Thus, the fact that there is no ‘compelling requirement in the Medico-Legal Examination procedure to make it mandatory for a doctor to have a record of the identity of the examinee produced before him’ is noted as being of immediate concern.<sup>582</sup>

In his February 2008 Report following a mission to Sri Lanka, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak, reported a serious shortcoming in the process whereby a suspect is taken for medical examination before a Judicial Medical Officer (JMO).<sup>583</sup> In most cases, he observed that 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.<sup>584</sup> Also, he found that 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.

*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 HRC, instances where probable cases of torture are discovered.* <sup>585</sup>

Meanwhile, study of the cases of victims of torture held under the PTA and produced for examination at the initiative of the police, reveal that these examinations are engaged in purely for the purpose of protecting them from allegations of torture in possible fundamental rights applications later.

*What happens in practice is that police along with the suspect will produce the Medical-Legal Examination Form (Police/20). The police officer enters names, address etc and the medical officer promptly fills up the balance columns and hands the Form back without examining the suspect.* <sup>586</sup>

Examples illustrate this irregular procedure. In application FR No 363/2000 a laborer was arrested by the Chettipalayam STF on 19 April 1999 and was handed over to the Kaluwanchikudy Police and then handed over to the Counter Subversive Unit (CSU) where he was subjected to torture. The police while denying the allegation of torture submitted to the

<sup>574</sup> *Sunil Rodrigo v De Silva* [1997] 3 Sri LR 265. where a former Minister was detained under emergency law without access to legal counsel, the Supreme Court had granted interim relief allowing Cooray’s right of access to lawyers on the basis that he should not have been denied that right, but this did not form part of the substantive judgment

<sup>575</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at para. 73.

<sup>576</sup> *ibid.*, at para.77.

<sup>577</sup> *Republic of Sri Lanka vs Suresh Gunasena and Others*, HC Case No 326/2003, HC Minutes 02.04.2008, at p 12. (English translation of the original judgment written in Sinhala).

<sup>578</sup> *ibid.*

<sup>579</sup> Pinto-Jayawardena, Kishali and Kois, Lisa in ‘*Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response*’, Law & Society Trust, 2008, at p. 61.

<sup>580</sup> *ibid.*

<sup>581</sup> *ibid.* Report issued by Professor Ravindra Fernando, Professor of Forensic Medicine, University of Colombo

<sup>582</sup> Thangavelu, Jeyakumar, ‘*Equal Access to Justice: Where Should it begin to ensure Human Rights*’, AHRC Third Special Report on Torture; *An X-Ray of the Sri Lankan policing system and torture of the poor*, 2005, at pp55 and 56.

<sup>583</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at para. 38.

<sup>584</sup> The Government reported to the Special Rapporteur that it is generally the practice of JMOs to request that accompanying police officers remain outside the examination area/room.

<sup>585</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at para. 39.

<sup>586</sup> Ganesalingam, V.S., in ‘*Case study of custodial torture survivors*’, Beyond the Wall, Home for Human Rights, 2005, at p 22

Supreme Court, five medical reports obtained on production of the suspect before medical officers on their initiative during a short period of 2 months.<sup>587</sup>

According to the Officer in Charge (OIC) of the CSU (the 3<sup>rd</sup> Respondent) the applicant was produced on 15 June 1999 twice, once before recording the confession and the other after recording the confession. Yet, the author states after a meeting with the aforesaid victim that he was never examined and the Medical officer did not ask for his name or consent for examination. In reference to the 5 medical examinations on 17 August 1999 he was examined by the same JMO on orders of the court and the report contained the fact that he had 20 injuries caused by torture, in other words the results of the medical examination confirmed his allegation of torture. The Supreme Court, in rejecting the five medical reports, stated thus;

*“The Medico-Legal Examination Forms (1R4, 3R3, 3R6 and 3R7) produced by the Respondent is self serving evidence and no reliance could be placed on them.....their contents are totally contradicted by the Medical reports stated 30 August 1999 submitted pursuant to an examination carried out on an order by the Magistrate. In the circumstances I place no reliance on the contents of Medico-Legal examination forms marked 1R4, 3R3, 4R6 and 3R7”<sup>588</sup>*

It has been observed that one of the major problems under the current system is that whether or not a detainee held under the PTA or ERs is examined by a doctor is entirely at the discretion of the detaining authorities.<sup>589</sup>

*“Unfortunately on occasions doctors do not record evidence of torture or sometimes provide false reports supporting the police or security forces’ version of how injuries were inflicted acting perhaps in an esprit de corps among servants of the state. ...in addition to providing false evidence, some doctors have also indirectly participated in torture by providing treatment to victims thereby perpetuating the practice.”<sup>590</sup>*

#### E. Absolute prohibition of confessions made to police officers

While the purposes for which torture and CIDTP is resorted to are discussed in Section 5.2. below, the following analysis limits itself to the factual context in which instances of confessions have been obtained under duress by suspects during the initial hours of interrogation.

Where suspects of predominantly Sinhalese ethnicity are concerned, they are tortured by police officers and confessions are obtained from them with the intention of compelling them to confess to unsolved robberies or the committal of other offences. This is due to public pressure exerted on the police in respect of solving such crimes and bringing the offenders to book or due to undue influences exerted upon the police by one of the parties connected to the dispute. The other pattern evident is that persons are arrested for frivolous reasons and are then severely beaten or assaulted with confessions being extracted from them, at a later stage in police custody, with a view to justifying the arrest and detention.

Where persons of predominantly Tamil ethnicity are concerned, confessions are sought to be extracted from them while under torture in police custody in order that they implicate themselves with the Liberation Tigers of Tamil Eelam.

<sup>587</sup>ibid, These reports contained interesting remarks by the medical officers:- 3R2 dated 19.04.1999, issued by Deputy Medical Officer (DMO) Kaluwanchikuddu before whom the Petitioner was produced by Chettipalayam STF – Remarks- no external injuries, 3R3 dated 20.04.1999 was issued by the same DMO on the Petitioner being produced by Kaluwanchikuddu Police, remarks- no external injuries, 3R4 dated 21.04.1999 was issued by Judicial Medical Officer (JMO), Batticaloa whom the Petitioner was produced by the CSU, remarks- no external injuries, 3R6 dated 15.06.1999 was issued by the same JMO on being produced by the CSU, remarks- he is anxious about his family, 3R7 dated 15.06.1999 was issued by the same JMO on being produced by the CSU, remarks- torture/frightened.

<sup>588</sup>ibid

<sup>589</sup>Amnesty International, June 1999, “SRI LANKA: Torture in Custody”, AI INDEX: ASA 37/10/99., p 32, 33

<sup>590</sup>ibid.

Typical cases that are generally illustrative of these trends are as follows;

- Jayakody Arachchige Don Ajith Rohana Chandrakumara was arrested by the Peliyagoda police on 2 November 2000 and was badly assaulted with a view to implicating him in a robbery, consequent to which he signed a statement and a detention order was obtained to keep him in custody. His fundamental rights petition before the Supreme Court resulted in him being awarded compensation on the basis that torture had been proven and that there was no evidence implicating him in any robbery. In the circumstances, his ‘confession’ was not ruled to be in order.<sup>591</sup>
- R.M.P. Prasanna had been arrested by police officers of the Chilaw Police Station on 22 January 2003 and after being stripped, had his genital area severely beaten following which he was forced to place his signature onto a typed statement that was not read over or explained to him, but which implicated him in several robberies that had occurred in the area. The Court ruled that his ‘confession’ was not supportable and that his alleged involvement in the robberies was not supported by any other evidence and declared a violation of his rights to be free from unlawful arrest, detention and from torture and CIDTP.<sup>592</sup>
- Mahesh Kumar, an eleven year old teenager was arrested on 6 February 2005 by police officers of the Wattagama Police Station after a dispute had occurred in school between Mahesh and another boy. Due to the fact that the parents of the other boy were related to a police officer attached to the Wattagama Police Station, the other boy was not brought to the police station, but only Mahesh was brought and was threatened to sign a statement, even though neither he nor his father had seen the contents of the statement. He was abused in foul language during the period of detention, produced before the courts and charged by the police with committing an offence which his parents insist is false;<sup>593</sup>
- Naresan Sivakumar was arrested on 19 April 1999 by officers attached to the Chettipalayam Special Task Force (STF) Camp and thereafter handed over to the Counter Subversive Unit, Batticaloa, where he was tortured and forced to sign a confession stating that he was associated with the Liberation Tigers of Tamil Eelam (LTTE). The Court, in examining the petition, ruled that there had been a violation of the right to be free from torture and CIDTP even though the petitioner may be a hard core criminal – or by implication – ‘a terrorist.’<sup>594</sup>
- Yogalingam Vijitha was arrested on 21 June 2000 by police officers attached to the Negombo police station and tortured in the most brutal manner including being subjected to sexual torture. She was then forced to sign a confession to the effect that she was a suicide bomber in the pay of the terrorists, even though this was not read over or explained to her. Her plea filed in the Supreme Court regarding the violation of rights was accepted on all counts by the Court which, following a careful reading of the evidence, condemned the treatment that she had been subjected to in the strongest terms;<sup>595</sup>

For example, it has been observed by a senior human rights lawyer appearing in cases of detainees under the PTA and Emergency Regulations that in 99% percent of the cases filed under the PTA, the sole evidence relied upon are confessions made to an ASP or an officer

<sup>591</sup>Jayakody Arachchige Don Ajith Rohana Chandrakumara vs OIC, Special Investigations Unit, Peliyagoda Police Station and others, SC(FR) No 681/2000, SCM 05.06.2002.

<sup>592</sup>R.M.P. Prasanna vs Jude RPC and others, SC (FR) No. 106/2003, SCM 11.12.2003

<sup>593</sup>AHRC Third Special Report on Torture; *An X-Ray of the Sri Lankan policing system and torture of the poor*, 2005, at pp 96-97.

<sup>594</sup>Sivakumar vs OIC, Special Task Force Camp, Chettipalayam and others, SC (FR) No; 363/2000, SCM 01.10.2001.

<sup>595</sup>Yogalingam Vijitha v. Mr. Wijesekara and others, SC (FR) App. No. 186/2001, SCM 23.08.2002. This case is discussed in detail in Section 5.2. below.

above this rank. Therefore, persons are charged on the grounds of involuntary statements derived through force by the police. Courts have convicted persons on evidence of confessions in spite of –

- Medical reports of torture before court.
- The accused had no legal representation during interrogation or when produced before a Magistrate.
- The absence of an independent and competent interpreter during interrogation.<sup>596</sup>

Meanwhile, the confession itself is not scrutinized rigorously in legal proceedings

*Detainees do not mention of torture to the Magistrate at their first hearing because of ignorance or fear of reprisals. However, the Court interprets this in a manner in favourable to the accused and fails to comprehend the mentality of the accused. In Singarasa's Case, (Colombo High Court No 6825/94), when Singarasa failed to complain of torture at the first given opportunity the trial judge stated that, 'on a clear examination of the evidence it is clear to me that at the very first opportunity he would have informed an official of such assault described by him in this court had taken place and he could have obtained protection. That is the behaviour that can be expected from a normal human being'<sup>597</sup>*

#### 4.2. Right to invoke the writ of *habeas corpus*

In the exercise of this jurisdiction by both the Court of Appeal and the High Court as discussed above, the matter is ordinarily referred to the Magistrates' Court for preliminary inquiry. This inquiry takes years to complete, due in part to the absence of the witnesses and also to the dilatory tactics adopted by the lawyers appearing for the suspect army officers or police officers accused of keeping the petitioner in custody. As observed by a mission team of the International Commission of Jurists who visited Sri Lanka in 1997, *habeas corpus* applications take years to be disposed of, regardless of the fact that in most jurisdictions, they are treated as a matter of utmost urgency. The observer team pointed out that a tougher attitude should be taken towards adjournments. Equally, the inquiry process by a court of first instance is cited as being a considerable factor for the delay.

The delays are most particularly seen in 'sensitive cases' emanating from the conflict in the North-East. For example, in one *habeas corpus* application filed in the High Court of Jaffna in 2003, the matter has been continuously postponed following its referral to the Magistrates' Court for preliminary inquiry. Perusal of the relevant journal entries indicate that in most instances, postponements have been at the instance of the state counsel appearing for the respondent army officers.<sup>598</sup> Other general reasons for postponements include; inability of witnesses to be present, absence of a competent interpreter and unspecified 'personal grounds' of counsel appearing in the applications. In addition, the tense security situation continually prevalent in these areas has also resulted in the postponements of hearings.

In many cases, requests are made by the respondent army or police officers to transfer the cases from the relevant Provincial High Court to the Colombo High Court or to the Court of Appeal for hearing. However, the problem with this transfer process is that, witnesses are then compelled to travel all the way from their places of residence to the capital city to attend the case. Where *habeas corpus* applications are transferred from the High Courts in the North-East such as Jaffna, Trincomalee or Batticaloa, travelling becomes specially problematic for petitioners of

Tamil ethnicity, who are unable to withstand the rigorous security checks prevalent in the city quite apart from the financial constraints involved.

#### 4.3. Extension of detention

The level of magisterial supervision in extending periods of detention has dwindled to a mere technicality and lax magisterial actions in this regard have been subjected to criticism by the Supreme Court<sup>599</sup> itself as well as the High Court.<sup>600</sup> What happens practically is that the Magistrates do not conform to the law that prescribes an upper limit to the period of time in which a person may be kept in remand, upon extensions being requested for on prescribed grounds, but keep on continuously remanding suspects.

In addition, the fact that emergency law allows indefinite detention of persons has resulted in the safeguard that extension of detention is allowed only on magisterial orders being rendered nugatory.

#### 4.4 Pre-trial detention including access of police officers to suspects and possible transfers

The following extract is pertinent to this discussion:

*"Even Judges do not seem to be moved by long remands of persons against whom no charge has been laid. Unquestioningly and without any regard to the rights of the citizen they grant the applications of Police Officers for illegal remand after illegal remand extending in some cases for months. Human rights declared in enactments do not enforce themselves. Someone has to enforce them. Our legal system lacks that someone and the weak and the poor who are denied their rights are left to suffer in silence. We have for that reason provided in the draft Police Act a provision making it an offence punishable with a fine not exceeding five hundred rupees or with rigorous imprisonments for a term not exceeding twelve months or with both such fine and such imprisonment to detain in custody an accused person beyond twenty-four hours. Such a provision should serve as a deterrent to Police Officers who are inclined to transgress the law. ...."*<sup>601</sup>

*It is most unfortunate that the very functionaries appointed to keep watch and ward over the Police have failed to discharge their sacred function. Today accused persons are kept on remand for long periods, in some cases as much as two years. This is a scandalous state of affairs and the sooner Magistrates realise the extent to which they are by their illegal orders denying the liberty of the subject the better it is. Else one may justifiably ask : *Quis custodiet ipsos custodes?* (Who watches the watchmen?) We hope that this practice will stop even now after we have drawn pointed attention to this state of affairs....."*

*The injunction laid down (...) that every investigation (...) shall be concluded without unnecessary delay has in recent years come to be disregarded, and disregarded with impunity. There does not appear to be any urgency in carrying out investigations into crimes. This lack of a sense of urgency contributes in no small measure to the miscarriage of Justice. Witnesses do not have perfect memories and the impression of what they saw and heard is bound to fade with the passage of time."*<sup>602</sup>

Though this observation was made decades back, it remains relevant in the current context, where the possibility of a suspect languishing in remand for many years is high. As explained previously, pre trial detention could be indefinite even in terms of the ordinary law. Regular magisterial supervision has not acted as a safeguard against arbitrary detentions, beyond the legally permissible limit; instead Magistrates are commonly known to routinely extend the periods of remand without inquiring into the reasons put forward for continued detention.

<sup>596</sup> Ganeshalingam V.S., in "PTA violates international human rights standards", Beyond the Wall, Home for Human Rights, 2002, p 32

<sup>597</sup> *ibid.*

<sup>598</sup> Case No HCA 08/2004, Minutes of the Magistrates' Court of Chavakachcheri, 12.02.2007.

<sup>599</sup> *Weerawansa v Attorney General* [2000] 1 Sri LR 387.

<sup>600</sup> *Madilpanatthe Jayalathge Thilakarathna Jayalath*, (HC 9775/99, order of S. Sriskandarajah J. ).

<sup>601</sup> This Act has not been implemented.

<sup>602</sup> Sessional Paper XXI-1970, Final Report of the Police Commission of 1970, at pages 59 to 62.

The situation is, as again explained previously, worse where detention under emergency law is concerned where the trial may take years and the suspect is kept in custody till then. The judiciary has, in some cases, intervened to ensure that rights are not abused in regard to pre trial detention. In one particular instance of pre trial detention under the PTA,<sup>603</sup> it was held that as there was no reasonable suspicion established of any unlawful activity on the part of the detainee, his arrest in terms of PTA Section 6(1) as well as his subsequent detention was unconstitutional. PTA Section 7(1) authorising detention up to a period of seventy two hours would apply only to a valid arrest made under PTA Section 6(1). Where the arrest had been unlawful as was the case in this instance, the condition imposed by Article 13(2) of the Constitution that the arrestee be brought before a judge of the nearest competent court according to procedure established by law, would apply.<sup>604</sup>

Further, the fact that police officers have unlimited access to suspects kept under emergency and the power to transfer them to other places of detention is particularly problematic. For example, the February 2008 Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak<sup>605</sup> details instances of detainees being transferred, consequent to his visits to those places of detention, with the consequent inference that such transferrals were to prevent him from seeing that they were tortured.

*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. 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.*

#### 4.5. Administrative detention

Judges were slow to assert their authority in cases of preventive detention in early years. In 1990<sup>606</sup> and negating the effects of earlier more progressive decisions,<sup>607</sup> the Supreme Court held that a person kept in preventive detention is restricted from claiming certain crucial rights such as the right to be told the reason for arrest and to be produced before a judge for the nature of his detention to be scrutinized. Later, this judicial attitude changed for the better and it began to be consistently articulated that preventive detention should not mean the absence of ordinary safeguards in respect of arbitrary arrest and detention. In *Weerawansa vs AG*<sup>608</sup>, preventive detention in terms of PTA Section 9(1) by ministerial order, ostensibly on the basis that there was "reason to believe or suspect" that such person is concerned in unlawful activity, was ruled

<sup>603</sup>*Weerawansa v Attorney General* [2000] 1 Sri LR 387. R.P.A.L. Weerawansa, an Assistant Superintendent of Customs was taken in by the CID on the 30th of April, 1996 under Section 6(1) of the PTA. He was detained thereafter up to the 2nd May, 1996 under PTA Section 7(1). From 2nd May to 2nd October of that year, he was detained by ministerial orders under PTA Section 9(1). Thereafter, he was transferred into the custody of the Customs and detained from 3rd October to 31st December under a magisterial remand order.

<sup>604</sup>*ibid.*

<sup>605</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at para. 11. These conclusions were denied by the Government.

<sup>606</sup> *Wickremabandu vs Herath* [1990] 2 Sri L.R. 348.

<sup>607</sup> *Dhammika Sriyalatha vs Baskaralingam*, C.A Application No 7/88; C.A. Minutes of 07/07/1988. See also *Kumarantunge vs Samarasinghe* [1983] 2 Sri L.R. 63.

<sup>608</sup>[2000] 1 Sri LR 387.

to be unconstitutional, as the continued detention had been at the instance of the CID, which had merely informed the Defence Minister, (who was also the Executive President) of their wilfully false and unreasonable conclusions, thereby misleading her. There had been no independent exercise of judgment by the Defence Minister.

Decisions of this nature, however good they have been in theory, have had little impact. Emergency law continues to create an environment which permits torture and CIDTP, due to the extended period of detention, (which could extend up to two years and more as aforesaid), which at times takes place in locations not supervised by the prisons.<sup>609</sup> Though there is provision for magisterial supervision within thirty days of arrest<sup>610</sup>, this is not an adequate remedy for preventing ill treatment as the magistrate does not question the suspect as to whether he/she had been subjected to ill treatment and also because there is little magisterial discretion in ordering the suspect back to remand. There is also no requirement to publish a list of authorized places of detention. Though there is provision for appeal to an Advisory Committee, the members of such Committee are appointed by the President, thus ensuring no independent representation. Practically, this Advisory Committee has proved to be of little effect in safeguarding the rights of persons arbitrarily detained.

#### 4.6 Guarantees of fair trial, legal assistance, judgment, appeal and imprisonment

##### A. The Trial Process

There is noticeable failure to ensure all the facilities to an accused in order to enable himself or herself to defend himself/herself adequately. In a recent seminal criminal appeal<sup>611</sup>, the failure to annex the documents listed in the indictment, came to the specific attention of the Supreme Court. It was decided that this failure resulted in the impairment of the accused's right to a fair trial, which is guaranteed to him under Article 13(3) of the Constitution.<sup>612</sup>

Bringing in the concept of "equality of arms" in a criminal trial under constitutional protections, it was observed that Article 13(3) of Sri Lanka's Constitution, not only entitles an accused to a right to legal representation at a trial before a competent court. In addition, it entitles the accused to a fair trial and that would mean anything and everything necessary for a fair trial. The Court applied South African law in this respect on the basis of the right to information read with the right to a fair trial. In the opinion of the Court, the fact that South Africa had an independent right to information does not make a difference as the right to a fair trial recognised by Article 13(3) of the Sri Lankan Constitution, in fact, includes the ancillary right to all information necessary for a fair trial. The Supreme Court emphasized the principle that there is a general duty on the state to disclose to the defence all information which it intends to use and even, which it does not intend to use, but which could assist the accused in his defence. This is however, subject to the limitation excluding privileged information and when information is delayed due to the investigation not being complete.

Though efforts were made to amend the law thereafter so as to afford to the accused all material information relating to the commission of the offence, including the field notes made by the police and other connected documentation, this was not successful. Currently therefore – and despite the above mentioned Supreme Court judgment - the accused is denied such information in many cases. In situations where witnesses are called, who in some cases are police officers, the denial of such relevant information regarding the case against the accused is subject to critique. In this instance, the accused's right to an adequate defense is denied to him/her.

<sup>609</sup> Regulation 19 (3) provides that detained persons shall be detained "in such place as may be authorized by the Inspector-General of Police and in accordance with instructions issued by him" for a period up to one year (read with Regulation 19 (1).

<sup>610</sup> Regulation 21 (1), EMPPR 2005.

<sup>611</sup> *Danwate Lyanage Wijepala vs The Attorney General*, SC Appeal No; 104/99, SCM 12.12.2000; per decision of Justice Mark Fernando.

<sup>612</sup> 'any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.'

Meanwhile, the practice is that some lawyers act as unofficial Magistrates and are appointed by the Ministry of Justice in that respect. They perform largely administrative functions such as the postponement of cases, at times when the Magistrate is not able to sit. However, though the functions of such unofficial Magistrates are limited, the role that practicing criminal lawyers, who often maintain links to the police, play in even temporarily officiating as Magistrates is problematic.

At times, the diminished capacity of judges themselves reflects adversely on the nature of the legal rights of the accused. This is illustrated by a recent example, where the accused had made a statement from the dock consequent to which the High Court judge had requested the prosecuting counsel to cross examine him. When the prosecuting counsel had refused to do so, pointing out that such cross examination is not permitted under the law, the judge himself had cross examined the suspect. This untoward judicial act clearly infringes a basic criminal justice right that the accused can make a statement from the dock, without being subjected to cross examination. It is reliably understood that the Attorney General has appealed in this case.<sup>613</sup>

Long delays during the pre-trial and trial stage are a common phenomenon. While indictments take years to be served in some cases (which delay is attributed to the lack of resources in the Attorney General's Department), delays in trials are occasioned both by the state counsel and the defence counsel moving for dates, which are granted without demur by the judge.

*"Usually, a prosecuting counsel (State Counsel) prosecutes in a High Court for three to six months. Unless the prosecuting counsel is keen to study his cases and the judge is committed to conclude the cases, the most that can happen during this period is that the evidence of one or two witnesses are concluded. Prosecutors and the judges, who have mastered this art, know how to play for time. The prosecutor is aware that it is sufficient if he can manage to lead a witness for half an hour or so as the judge will then, adjourn the case for another date. When witnesses are led at random in an unplanned prosecution, it ends with the obvious outcome – an acquittal. Thus, the system facilitates marking of time. It is sad to note that there have been instances where State Counsel who have been prosecuting for several years have had no experience in conducting a prosecution before the High Court from beginning to end. Such officers who cannot perform their official duties with confidence naturally tend to succumb to internal and external pressures and interferences as regards their official functions. Their mindset is to 'somehow survive in their job' with the least realization that their functional involvements as State Counsel call for much higher standards of honesty, integrity and commitment than for an ordinary 'job'."*<sup>614</sup>

The manner in which a trial 'moves' through the High Court impacts on laws' delays. Since the option to conduct non jury trials in regard to offences in the Second Schedule<sup>615</sup> was introduced as stated previously, the accused more often opts for non jury trials on the advice of their lawyers. Thus, almost 95% (or even more) of cases under the terms of the Second Schedule are non jury trials. The abandoning of the earlier practice of holding day-to-day trials in the High Court has been negative in that this has afforded the opportunity for long postponements, where sometimes several months lapse between the testifying of a witness on one occasion and the next occasion.

*"Jury trials are now optional. The choice is with the accused, which is to say the lawyers of the accused. One advantage of a jury trial is that when a hearing begins it will usually continue each day until complete. However, when trials are heard without juries there are usually many postponements. Many partly heard cases will be fixed for a single working day. Very often, only parts of a witness's evidence can be heard on that day. In some cases the evidence of a single person is stretched across several days that are spread over several months or more. From the evidence of one witness to the next there may be gaps of one or two years, prolonging the whole trial process and defeating the possibility of speedy justice."*

<sup>613</sup>De Silva, Samith, 'A Judicial Response in regard to Imposing Accountability for "Enforced Disappearances"', LST Review, Law & Society Trust, Volume 17, Issue 234 & 235 April & May 2007, at p. 37

<sup>614</sup>ibid.

<sup>615</sup> ibid, at p. 36.

*Judges and prosecutors are unable to work effectively under these conditions. With a pile of partly heard cases, they have inadequate time to prepare for each one, in contrast to when a case is heard from start to finish. To succeed under the adversarial justice system prosecutors need to develop a strategy and carry it through. This is made much more difficult when cases are spread out across months and years. Meanwhile, a judge may be transferred before a case is done. To complete it, the judge must be gazetted to come back to the same court. Alternatively, trials are begun all over again, particularly when judges are promoted to higher courts or retire."*<sup>616</sup>

Indeed, departure from formerly strictly enforced rules of procedure in the criminal justice system currently characterizes almost every aspect of the trial process. For example, generally an average trial takes 3-4 days and the trial is heard from beginning to end. However, even though it is not legally permissible, there are instances where jury trials are not conducted from day-to-day, but instead have been adjourned by the relevant High Court judge for weeks.<sup>617</sup> In instances where trial is by a judge sitting alone, the situation is even worse.

*"The judges usually fix a large number of trial cases (usually six to ten) a day and as a result of this, the time of recording evidence of a witness is reduced to 30 to 45 minutes or even less on each day of trial. This compels witnesses to attend court on several days to give evidence causing untold inconvenience. At the same time, this facilitates the accused and the victims/witnesses to meet in court. Such meetings provide golden opportunities to the police and the officers of the armed forces when they happen to be the accused. They make the best out of those opportunities. Long adjournments between two trial dates help interested persons to approach the witnesses and come to terms with them to go back on their evidence. Quite often the adjournment between two trial dates where the same witness gives testimony can range from a couple of months to even to two years. Also, it is usual for differences in testimony to occur due to forgetfulness as a result of long delays and this leads inevitably to acquittals."*<sup>618</sup>

Moreover, intermittent trial dates help lawyers to collect more fees from their clients as fees are often paid on a daily basis. Trials before jury were earlier heard continuously to an end (day to day). However, in non-jury trials, the situation is different; as result of interim adjournments, lawyers do not have to get ready for the whole case. In short, both the prosecution and the defense generally do not get ready for the whole case - neither party plans the case as a whole.

This long drawn out nature of the trial process has undoubtedly contributed towards an uncontrollable overall increase in the cases before High Courts. As a result of the large number of pending cases, there is an inordinate delay even in the commencement of a criminal case before the High Court. These delays before the commencement of trial sometimes range from three years to ten years or more. Excessive delays also occur at the Government Analyst's Department. Often, the Government Analyst takes a couple of years to examine the samples sent in detections of heroin, leave aside the productions sent for analysis in cases of murder and etc. If the judge opts not to grant bail until the Government Analyst sends his report to court, the suspect may be denied bail for a very long period, even if the quantity of heroin is small. Delays at the Government Analyst's Department are attributed to lack of resources and staff.<sup>619</sup>

The government has conceded that long delays in trials are a problem and has stated that legislation giving the judges power to continue with criminal trials on a day to day basis with an aim to expeditiously conclude criminal trials will be introduced.<sup>620</sup> However, this is not evidenced in practice.

A further factor is that owing to the excessive time that lapses till the commencement of the investigation, the police and services personnel implicated in the case have ample time to falsify

<sup>616</sup>Asian Human Rights Commission, (June 15, 2005) "Better management could address Sri Lanka's delays in justice", AS-63-2005

<sup>617</sup>De Silva, Samith, 'A Judicial Response in regard to Imposing Accountability for "Enforced Disappearances"', LST Review, Law & Society Trust, Volume 17, Issue 234 & 235 April & May 2007, at p. 37

<sup>618</sup> ibid.

<sup>619</sup> ibid, at pp. 36-37

<sup>620</sup> CAT/C/LKA/CO/2/Add.1(20 February 2007) at para 13.



relevant documentation. It must be noted that all these actions amount to dereliction of duty and grave misconduct according to the cumulative effect of the Establishments Code as well as internal departmental orders of the police.<sup>621</sup> However, no action is taken on a consistent and regular basis.

In a recent report of a committee appointed to inquire into laws delays,<sup>622</sup> the committee recognized the need for police officers to be compulsorily required to attend court, given the frequency with which police officers obtain leave and absent themselves from sittings on grounds castigated by the committee as being 'inappropriate.'<sup>623</sup>

The police themselves have been identified as shouldering a great part of the blame for delays.

*'In this matter of delay in trying or inquiring into cases, we would point out that in recent years the Police themselves have been, to a great extent, to blame. It is quite a common practice for them to ask for adjournments on inadequate grounds. We would suggest that Magistrates would refuse these applications on the part of the Police even more sternly than other applications. With all the resources and facilities available to them they should be able to be ready to produce their evidence on the due date. In other words, sections 157 (1) and 289 (5) of the Criminal Procedure Code should be strictly enforced. Some cases fail, not seldom, in the Assize and District Courts owing to the fact that in the long interval that has elapsed between the inquiry and the trial, illiterate and unintelligent witnesses have forgotten all the details of the case and give their evidence in variance, in some respects, with their version in the Court below, and we know how easy it is to exaggerate the importance of these variations and to impress Juries with them. In other instances, in the long interval, parties have been reconciled, not infrequently through some payment made, and witnesses are then bought over and a true case collapses.'*<sup>624</sup>

However, the problem is of a more extensive nature than the dilatory or obstructive attitudes of police officers. Rather these tactics are symptoms of a more serious deterioration in the criminal justice system as is sought to be explained in the following observation;

*'This phenomenon of the police virtually defying the authority of courts was evidenced from 1971 when protection of 'security concerns' were perceived to override every other concern, including the obligations of police officers to attend legal proceedings. The result was that police officers who (for reasons of their own), did not wish to attend court made use of the perennial excuse of 'having to attend to serious matters.' Thus we see that the authority of the court system suffered greatly due to the acceptance of this practice. In recent times, ostensible concern for protection of national security has undermined concern for implementation of the rule of law. Among the most important structural questions that affect the court system is the undermining of the importance of the legal process and the independence of the institution of the judiciary. These are concerns that should receive the highest priority for attention.'*<sup>625</sup>

Then again, the question of delayed justice being the direct responsibility of lawyers and judges had been a concern occupying public space as far back as 1948 as is evident by this observation by the Soertsz Commission of Inquiry on the Police

*'By the time the offender comes to be punished, this offence is only a dim memory, and people have lost interest in the case. The psychological effect is disastrous. ....the delays that now occur are due to nothing but indifference on the part of Magistrates or to their being too ready to accommodate parties and*

*their pleaders by granting postponements. ....the records of summary cases tell a different tale, a tale of adjournments and postponements on the flimsiest grounds and, not infrequently, on no grounds at all. We regret to say it, but it does appear to us that all this is due to a lack of responsibility on the part of some Magistrates. It is common knowledge that cases were tried and concluded with admirable expedition when the minor judiciary was, for the greater part, filled by Civil Servants, and although one naturally expected an improvement in this respect with professional judges on the Bench, one must confess that this expectation has not been fulfilled on the whole. This is a matter calling for serious and immediate attention.'*<sup>626</sup>

The Soertsz Commission, in fact, called for the re-introduction of the system of regular and frequent inspection of the records of Magistrate's Court cases by independent inspecting officers and not by 'any assistant of the Department of the Legal Secretary.'<sup>627</sup> It was observed that though earlier, this duty had been vested with Judges of the Supreme Court, this was not a practical solution given the volume of work that has devolved upon the Court in the course of the last ten years or so. Though decades have passed since this Commission Report, it is an indictment on our system that the same concerns prevail with greater intensity. Whereas a body such as the Judicial Service Commission (JSC) may have been expected to shoulder this responsibility of ensuring prompt delivery of justice, this has not been evidenced. Pertinently, many recent reports on laws' delays have not considered the impact of failures by judges and lawyers on the problem of laws delays'; for example, the 2004 Report of the government committee appointed to look into laws delays quoted above, does not identify postponements by lawyers which are agreed to by judges, as being a primary concern. This omission has been subjected to eminently justifiable critique.<sup>628</sup>

Even where judicial orders are given at whatever point, their implementation is delayed due to lack of resources of the courts and registries. For example, a torture victim, who was accused of armed robbery on fabricated charges was ordered to be released on bail by the Court of Appeal, this order took considerable time to be implemented by the High Court as it was said that the order of the Court of Appeal contained certain 'typographical errors', which had to be corrected only through a long drawn out process, whereby if a fax machine had been available, this would have been much easier.<sup>629</sup>

## **B. Presumption of Innocence/Accused should not be compelled to testify against himself or to confess guilt**

Trials under emergency law are characterised by the admissibility of confessions against the accused; the burden of proving its voluntary nature is also on the accused, which is often impossible for him/her to prove given that confessions are extracted under torture and in the most secretive of circumstances. This has been of long standing concern in Sri Lanka. In 1996, Amnesty International made the following observation;

*'Just one example of how provisions in the PTA and the ERs fall short of international standards is that both provide that during trials the burden of proving that evidence in the form of a statement made to a police officer was extracted under torture is upon the person making such an allegation. Amnesty International believes these provisions constitute a direct incentive to interrogating officers to obtain information by any means, including torture.'*<sup>630</sup>

<sup>621</sup>For example, Police Departmental Orders No A. 20, No A. 3, and No E. 21 which imposes rigorous duties on police officers in terms of arrests, searches, detention as well as on officers in charge in respect of monitoring the police stations under their authority.

<sup>622</sup>'The Eradication of Laws Delays', Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2<sup>nd</sup> April, 2004, at para.13.1. Members of this Committee, (comprising lawyers from the official as well as the unofficial Bar and chaired by the former Attorney General), were appointed by the Ministry of Justice, Law Reform and National Integration to recommend amendments to the practice and procedure in investigations and Court with a special focus on curbing crime and eradicating procedural delays existent in the administration of criminal justice in Sri Lanka. The Final Report was based on recommendations discussed by the members of the committee over a four-month period from November 2003 to March 2004.

<sup>623</sup> *ibid*, at para. 1.2.a.

<sup>624</sup> *ibid*, at para.1.2.a.

<sup>625</sup> Fernando, Basil, 'Laws Delays: Some Further Perspectives' in Protection and Participation, South Asia Legal Reforms and Human Rights, Vol. 4 No 2, Asian Human Rights Commission, 2007, at p. 10.

<sup>626</sup> Report of the Soertsz Commission, at p. 35.

<sup>627</sup> *ibid*.

<sup>628</sup> de Silva, Frank 'Laws Delays: Taking the Debate Further' in Protection and Participation, South Asia Legal Reforms and Human Rights, Vol. 4 No 2, Asian Human Rights Commission, 2007, at page 14; the writer, a retired Inspector General of Police makes the acerbic comment that 'no reference is made by the committee to lawyers who in like manner, obstruct the course of justice. Else, by inference, the negative effect of the action of the lawyers, if at all, is less than major compared to the action of the police.'

<sup>629</sup> AHRC Third Special Report on Torture; *An X-Ray of the Sri Lankan policing system and torture of the poor*, 2005, at p 209.

<sup>630</sup> Amnesty International, August 1996, "SRI LANKA: Wavering commitment to human rights", AI INDEX: ASA 37/08/96, p 14

Though the government has claimed that convictions solely on the basis of confessions are extremely rare<sup>631</sup>, this is not actually the case. In considering one of the many such instances, where a conviction solely based on a confession was upheld all the way to the Supreme Court, the UN Human Rights Committee recommended that Sri Lanka amend the PTA in order to reverse the burden of proof in this regard. This was an instance of a suspect, who alleged that he had been tortured while in detention to extract a confession, a complaint was put forward in an individual communication<sup>632</sup> submitted against Sri Lanka under the Optional Protocol procedure to the ICCPR.

The Committee declared as follows;

*Even if, as argued by the State party, the threshold of proof is "placed very low" and "a mere possibility of involuntariness" would suffice to sway the court in favour of the accused, it remains that the burden was on the author. The Committee notes in this respect that the willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after the interrogation and ensuing confession) suggests that this threshold was not complied with. Further, insofar as the courts were prepared to infer that the author's allegations lacked credibility by virtue of his failing to complain of ill-treatment before its Magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention.....*

*The Committee concludes that by placing the burden of proof that his confession was made under duress on the author, the State party violated article 14, paragraphs 2, and 3(g), read together with article 2, paragraph 3, and 7 of the Covenant.*<sup>633</sup>

### C. Legal Assistance to Accused

There are frequent complaints by the accused that they are unable to retain lawyers working in a particular Court to appear for them, where the case involves policemen. Lawyers themselves face intimidation and/or threats from the police and are conscious of losing their criminal clientele if they antagonize the police.<sup>634</sup> In one letter by the Bar Association of Wattala to the Inspector General of Police (IGP),<sup>635</sup> lawyers alleged that police officers of the Wattala police were interfering with the work of the lawyers, to the extent that they were unable to conduct their professional duties towards their clients in the proper manner. The lawyers complained that the police have virtually taken control of the presentation of court cases and the defense in this Magistrate's court.<sup>636</sup>

Intimidation of lawyers, who appear for clients in cases, where police officers are involved, is also evident.<sup>637</sup> None of these cases are effectively investigated and the responsible police officers

<sup>631</sup> In 90 percent of cases in Sri Lanka, according to government statistics where evidence is based solely on confessions, the accused are acquitted or given a suspended sentence. The delegates stated that when the victim claims that the confession was made involuntarily, the burden of proof falls upon the accused and in case of doubt, the confessions are rejected as evidence (at CCPR/C/SR. 1437, para 36, unofficial translation). The head of the Government delegation stated that "the courts had been extremely reluctant to convict on the basis of confessions alone. A number of inquiries had been made in the courts in respect of prosecutions under the [PTA] in order to ascertain whether confessions had been obtained voluntarily or not, and in several cases the courts had categorically rejected statements when they did not meet the high standard of proof required by the law. Such cases had been given wide coverage in the media" (at CCPR/C/SR. 1438, para 19 Amnesty International, December 1995, "SRI LANKA: Under scrutiny by the Human Rights Committee", AI INDEX: ASA 37/21/95, p 9

<sup>632</sup> *Nallaratnam Sinharasa v Sri Lanka*, CCPR/C/81/D/1033/2001, adoption of views, 21-07-2004.

<sup>633</sup> *ibid.*

<sup>634</sup> *Prevalence of Torture in Sri Lanka; Persisting Problems and Outstanding Issues*; Alternative Report of the Law & Society Trust and the Asian Human Rights Commission to the CAT Committee, 2005, in *LST Review*, Law & Society Trust, Volume 16 Joint Issue 216 and 217, October and November 2005

<sup>635</sup> See <http://www.abrchk.net/ua/mainfile.php/2004/723/>.

<sup>636</sup> *ibid.*

<sup>637</sup> For one such recent example, see AHRG-PRL-007-2009; SRI LANKA; *Human rights lawyer and activist facing death threat* – this relates to threats issued against Attorney-at-Law Amitha Ariyaratne, was threatened three times with death on 27, January 2009 at the Negombo Police Station by police officers. Mr. Ariyaratne was the lawyer for Mr. Sugath Nishanta Fernando, who was a complainant in a bribery case. Ariyaratne was also representing Sugath's family in a complaint of torture, where some police officers from Negombo Police Station are accused of torturing Sugath. Sugath was later murdered, an incident in which the role of some police officers against whom Sugath has filed the complaint are suspected to be involved. Earlier, this same attorney-at-law had been threatened with death and the Bar Association of Sri Lanka passed a resolution condemning the death threats and requesting an

enquiry from the Inspector General of Police (IGP). However, no officers were arrested or questioned on these death threats. In another recent incident, a grenade was thrown at senior attorney-at-law, Mr J.C. Weliamuna's house, narrowly escaping causing injury to himself and the members of his family. On Oct. 22, 2008, a letter was widely distributed by a group calling itself the Mahason Balakaya (Battalion), which published a threatening message for lawyers who appeared for suspected terrorists: In the future, all those (who) represent the interests of the terrorist will be subject to the same fate that these terrorist mete out to our innocent people. (Vide <http://www.abrchk.net/statements/mainfile.php/2008statements/1772/>).

A related development is government backed intimidation of lawyers, who appear for suspects in cases filed under the PTA/Emergency Regulations. Problematically, their names appear on the official website hosted by the Ministry of Defence as lawyers, who are appearing for terrorists, thus again impinging on the rights of the suspects as well as the rights of the lawyers themselves.

### D. Protection of Witnesses

For decades, it has been an accepted fact that the pressure exerted by the police and the security forces can put severe pressure on petitioners, lawyers, litigants, witnesses and families to drop human rights cases.

Such cases have been documented from the nineties. Thus, in November 1990, the Supreme Court heard complaints from two petitioners that they had been pressured by police to drop their claims. The first petition was directed against police in Homagama Police Station, about 15 miles outside Colombo, and the second was lodged against officers of the Galagedara Police Station.<sup>638</sup>

The Homagama case was particularly informative in this respect in highlighting the nature of the intimidation. In this case, five persons Ratnayake Wijesiri, Katri Achige Gamini Priya Kumara, Mallika Aratchige Anura, Porage Lakshman and Pitipane Achige Mahinda<sup>644</sup> petitioned the Supreme Court in late June 1990 against the Police officers of the Homagama Police Station for allegations of ill-treatment. The case was filed by the Legal Aid Centre of the Bar Association of Sri Lanka. The five petitioners were taken into custody on 23 April 1990 and they were tortured by police officers with the intention of compelling the petitioners to withdraw the fundamental rights petition. The petitioners alleged that the Headquarters Inspector of the Homagama Police, Rohan Fernando, together with six other police officers, inflicted severe torture on them through various harsh methods which caused considerable physical harm to all five petitioners. However, after transferring the petitioners to the Maharagama Police Station by Senior Superintendent, Henry Perera on 6 May 1990, they were examined by the Judicial Medical Officer and the reports were sent to the Supreme Court.<sup>639</sup>

Four were released on 1 June 1990 and the fifth on 14 June 1990. Though Ratnayaka Wijesiri's case was taken up by the Supreme Court and was concluded on 23 January 1992, the other cases were scheduled for 19 February 1992. In the meantime, Rohan Fernando, who was responsible for contributing to the most serious abuses and four other police officers of the Homagama Police Station, once again demanded the petitioners to withdraw the petition. This was strengthened by the fact that an unconnected lawyer requested Ms. S. Beneragama (BASL's Legal Aid Duty officer) to cancel her proxy of the 5 applications, since the petitioners wished to retain new lawyers for the case. The lawyer filed papers with the Supreme Court cancelling the proxies and issuing new ones in his name. The petitioners were absent in court. When the cases were called to court, the lawyers who stated that they were representatives of the petitioners attempted to withdraw the applications. However, the petitioners claimed that they were threatened by the lawyers to withdraw their application.<sup>640</sup>

<sup>638</sup> Asia Watch, 31 May 1992, "Human Rights Accountability In Sri Lanka", Human Rights Watch, at pp 26, 27, 28 - referring to Supreme Court Application No 20/90; Supreme Court Application No 22/90; Supreme Court Application No 23/90; Supreme Court Application No 24/90; Supreme Court Application No 31/90.

<sup>639</sup> *ibid.*

<sup>640</sup> *ibid.*

The Supreme Court gave approval for the petitioners to continue with their original application and warned the police officers of the Homagama Police against future intervention. On 3 April 1991, on the day of the case, Porage Lakshman was claimed missing by his counsel. Further investigation into the inquiry showed that he was abducted by unknown persons in a jeep that was registered to the Matara Police Station. HQI Rohan Fernando continued to serve at the Homagama police and was later transferred to another post.

The following illustrations are taken from the more recent cases documented by activists.<sup>641</sup>

- **A.P.S. Jayaweera Sandanayake** was arrested by police officers of the Mundal Police Station was arrested by the police on 14<sup>th</sup> December 2003 for reasons that still remain unknown and was tortured while in custody. He filed a fundamental rights application in the Supreme Court against the torture and was thereafter threatened to withdraw the case by the perpetrators.<sup>642</sup>
- **K.E. Sampath** was arrested by the OIC of the Thebuwana Police Station on 2<sup>nd</sup> January 2004 and badly beaten. After he lodged a fundamental rights application in the Supreme Court, he was repeatedly threatened by the OIC to withdraw the petition on the basis that if he did not do so, then a fabricated case would be filed against him.<sup>643</sup>
- **Kurudukarage Eranjana Sampath** -- was arrested by the Thebuwana police on suspicion of theft on January 2, 2004 and is alleged to have been tortured while in custody. Subsequently, he was released on bail and filed a fundamental rights application in the Supreme Court against the alleged perpetrators. The OIC threatened the victim several times to withdraw his complaint, saying that he would take Eranjana into custody and charge him with fabricated allegations in court, if he did not do so. On May 22, 2004, Eranjana was arrested allegedly on false charges and remanded until June 1 2004;<sup>644</sup>
- **Chamila Bandara** 17, was illegally detained and severely tortured by the OIC of the Angkumbura police station from July 20 to 28, 2003. As a result he was hospitalised for a long time and was in fear of losing the use of his left arm. There was an attempt to kidnap him from the hospital, where he was receiving treatment. He was removed from the hospital for his safety, and ever since has been living away from his village, under the protection of local human rights organisations. His mother was also forced to leave the village due to constant severe harassment. His two younger sisters have been unable to go to school due to death threats. Complaints have also been made to the Special Rapporteur on torture, the NPC and the HRC. His fundamental rights petition in the Supreme Court has been laid by due to the ongoing trial in the High Court filed under the CAT Act. However, this trial has been pending for many years with the indictment itself being filed only after some two years. Consequently, the victim is in a near permanent state of displacement<sup>645</sup>;
- **Lalith Rajapakse**, was brutally tortured by the officers from the Kandana Police and taken to the hospital in an unconscious state on April 20, 2002. After filing a fundamental rights case against the perpetrators in the Supreme Court, and with the state also filing a criminal case in the Court under the Convention against Torture Act, No. 22 of 1994, he was threatened to settle or withdraw the case. Later the police filed 2 cases of robbery against the victim in the Magistrate's court. But after the complainants in both cases denied having complained against the victim and in the absence of evidence, the

<sup>641</sup><http://www.ahrchk.net/ua/mainfile.php/2003> & <http://www.ahrchk.net/ua/mainfile.php/2004>

<sup>642</sup> AHRK Third Special Report on Torture; *An X-Ray of the Sri Lankan policing system and torture of the poor*, at pp 92-94.

<sup>643</sup> *ibid*, at pp 124-125.

<sup>644</sup><http://www.ahrchk.net/ua/mainfile.php/2003> & <http://www.ahrchk.net/ua/mainfile.php/2004>

<sup>645</sup> *ibid*.

victim was acquitted of the fabricated charges against him.<sup>646</sup> While Lalith's petition in the Supreme Court is still pending, the trial against the perpetrators of torture in the High Court resulted in the acquittal of the accused. He has lodged an appeal against the acquittal to the Court of Appeal <sup>647</sup>;

- **Dawudage Pushpakumara** 14, was tortured by the OIC and other officers of the Saliyawewa police post in Putlam on September 1 and 2, 2003. After he was released, the victim's family asked a human rights organisation to investigate their son's case. Thereafter they allege that the police and a local politician threatened to burn the family home if they pursued their complaints. When he was released from the police station, the police had prevented the victim from obtaining medical treatment and it was only with the help of the Child Protection Authority that he was hospitalised. Finally, the victim was forced to go into hiding with the help of a human rights NGO, who is caring for him now. He alleges that he was also threatened to withdraw his fundamental rights application in the Supreme Court.<sup>648</sup>

Intimidation of witnesses is not an isolated practice resorted to only on the part of the police/armed forces during times of emergency and war. Instead, it is a common practice among law enforcement agencies and has been manifested even in normal times, by police officers in Sri Lanka. Accused of torture, the law enforcement officers are kept in their positions, despite indictment and are thus afforded an opportunity to threaten and even kill witnesses.

Analysis of several judgements of the High Court relating to acquittals handed down of police officers responsible for extra judicial executions and enforced disappearances during the eighties,<sup>649</sup> indicate that the acquittals were due in large part to the purportedly inconsistent testimony of the witnesses, leading to a situation where the requisite standard of proof beyond reasonable doubt could not be established.

Further, there is delay in lodging complaints, due to the extreme trauma that the victims suffer along with the antagonism shown to them by the police. Witnesses continue to face death threats by those very persons in custodial uniform, who continue to occupy their positions.

Though a Witness and Victims of Crime Protection Bill was presented to Parliament in 2008, this Bill has been pending for many months in the House with no legislative intent to pass it. Its range is commendably wide; clause 21 confers particular entitlements upon a victim of crime or a witness 'who has reasonable ground to believe that any harm may be inflicted on him due to his cooperation with or participation in any investigation or inquiry into an offence or into the infringement of a fundamental rights violation or the violation of a human right, (which is) being conducted or his intended attendance at or participation in any judicial or quasi judicial proceedings.' The entitlement extends to the right to seek protection from 'any real or possible harm' arising in this regard.

Protections being offered to 'intended' testimony is also positive as is the wide definition of a victim of crime as a person, who suffers physical, mental, emotional, economic or other loss as a result of an act or omission constituting not only an offence or a fundamental rights violation but also a violation of a human rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR). However, the language of the entitlements available to witnesses is somewhat ambiguous as for example, clause 4(1) of the Bill which declares that he/she shall...receive from

<sup>646</sup> *ibid*

<sup>647</sup> *Republic of Sri Lanka vs Wannakulasuriya Mahawaduge Rohan Prasanga Pieris*, HC Case No 259/2003, High Court of Negombo, HC Minutes 09.10.2008 – discussed earlier in Section 3.3.3.3. sub section A.

<sup>648</sup><http://www.ahrchk.net/ua/mainfile.php/2003> & <http://www.ahrchk.net/ua/mainfile.php/2004>

<sup>649</sup> High Court Hambantota No. 94/99 HC Minutes 04.02.2004, per (as he then was) High Court judge Sarath de Abrew; H.C./Hambantota 14/2001 HC Minutes 25.08.2003, per (as he then was) High Court judge Sarath de Abrew; H.C./Hambantota /24/2002 HC Minutes 19.06.2003, per (as he then was) High Court judge Sarath de Abrew; High Court Galle No. 2073, HC Minutes 29.07.2004, per (as she then was) High Court Rohini Perera

investigational, quasi-judicial and judicial authorities, 'fair and respectful treatment', with due regard to his/her dignity and privacy.'

The contents of the Bill is more seriously flawed in other respects. For example, clause 7(5) of the Bill encapsulates the prohibition imposed against any person, who having received and/or gathered information during the commencement or the conducting of an investigation, to provide, publish or disseminate *inter alia*, such information regarding the identity of the relevant victim of crime or a possible witness or informant. Relatively harsh penalties of not less than two years imprisonment and not exceeding seven years are provided in regard to persons convicted of these offences

This prohibition, as any competent investigator or criminal lawyer would agree, is pivotal to a good witness protection programme. However, the prohibition is substantially undercut in two ways in this the clause itself. Firstly, the prohibition applies only if the release or dissemination of such information 'places the life of such victim of crime, witness or informant in danger.' Yet, this is an unnecessary restriction on the prohibition which should be couched in absolute terms rather than hedged about by a phrase such as 'places the life...in danger' which is subject to varying interpretations. What about release of information that results in harm qualitatively different to that of placing a life in danger? Would one action be sanctioned but the other exempt from the reach of the prohibition?

Secondly, such an action would, even if the life of that person is put in danger, be excused by clause 7 (5) if the action was in 'good faith' which is demonstrably an exception that has no place here notwithstanding its possible applicability elsewhere. Such action would also be excused if it was in accordance with or in compliance with, any provision or procedures established by law, an order made by a judicial officer or a directive issued by a person duly authorised to do so by or under any law. Thus, if the release of information indicating the identity of the so-called protected person was due to, for example, a directive issued by an 'authorised person' under any emergency regulation, the entire force and effect of the protection would be diminished.

Then again, clause 7(8) of the Bill, which makes the provision, issuance or the giving of information in relation to the very nature of the protection offered, has exactly the same limitations in regard to its reach.

Clause 21(2) meanwhile states that a request for protection may be made not only to a court or a Commission, but also to a National Authority and a Protection Division. The section then envisages a complex intertwining of approval between these two bodies *r.e.* the protection of particularly vulnerable witnesses. Yet, what undercuts this yet again is the manner of composition of the Division as a body established within the Police Department (with its head being a senior Deputy Inspector General of Police) instead of possessing the necessary attributes of independence that it requires. The practical impact of the protections offered is consequently cast in doubt.

Further, in clause 29, it is provided that the evidence of a witness or a victim of crime may be secured without 'his' personal attendance but through an audio-visual linkage from any location either inside or outside Sri Lanka. However, the clause relating to testimony given from outside Sri Lanka is stripped of all its positive flavour by its stipulation that 'a competent person' should be present at such location. Ideally such competent person should have been nominated by the relevant court or a Commission before whom the proceedings are in issue, with the substitution of a judicial officer perhaps for a patently amorphous 'competent person.' However, clause 29(b) prescribes that such 'competent person' may be designated on the 'recommendation of the Attorney General and the Foreign Affairs Secretary. The question is as to whether government intervention through the Attorney General or a ministry is justified in these circumstances.

The Bill was not extensively discussed in the public forum prior to it being brought before Parliament.

## E. Public Hearings

Public hearings are not denied except in exceptional cases. However, due to the severe overcrowding in courtrooms, the public is practically denied access in certain instances.

## F. Pronouncing of Judgments

In certain instances, copies of judgments are not available to the accused or there is delay in the writing of the judgments, which means that the period within which an accused is permitted to appeal from a decision of the High Court to the Court of Appeal<sup>650</sup> or from the Magistrate's Court to the High Court<sup>651</sup>, lapses. In addition, as stated previously, members of the public do not have a *bona fide* right of access to these judgments in the absence of a Right to Information Law in Sri Lanka which is a significant obstacle in regard to maintaining accountability and transparency in the legal system.

## G. Right of Appeal

There has been failure on the part of the Attorney General to appeal from acquittals of the High Court, particularly in the cases of human rights violations, where state officers are the accused. The failure to do so in regard to acquittals handed down by the High Courts under the CAT Act is more fully examined in Section 6.6.2.1.

## 4.7. Minimum guarantees of prisoners

Upon the admittance of a person into the prisons system, the distinction between the innocent and the guilty, becomes of little importance. Remand prisoners are not separated from those convicted, in accordance with international standards.<sup>652</sup> The February 2008 Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak<sup>653</sup> raises this issue as a matter of concern and suggests that the separation be strictly adhered to.<sup>654</sup>

The following statistics demonstrate the extent to which the prisons are overcrowded by those who should actually not be inside prison walls.

- a) 76.9 of the percentage of total admissions of prisoners serve their sentences for non-remission of fines;
- b) Overcrowding is at the rate of 461.7% with associated problems of young and old, hardened criminals and mild offenders being grouped together;

<sup>650</sup> The time limit from High Courts exercising original criminal jurisdiction, to the Court of Appeal is 14 days from date of conviction/judgment.

<sup>651</sup> Appeals to the High Court from the Magistrates' Court needs to be within 14 days of judgment (28 days, if the appeal is by the Attorney General).

<sup>652</sup> ICCPR Article 10 2. a. "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subjected to separate treatment appropriate to their status as unconvicted persons." Also see *Thomas vs Jamaica* (Communication No 266/1989, views of UN-HRC, 2<sup>nd</sup> November 1993. Also, General Assembly Resolution 43/174 of 9<sup>th</sup> December, 1988 and the Standard Minimum Rules for the treatment of prisoners adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955 and approved by the Economic and Social Council by its resolutions 663 C(XXIV) of 31<sup>st</sup> July 1957 and 2076 (LXII) of 13<sup>th</sup> May 1977.

<sup>653</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at para. 83.

<sup>654</sup> *ibid.*, at Recommendation (s).

- c) 63% of convicted prisoners are first time offenders
- d) 75.4% of the remand prisoners are short term remand prisoners (in remand for periods ranging from under 14 days to 6 months)<sup>655</sup>

As a recent study demonstrates, the above figures do not reflect the actual picture in relation to overcrowding as the percentage of overcrowding differs from institution to institution.<sup>656</sup>

A good example is the Welikada Prison, normally referred to as the premier prison institution in the country. The prison that has an authorized accommodation for 1500 prisoners is presently holding over 4000 prisoners. This is an overcrowding of about 270 per cent. Though the prison is designated as the prison for first offender convicts, it also houses a large number of remand prisoners due to severe overcrowding of remand prisons in Colombo. Remand prisoners at the Welikada Prison are housed in a three-storied building known as the L-Hall. The authorized number that can be accommodated in this section is 307, but holds on an average some 1400 prisoners. This is an overcrowding of over 450 percent. The conditions prevailing here are so atrocious that prisoners, who understand English, call it the Hell-Hole. This building, built during the colonial period is in a very bad state of disrepair. The roof leaks during rains flooding the floors. The lack of ventilation creates a suffocating atmosphere. The foul smell emanating from the cells and the surroundings is unbearable. Most prisoners have to sleep on the bare floor as no mats or pillows are provided and large numbers have to sleep in the corridors due to lack of room in the cells. They do not have sufficient water to wash or bathe as running water is available only for a short period during the day. Some prisoners complain that they have to bribe senior prisoners and officials to get a bath. There are less than ten toilets for the entire population of 1400 and prisoners complain some of them are often clogged. These prisoners get little exposure to sunlight as they are confined indoors most of the time during the day.<sup>657</sup>

The situation is very similar in most remand prisons in the country. During a visit to the Jaffna Prison in December 2007 by a team of officers from the Consortium of Humanitarian Agencies (CHA) they observed the appalling situation prevailing there. This makeshift prison consisting of two converted old residential buildings is so overcrowded that prisoners have to sleep in shifts in the night. At the time of the visit there were 480 inmates, while the space available was only for about 200 prisoners. It was observed that the prisoners are locked up in the cells throughout the day except for half an hour allowed for exercise, exposure to sunlight and the time allocated for the meals. Unending hours are spent idling and in utter boredom. Prisoners lack many basic facilities necessary for human living. Water is in short supply and the toilet facilities are grossly inadequate. There are no mats and pillows or any other kind of bedding given to the prisoners. Due to the severe overcrowding and the unsanitary conditions infectious diseases were spreading fast. There were 35 prisoners afflicted with chicken pox on the day the CHA team visited the prison. The time allowed for visits by friends and relations too is limited, as large numbers have to be accommodated during limited hours allocated for visits. Since the last visit the CHA had provided some essential equipment and also built two toilets in order to alleviate the difficulties faced by the prisoners at least to some degree.<sup>658</sup>

The situation of the convicted prisoners is no better. Where water, sanitation and accommodation are concerned they are in a similar situation as the remand prisoners at the Welikada Prison. In a prison cell with a floor space of 54 sq. feet that is meant to keep a maximum of three, often seven or eight prisoner are locked up. During the night lock-up time between 6.00pm to 6.00am they do not have any toilet facilities other than a small bucket. To ease oneself in the presence of several others is very humiliating act.<sup>659</sup>

<sup>655</sup> Source; Department of Prisons, 2001.

<sup>656</sup> Report of the Human Rights Monitoring Group (HRMG), Consortium of Humanitarian Agencies (CHA), August 2008, at page 20 (unpublished)

<sup>657</sup>ibid.

<sup>658</sup>ibid.

<sup>659</sup>ibid.

Mission reports in the past have observed that access to medical assistance is limited and irregular checks are conducted as to the health of prisoners.<sup>660</sup> This situation has not improved in recent years. In one recent observation, frequent complaints of prisoners that they have inadequate access to medical assistance were noted.<sup>661</sup>

Meanwhile, the number of persons languishing in the death cells has dramatically increased to nearly 200, due to non commutation of death sentences to life sentences. Though the prison rules require that prisoners sentenced to death be kept separately in single cells, presently three or more occupy a death row cell. There are also an unprecedented number of over 250 prisoners serving life sentences. This situation has arisen due to ill conceived policy decision not to commute life sentences until 20 years of the life sentence have been served. In our neighbouring country India, a life sentence is commuted to specific period after the prisoner has served 14 years.<sup>662</sup> In addition to the severe overcrowding, prisons presently face an acute shortage of staff. In such situations prison officers have to work under severe stress and their work environment becomes insecure. This makes the situation of the prisoner worse, as even minor deviations from the rules are sternly dealt with by the officers, often with physical force.<sup>663</sup>

The Government has conceded that overcrowding of prisons is a pressing problem faced by the prison authorities.<sup>664</sup> It is claimed that contributory factors are the loss of a number of prisons in conflict areas, increase in the crime rate, increased number of individuals arrested under the Emergency Regulations (ER) and Prevention Terrorist Act (PTA) for security reasons, judicial delays etc.<sup>665</sup> Measures suggested an increase in the number of prison buildings and the relocation of prisons in rural areas.<sup>666</sup> However, not much appears to have been done in respect of new prison facilities.

#### 4.8. Juveniles in detention

Though corporal punishment has been abolished in Sri Lanka as aforesaid, this practice still prevails in relation to both children and adults. In practice, the treatment of children by the criminal justice system amounts to cruel, inhumane and degrading treatment.

Child offenders are kept in police cells together with adult offenders prior to being produced in court. Consequently, children are exposed to abuse. As has been observed, the Sri Lankan legal system treats child victims as if they were suspects. This is a side-effect of the initial documentation that must be filled out, when a juvenile case is documented, which treats children as either 'suspects' or 'prisoners'.<sup>667</sup>

<sup>660</sup>Amnesty International, 3 May 1983, "Report of an Amnesty International Mission to Sri Lanka", (31 January- 2 February 1982), at pp 26, 27

<sup>661</sup>Dharmadasa, HG, in 'Rights of Prisoners', State of Human Rights 2003, published by the Law & Society Trust, 2004, at pp 210, 213

<sup>662</sup>Report of the Human Rights Monitoring Group (HRMG), Consortium of Humanitarian Agencies (CHA), August 2008, at page 20 (unpublished)

<sup>663</sup>ibid.

<sup>664</sup> United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 236.

<sup>665</sup> ibid.

<sup>666</sup> Though it is said that other measures such as license board releases<sup>666</sup> and home leave schemes have been initiated in minimise overcrowding (ibid) the implementation of these mechanisms leaves much to be desired. License Board releases under Section 11 of the Prevention of Crimes Ordinance are apparently awarded to only the affluent or the influential. The prevalence of bribery and corruption within prisons is well documented. Recently a Commissioner of Prisons was put on inquiry after his involvement in supplying luxuries to a drug baron who had been convicted of assassinating a High Court judge.

<sup>667</sup> Herath, S., 'Rights of the Child', in Sri Lanka; State of Human Rights Review, 2000, Law & Society Trust, October 2000, at p121. In 1997, the Law Commission of Sri Lanka at the request of the Ministry of Justice examined in detail all matters relating to the administration of juvenile justice. The Law Commission identified the following general areas as requiring consideration for change; namely anomalies in terminology used to define categories of juveniles, the decisive nature of and difficulties encountered in establishing the age of juveniles, the jurisdiction of juvenile courts and the procedures to be adopted by them, the need to ensure the segregation of juveniles from adult detainees at all stages of the legal process, representation of/ protection for juveniles involved in the legal process, the need for a Code of Juvenile Justice Procedure, the classification and conditions of places of detention of juveniles and the need to develop non-custodial measures for the treatment of juveniles in conflict with the law.

The February 2008 Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak<sup>668</sup> requested in recommendation (t) to 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.

Children kept in custody under emergency law face even greater hardships. The Special Rapporteur observed as follows;

*In the TID (Terrorist Investigation Division) 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.*<sup>669</sup>

In 2005, the CAT Committee expressed its concern about continued allegations of sexual violence and abuse of women and children in custody, including by law enforcement officials, as well as the lack of prompt and impartial investigations of these allegations. The State party was called upon to ensure that procedures are in place to monitor the behaviour of law enforcement officials and promptly and impartially investigate all allegations of torture and ill-treatment, including sexual violence, with a view to prosecuting those responsible.<sup>670</sup>

Further, the police hardly follow alternatives to detaining children in the police station, such as release of children to their parents or placement in a remand home, in accordance with the CYPO. There are no separate facilities for children although the CYPO requires that special arrangements need to be made for children.<sup>671</sup>

In practice, the police do not ordinarily release child offenders on recognisance, which they are allowed to do by the CYPO. It is more convenient for the police to produce the child in court and allow the Magistrate to make the decision, which often results in the child being remanded. The child's parents or guardians are not informed immediately of the child's arrest and there is no clear duty laid on the police officers to immediately notify the parents of the child. There is no lawyer, probation officer or next friend present, whenever the child is questioned by the police and there is no procedural requirement to this effect. Children are restrained with physical force, restraints or handcuffs, when arrested in the absence of a procedural requirement that special restraints should be used in such cases that are appropriate to the age of the child.<sup>672</sup>

Meanwhile, juvenile offenders are treated as criminals in the Magistrates' courts and due to the trial roll being crowded, scant respect is shown for children at the hearings. The cases of child offenders are taken up in open court along with adults' cases. The placement of children in adult prisons pending trial is a common practice, as there is lack of capacity in remand homes for children. Though legal representation for a child offender is available as a right, financial constraints mean that this right is most often not realised in practice and the most child offenders plead guilty due to inadequate or complete absence of legal representation.

It has been found that the minimum age of criminal responsibility is far too low as a child as young as 8 years of age has not sufficient maturity of understanding to be caught up in penal consequences. Further, the point at which the age becomes relevant is not clear in law: namely whether it is at the time of the commission of the offence or at the time of conviction and sentencing. Often the child is not consulted or the child's consent secured prior to making an

<sup>668</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008.

<sup>669</sup> *Ibid.*, at para. 87.

<sup>670</sup> United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, at para. 13.

<sup>671</sup> Interview with child rights activists, 20/01/2009.

<sup>672</sup> *Ibid.*

order regarding remand. The practice ordinarily followed is to detain the child offender for 21 days at a time after being found guilty till the probation officer files a report about the 'child's antecedents and circumstances, prior to sentencing.'<sup>673</sup>

Community based correction orders are not applicable to children under 16 years and are not generally resorted to in the case of child offenders.<sup>674</sup>

#### 4.9. Visits to Prisons<sup>675</sup> and 'Places of Detention'

Though it is provided for by law that Magistrates visit remand prisons,<sup>676</sup> this is seldom observed in practice. The Government has announced that it is considering the introduction of legislation to make it compulsory that Magistrates inspect places of detention.<sup>677</sup> Yet, here again, this intention has not been translated into actual practice.

Further, the provision that a Board of Visitors may examine the prevalence of torture and CIDTP in prisons, this has not been effective. Apparently, the current Board comprises seven members who are non-governmental personnel and who advise the Commissioner of Prisons.<sup>678</sup> They meet with the Commissioner at least once in two months. Their recommendations however appear to be long delayed; for example in the 2002 Periodic Report, the Government states that the recommendations of the Board made as way back as in 1996 are being 'considered.'<sup>679</sup>

In this context, the February 2008 Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak observes as follows;

*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.*<sup>680</sup>

Further, in 2005, the CAT Committee expressed its concern regarding the lack of an effective systematic review of all places of detention, including regular and unannounced visits to such places (UNCAT, article 11), by the Human Rights Commission of Sri Lanka and other monitoring mechanisms.<sup>681</sup>

The CAT Committee's observations were pertinent in the face of activists' reports that officers of the Human Rights Commission, even on the rare occasions, when they do visit places where

<sup>673</sup> *Ibid.*

<sup>674</sup> *Ibid.*

<sup>675</sup> The term 'Prisons' is differentiated from the term 'Places of Detention' for specific reasons. In Sri Lanka, 'Prisons' refer to government institutions established under the Prisons Ordinance No 16 of 1877 (as amended) which are subject to specified rules and regulation governing the detention of persons. On the other hand, 'Places of Detention' are referable to *ad hoc* holding camps established under the Emergency Regulations which do not operate within a prescribed legal structure as such. This differentiation is therefore important in the Sri Lankan context.

<sup>676</sup> Act, No 8 of 1991.

<sup>677</sup> See United Nations Committee against Torture, Second Periodic Report, Second periodic reports of States parties due in 1999, CAT/C/48/Add.2, 06/08/2004, at paras. 41 and 42.

<sup>678</sup> United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 246.

<sup>679</sup> *Ibid.*

<sup>680</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at para. 76.

<sup>681</sup> United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, at para. 11.

persons are detained, are only shown the regular holding areas rather than the mess rooms and the toilets, where torture actually takes place. Also, the fact that they have to obtain prior permission for these visits makes the 'surprise element' in such visits of little use.<sup>682</sup>

Meanwhile, where persons are detained under emergency law in 'places of detention', since the identity of these places' are kept secretive, no question of visits or monitoring even arises.

## 5. The Situation of Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment

### 5.1. The perpetrating institutions, including estimate of scale of torture and CIDTP

#### 5.1.1. The Police

The analysis in other parts of this Study sufficiently establishes the nature and prevalence of torture and CIDT perpetrated by police officers. Consequently, it is sought to merely frame that analysis by underlining some key observations by a range of persons, including judges of Sri Lanka's Supreme Court, heads of monitoring bodies and by United Nations Special Rapporteurs in this regard.

*"The vast majority of custodial deaths in Sri Lanka are caused not by rogue police but by ordinary officers taking part in an established routine."*<sup>683</sup>

Statement by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston.

*"...We are not talking about isolated cases of rogue policemen: we are talking about the routine use of torture as a method of investigation. It requires fundamental structural changes to the police force to eradicate these practices."*<sup>684</sup>

Statement by the former chairperson of Sri Lanka's National Human Rights Commission, Dr. Radhika Coomaraswamy.

Judicial warnings in this regard are also instructive

*"the number of credible complaints of torture and cruel, inhuman and degrading treatment (showed) no decline."*<sup>685</sup>

Statement by Justice M.D.H. Fernando.

*"I wish to add that infringements of fundamental rights by the police continue unabated even after nearly 18 years from the promulgation of the 1978 Constitution and despite the numerous decisions of this Court which have condemned such infringements."*<sup>686</sup>

Statement by Justice KMMB Kulatunga.

<sup>682</sup> Confidential interviews with field officers of the Human Rights Commission, 03/12/2008.

<sup>222</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at paragraph 54. The Special Rapporteur called on government officials to accept that disrupting this pattern of custodial torture is a necessary step not only in ensuring the human rights of those arrested but also of retaining public trust and confidence.

<sup>684</sup> Interview by the London based REDRESS in the Reparation Report Issue 5 May 2005, a bi-annual journal of the Redress Trust.

<sup>685</sup> *Sanjivana vs. Samarawera*, [2003] 1 Sri LR, 317.

<sup>686</sup> *Ahasin Banda vs Gunaratne* ((SC. (FR) 109/95, SCM 3.11.1995).

#### 5.1.2. The Prisons

Documented cases indicate the extent to which legal safeguards against torture and CIDTP, while in prison custody break down. In the *Wenelage Rani Fernando Case*<sup>687</sup> where death was due to assault by prison officials, the treatment meted out to the prisoner while he was at the Negombo prison was characterised by Court to paint "a gruesome picture where a hapless prisoner was brutally tortured and left alone, tied to an iron door, to draw his least breath."

Then again, in the case of Michael Edward,<sup>688</sup> who was arrested on 21 May 1998 as a terrorist suspect and thereafter remanded into the Bogambara prison in Kandy, he testified that he had been brutally tortured and subjected to genital torture as well. His case was investigated by activists and found to be credible; complaints were lodged with the relevant authorities, but even after six months had lapsed, no action had been taken.<sup>689</sup>

Prison officials themselves have accepted that torture and CIDTP occur within prison walls and do not seem to have regular procedures of inquiry and report.<sup>690</sup> Jurisprudence before the Supreme Court has indicated the manner of abuse by prison guards.<sup>691</sup> Activist documentation has also indicated the same; in certain cases for quite frivolous reasons as was the case when Kalpeliyanegge Priyantha Anuruddha Shammi, who was tortured by prison officer Rajive at the Kalutara Remand Prison, since he refused to give Rajive, the money that he demanded.<sup>692</sup> Another instance is the case of Mudalige Sunil Fermin Perera who was tortured by prison officers at the Kuruwita Prison during June 28 and July 3, after being unjustifiably arrested by the Ratnapura police.<sup>693</sup> In certain instances, prisoners detained under emergency regulations have been killed inside the prisons, the Welikada prison massacre<sup>694</sup> and the more recent Kalutara prison murders<sup>695</sup> are good examples. Other than these two well known instances, deaths inside prison walls have been recorded in a number of instances. In January 1991, Amnesty International reported the death of one prisoner awaiting trial at New Magazine prison, Colombo who died as a result of beatings with iron rods by one or more prison staff.<sup>696</sup>

Resort to torture and CIDTP by prison officials has not been documented in detail in any study. Existing research studies do not include this as a separate focus. The deplorable state of the country's prisons, the lack of proper infrastructure, and its inability to accommodate greatly increased numbers of prisoners are not encouraging features. Reports of the International Committee of the Red Cross in May 1999, September 2000, October 2001 and in 2002 observe that prison staff of the Bogambara prisons ill treats prisoners.<sup>697</sup> One Report refers to allegations

<sup>687</sup> SC(FR) No 700/2002, SCM 26/07/2004, judgement of Justice Shiranee Bandaranayake. The State was directed to pay a sum of Rs 925,000 while each of the three prison officials were directed to pay Rs 25,000, amounting to one million in equal shares. In awarding this considerable sum as compensation and costs, the Court took into account the fact that the deceased was a father of three minor children.

<sup>688</sup> Fernando, Basil, 'Recovering the authority of public institutions', Asian Human Rights Commission, 2009, at p.277

<sup>689</sup> *ibid.*

<sup>690</sup> Interview conducted with senior prisons officials, 16/12/2008

<sup>691</sup> *Wenelage Rani Fernando case, SC(FR) No 700/2002, SCM 26/07/2004*, per judgment of Justice Shiranee A. Bandaranayake). The Court specifically commented upon the treatment meted out to a remand prisoner while at the Negombo prison, which "painted a gruesome picture where a hapless prisoner was brutally tortured and left alone, tied to an iron door, to draw his least breath." See also the Individual Communication filed by Anthony Michael Fernando to the United Nations Human Rights Committee where Fernando set out a detailed description of the torture that he had been subjected to within prison walls - CCPR/C/83/D/1189/2003, adoption of views, 31-03-2005.

<sup>692</sup> See Asian Human Rights Commission (AHRIC) UA-52-2004: Sri Lanka.

<sup>693</sup> *Human Rights Report for 2006*, Chapter on Sri Lanka, Asian Human Rights Commission, November 2006, at point 3.a. 11.

<sup>694</sup> *From Welikade to Matur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay* Special Report, No 25. University Teachers for Human Rights (Jaffna) Sri Lanka (2007)

<sup>695</sup> This is an incident where on 6 and 7 January 2000, two Tamil political prisoners arrested and detained in Kalutara jail under the PTA were killed and 58 others severely injured. The incident occurred when an agitation launched by political prisoners demanding that their cases either be taken up or they be released, resulted in jail guards allegedly using illegal and excessive force to suppress the unrest. Forty two of the injured were warded at Nagoda, Welikada and Colombo hospitals, where they were humiliated and treated with indifference by the medical staff. Though steps were taken in law against the alleged perpetrators and the matter came up in court on several occasions, (Case Nos 4705/2001 & 4706/2001) no definitive findings were reached. For details see CHR/D, 2002, *CHRD in 2002: "CHRD provides legal assistance to those without help"*, Sentinel Special Issue, at p10.

<sup>696</sup> Amnesty International, January 1992, "SRI LANKA: Summary of human rights concerns during 1991", AI INDEX: ASA 37/01/92, p 5, 6

<sup>697</sup> Dharmadasa, H.G. 'Rights of Prisoners' in State of Human Rights Report 2003, Law and Society Trust, 2004, at pp 211/212.

regarding 'the violent nature of some guards, especially those involved in searches for drugs and other banned items. The Report further stated that prisoners alleged that they had been beaten for complaining about the quality of prison food. The delegates reported that they had seen physical marks on two prisoners, which were consistent with their allegations of ill treatment and that due to fear of reprisals, these prisoners were not willing to have their complaints conveyed to higher prison authorities.'<sup>698</sup>

### 5.1.3. Other (e.g. National Security Institutions, the Military, the LTTE, etc.)

Torture and CIDTP has been practiced by the military and the para militaries over the decades long conflict in the North-East between the Liberation Tigers of Tamil Eelam (LTTE) and the government as well as during the brutal uprising of the Sinhalese youth militant movement (*Janatha Vimukthi Peramuna*) in the seventies, eighties and early nineties in the country's Southern areas. 'The 'failure to rein in abuses committed or tolerated by the military' has been repeatedly commented upon by international observers.'<sup>699</sup>

*"Those cited as responsible for committing human rights violations on the government side include members of the military, the police and the Special Task Force (STF, a police commando unit) in some areas of the east, members of unidentified groups who wear plain clothes and use unmarked vehicles have also been cited. These people seem to operate in much the same manner as the plainclothes 'death squads' linked to government forces which were a feature of the recent counter-insurgency against the JVP in the South."*<sup>700</sup>

Human Rights groups have documented pervasive torture of detainees in police stations and army camps. The government has been accused of supporting, trained and armed groups with a history of abuses against civilians, sometimes supporting two or more rival factions against each other, sometimes encouraging the formation of death squads composed of members of the security forces.<sup>701</sup>

*All branches of the security forces as well as Muslim and Sinhalese home guards and armed cadres of Tamil groups opposed to the LTTE were cited by survivors and witnesses as responsible for human rights violations, including extrajudicial executions, 'disappearances', torture and arbitrary arrest and detention. Some of the violations apparently took place in reprisal for attacks by the LTTE; others during cordon-and-search operations. Both the army and the police in the north and east allowed (if not encouraged) members of armed Tamil groups opposed to the LTTE to carry out search operations or screen civilians, in the course of which they resorted to human rights violations.'*<sup>702</sup>

On its own part, the Liberation Tigers of Tamil Eelam (LTTE) have consistently engaged in practices of holding prisoners in *incommunicado* detention, of killing and torturing prisoners and of killing defenceless people, including prisoners and civilians. While these atrocities need to be noted, it is indisputably the case that the burden on the part of a lawfully elected government to bring perpetrators of torture and other grave human rights violations to brook, cannot be equated to the responsibility that could be imposed upon a non-state entity.

<sup>698</sup> *ibid.*

<sup>699</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at paragraph 3.

<sup>700</sup> See *Sri Lanka: Extrajudicial Executions, 'Disappearances' and Torture, 1987-1990*, (AI INDEX: ASA 37/21/90), September 1990, for the evidence that Amnesty International provided linking these plainclothes armed groups in the south to the security forces.

<sup>701</sup> See Human Rights Watch World Report 1992; An Annual Review of Developments and the Bush Administration's Policy on Human Rights Worldwide, December 1991, pp. 459-470. See also, "Human Rights in Sri Lanka: an Update," News from Asia Watch, March 12, 1991 and Asia Watch, 31 May 1992, "Human Rights Accountability in Sri Lanka", Human Rights Watch, p 8 "

<sup>702</sup> Amnesty International, August 1996, "SRI LANKA: Wavering commitment to human rights", AI INDEX: ASA 37/08/96, p 15

### 5.2. The purposes of inflicting torture and CIDTP (e.g. to extract confessions or information, or to punish)

*'Sometimes persons are tortured for no crime at all but instead, for example, for asking the reasons for being arrested, being 'too smart' with police officers or as an outlet for the sadistic pleasure of irate or drunken policemen. Woefully lacking proper investigative skills, police officers are liable to arrest individuals purportedly in relation to acts that amount to offences under the law, but with no real evidence against them. Instead law enforcement officers subject suspects to gross forms of torture with the intention of 'hammering out' a confession or with the aim of fabricating evidence against them.'*<sup>703</sup>

The following observations are pertinent in this regard;

*"Furthermore, our discussions with the police and other individuals and agencies have revealed that the police had not really been trained in basic investigative skills. For some reason, the training was more of a paramilitary nature. Torture is often a short cut to getting information, and as a result, it is systematic and widespread....."*<sup>704</sup>

Two discernible patterns of torture are evidenced, firstly where torture is resorted to for interrogation purposes and secondly where it is apparent as a pure abuse of power.<sup>705</sup> Into the first category of cases falls the denial of all of the commonly accepted rights available under the normal criminal procedure laws<sup>706</sup> such as the right to be given reasons for the arrest and the right to be speedily brought before a Magistrate. In many cases, the victims are suspected of having committed petty theft.<sup>707</sup>

Torture of persons on the basis of mistaken identity, Gerald Perera being a classic example,<sup>708</sup> could be classified under the second head. Indeed, reasons for the arrest may often be as trivial as asking for the name of a policeman<sup>709</sup> or refusing to engage in illegal acts.<sup>710</sup> Several instances where former illicit liquor sellers, who gave up such businesses, were punished by police officers have been documented. Such businesses often yield extra income for police officers as they are carried out with bribes being paid to them. Consequently they are infuriated when sellers of illicit liquor stop their nefarious activities. These examples of law enforcement officers profiting from the breaking of the law are many.<sup>711</sup> Fabrication of false charges is also another reason for torture and CIDTP.<sup>712</sup>

The purposes of inflicting torture during the interrogation of persons of overwhelmingly Tamil ethnicity detained under emergency are even more imprecise.

<sup>703</sup> Pinto-Jayawardena Kishali; Briefing Paper by the Law and Society Trust forwarded to the Special Rapporteur on Torture prior to his Mission Visit to Sri Lanka, 29 October 2007.

<sup>704</sup> Interview by the London based REDRESS with former Chairperson of Sri Lanka's National Human Rights Commission, Dr Radhika Coomaraswamy in the Reperation Report Issue 5 May 2005, a bi-annual journal of the Redress Trust.

<sup>705</sup> AHRIC Third Special Report on Torture; An X-Ray of the Sri Lankan policing system and torture of the poor, 2005, at page 6; Also, Pinto-Jayawardena, Kishali, "A 'Praxis' Perspective on Subverted Justice and the Breakdown of the Rule of Law in Sri Lanka" in Jasmine Joseph (ed), *Sri Lanka's Dysfunctional Criminal Justice System* (Asian Human Rights Commission, Hong Kong; 2007), available at [http://www.ahrchk.net/pub/pdf/Dysfunctional\\_AHRC.pdf](http://www.ahrchk.net/pub/pdf/Dysfunctional_AHRC.pdf).

<sup>706</sup> As discussed above, Section 23(1) of the CCP Act incorporates accepted procedures in relation to arrest, including the stipulation that the person making the arrest must inform the arrestee of the nature of the charge or allegation upon which the arrest is made.

<sup>707</sup> See the *Chamila Bandara case* (AHRIC UA -35-2003) and the *Wewelge Rami Fernando case*, (SC(FR) No 700/2002, SCM 26/07/2004). In these cases, the police arrest was on the basis that the arrestee had stolen some bunches of bananas. Chamila Bandara, though a minor was tortured by the police. In the *Wewelge Rami Fernando case*, the deceased was brutally tortured by prison officials after being arrested again for suspected theft.

<sup>708</sup> *Sanjeewa v Suraweera*, [2003] 1 Sri LR, 317.

<sup>709</sup> *Saman Jayasuriya's case* (AHRIC-UA 31-2004 (1 April 2004)). Saman Jayasuriya was driving a van with two others when his vehicle was stopped by two policemen in civilian clothes who asked for his license and insurance. He asked for their identity but was assaulted. Thereafter, though he escaped, policemen from the Kadugannawa police station came to his home and severely beat him while his wife was standing nearby. He was then arrested.

<sup>710</sup> Alleged death of a restaurant manager for refusing to sell liquor on a religious holiday AHRIC-UA 132-2004 (5 October 2004).

<sup>711</sup> Asian Human Rights Commission AHRIC-UA-03-2004: SRI LANKA: A man who gave up illicit liquor sale was tortured by police from the Katugastota Police Station.

<sup>712</sup> Asian Human Rights Commission AHRIC-UA-53-2004: SRI LANKA: A torture victim remanded on false charges for his refusal to withdraw a complaint against the police.



*“The Prevention of Terrorism Act and Emergency Laws created the favourable ambience to carry out ‘disappearances’, torture and drive an arrestee to die, be it in the way of homicide often or at times suicide out of intolerable despair and utter misery. The principle cause of these disappearances (deaths) is that the local police or armed services’ investigations were incapable of carrying out inquiries intelligently and hence used brute force to extort confessions. Naturally therefore investigation led to no credible result as through fear false confessions were extracted. The Prevention of Terrorism Act and Emergency Laws and poor supervision made it possible to terrorize and force coercion and eventually fatalities.”<sup>713</sup>*

In many of the documented arrests under emergency law, vague or general suspicion appears to form the basis of arrest and consequent torture. Thus, in one of many such documented cases throughout the years, ‘three individuals who testified about being tortured said that they had been told by officials, when they were released that they had been arrested on ‘suspicion’, but had been found innocent. One of them was told, when released from six months detention that ‘during the course of investigation some mistakes may occur.’<sup>714</sup>

The torture of Yogalingam Vijitha is a case in point.<sup>715</sup> The victim had been accosted by a group (later identified to be policemen) in civilian clothes headed by a Reserve Sub Inspector of the Negombo police station. She was arrested, hand cuffed and then taken to Negombo. There, she was first put into a garage. The police, after accusing her of being a LTTE suicide bomber<sup>716</sup> assaulted her with a club on her knees, chest, abdomen and back, causing her unbearable pain. Some four hours thereafter, she was put into a cell at the Negombo Police Station and detained for five days under a detention order issued in terms of Regulation 19 (2) of the Emergency Regulation. During the days thereafter, she was severely tortured in order ostensibly to obtain a confession; the nature of the torture that she was subjected to, is discussed immediately below. Being unable to bear the torture, she had signed the statements, which were neither read nor explained to her. She was then transferred to the Terrorist Investigation Division, where she was further assaulted. On 21<sup>st</sup> of September, she was remanded under Section 7(2) of the Prevention of Terrorism Act at the Negombo Remand Prison. By that time, she was suffering from extreme physical and psychological stress and was unable to function as a normal human being.

The Supreme Court ruled that there had been a grievous violation of her fundamental rights under Article 13(1), (2) and Article 11 relating to freedom from unlawful arrest and freedom from torture. The Court stated that while there had not been a shred of evidence to support her arrest on suspicion that she was an LTTE member, the torture that she had been subjected to was corroborated by independent medical testimony even though the medical examination that she was subjected to while in police custody was severely tainted and discounted for that reason.

<sup>717</sup>

Later, when questioned under the Special Procedures as to whether indictment in terms of the CAT Act had been filed against the perpetrators, the Government replied that, as the victim had left the country, this was not possible.<sup>718</sup> This is the common answer given in many of these cases

<sup>713</sup> “Disappearances or really deaths through law and order custodians in Sri Lanka”, Sentinel Overview, The Centre for Human Rights and Development (CHRD), 2005, pp 16, 17

<sup>714</sup> Amnesty International, 3 May 1983, “Report of an Amnesty International Mission to Sri Lanka”, (31 January- 2 February 1982), p 9.

<sup>715</sup> *Yogalingam Vijitha v. Mr. Wijesekera and others*, SC (FR) App. No. 186/2001, 23.08.2002, (citing Amal Sudath Silva vs. Kodituwakku, [1987] 2 Sri LR 119)

<sup>716</sup> In actual fact, the victim had entered into an arranged marriage at Vavuniya between her and an individual called Maheswaran alias Babu, living in Negombo. Subsequently, after learning that her husband was a married man with two children, she had refused to go through the customary Hindu marriage and to live with him as husband and wife. Maheswaran then commenced to harass her, consequent to which she had left home and proceeded to stay with her aunt in Trincomalee. Significantly thereafter, she had received a number of phone calls from him, threatening that unless she returned to Negombo and lived with him, he would use his influence with the Negombo Police, have her arrested as a member of the LTTE suicide squad and have her tortured.

<sup>717</sup> *ibid.*

<sup>718</sup> Report of the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/2004/56/Add.1, 23 March 2004, Commission on Human Rights, sixtieth session, at paragraph 1574 in Addendum, Summary of Information including individual cases transmitted to Governments and replies thereof.

in complete disregard of the Government’s own duty to provide protection to these victims to enable them to receive justice.

### 5.3. The torture victims (e.g. political opponents, common criminals, security suspects, terrorist suspects related to the LTTE conflict etc.) and indications as to their gender, ethnicity, professional status and social status

In a recent research study which examined approximately 52 Article 11 judgments of the Sri Lankan Supreme Court between the years 2000 and 2006<sup>719</sup>, the following findings were of interest. Evaluating these 52 judgments, it was found that the majority of the cases involved allegations under the Penal Code brought by petitioners of predominantly Sinhalese ethnicity, while a substantially lesser number of cases involved cases brought by petitioners of predominantly Tamil ethnicity involving alleged violations under the Emergency Regulations or Prevention of Terrorism Act.

Statistics in this regard were as follows<sup>720</sup>;

**Case Table 2: Legal Basis Alleged for Arrest/Detention<sup>721</sup>**

Cases under Penal Code	16
Cases under ER or PTA	9
No Basis for Arrest/Detention	10
Basis of Arrest/Detention Unclear	2
Other (military detention of military personnel)	2

The analysis observes that it is surprising that more cases alleging torture emerged in the course of normal police functions in the context of non-emergency or non-conflict situations in Sri Lanka than in the context of extraordinary circumstances arising in the course of armed conflict. However, it is cautioned that the number and kind of cases heard by the Supreme Court is not indicative of the total number or kind of torture cases. It is a select few cases that make their way to the Supreme Court<sup>722</sup>, and an even fewer number of cases that are granted leave to proceed.<sup>723</sup> Access to the Court requires access to resources, financial and legal, as well as geographic access to Colombo, as petitions to the Supreme Court can be filed only in Colombo. Thus, it is a select few cases that make their way to the Supreme Court.

It is pointed out that, the disparity in numbers between Penal Code cases and ER/PTA cases raises a number of questions and possible implications. What accounts for this disparity when torture has been so consistently and well documented in context of the armed conflict and through the application of the ER and PTA? First, the disparity suggests that more petitions are filed by individuals complaining of police brutality in the context of alleged Penal Code violations, and thus results in more petitions being granted leave to proceed. It is then observed that there are a number of possible reasons or implications for this disparity. Higher filing rates may suggest that potential petitioners in Penal Code cases: (1) have greater knowledge of their rights and/or a greater sense of entitlement to those rights; (2) have greater access to legal representation; (3) have a stronger sense that the state mechanisms in general, and the judiciary in particular, can and will protect their rights; and/or (4) have greater geographic access to the Supreme Court.<sup>724</sup>

<sup>719</sup> Pinto-Jayawardena, Kishali and Kois, Lisa in ‘Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response’, Law & Society Trust, 2008

<sup>720</sup> *ibid.*, at p. 12.

<sup>721</sup> Ed Note; Numerical data in this regard is approximate, based on the decisions reviewed.

<sup>722</sup> Vide data collected on Article 11 Applications during 2000-2006 in the course of the Study.

<sup>723</sup> The number of judgments is indicative of the number of applications granted leave to proceed.

<sup>724</sup> Pinto-Jayawardena, Kishali and Kois, Lisa in ‘Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response’, Law & Society Trust, 2008, at p 12.

A related finding was that the majority of petitioners in the Article 11 cases under review were Sinhalese, after which Tamils and Muslims were represented in substantively lower numbers.

**Case Table 3: Ethnicity of Petitioners<sup>725</sup>**

Sinhala Petitioners	50
Tamil Petitioners	11
Muslim Petitioners	3
Ethnicity Unknown	2

The following observation is pertinent in this context;

*Ethnic implications in the division between Penal Code cases and ER/PTA cases – Penal Code cases being brought overwhelmingly by Sinhala petitioners and ER/PTA cases being overwhelming brought by Tamil petitioners is clear and suggests that that the perception of ethnic bias may be fueling a lower number – if there is, indeed, a lower level – of petitions. Perceptions of inequality and disparate treatment, and higher levels of distrust in state institutions in general, may discourage victims of torture from minority communities from filing fundamental rights petitions.<sup>726</sup>*

These trends in under-representation of cases being filed by victims of the conflict had been evident for decades. In one analysis of this situation, Amnesty International remarked that the following reasons may be cited as factors for this under-representation; namely, difficulties encountered by victims of torture in the north and some part of the east of the country in finding a lawyer prepared to appear in the Supreme Court (most lawyers who do Supreme Court work are based in Colombo), financial constraints and fear of reprisals against the victim or his or her relatives.<sup>727</sup>

Other relevant results of the research analysis conducted by LST includes the fact that the majority of cases were filed by petitioners, who were living in and/or subjected to torture and/or CIDTP within a 30 mile radius of the capital city, Colombo<sup>728</sup>

**Case Table 4: Geographic Breakdown**

South – Less than 30 miles from Colombo	23
South – More than 30 miles from Colombo	8
North/East but transferred to South (Kalutara)	7
North/East	1

Discussing these findings, it is remarked as follows;

*The geographic breakdown of the cases under review – and the disparity reflected in that breakdown – raises serious questions about equal protection of the law. Geographic disparities suggest that the administration of justice, as it relates to the protection provided by the constitution, is inclined in favor of*

<sup>725</sup> *ibid*, Numerical data is approximate, based on the decisions reviewed. It must also be noted that ethnicity is, to some degree, speculative. Names have been used to identify the petitioners' ethnicity. However, names may, in some cases, be misleading and may not reveal hybrid or mixed identities. The gap between the number of Sinhala petitioners and the number of petitioners of other ethnicities is so wide that the numbers are nonetheless revealing even if one assumes some degree of error.

<sup>726</sup> *ibid*, at pp. 12 and 13. It is warned however that such reasoning is speculative – ascertaining the exact reasons for the disparity would need more comprehensive research based on analysis of not only judgments of the Court but also cases where leave to proceed had been refused at the very first instance itself. However, the research could not encompass such a wide ambit due to difficulties in obtaining the requisite information from the court registries. This was a difficulty encountered in this Study as well.

<sup>727</sup> Amnesty International, June 1999, "SRI LANKA: Torture in Custody", AI INDEX: ASA 37/10/99., p 28

<sup>728</sup> Pinto-Jayawardena, Kishali and Kois, Lisa in 'Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response', Law & Society Trust, 2008, at p. 14.

*those who live in the South, generally, and close to Colombo, specifically. Such disparities have undeniably negative implications. If there is a failure of the legal system to provide equal protection to those who live far from Colombo, there is a simultaneous failure of the legal system to provide equal protection for the Tamil and Muslim minorities, the majority of whom live outside of Colombo, and there is a failure to provide equal protection to Sri Lanka's rural population.<sup>729</sup>*

In regard to the type of persons subjected to torture and/or CIDTP, victims of torture during a single year are discernible, for example, from this comment made in relation to documented cases during 2003<sup>730</sup>

*There were numerous complaints of brutal assault. These included a labourer assaulted with batons and sticks while in army detention, the cleaner of a van assaulted after being blindfolded, an Attorney-at-Law pulled out of his car and assaulted, a reserve police constable subjected to assault by a reserve sub inspector, another Attorney-at-Law who was a bystander at a protest demonstration (and not a participant) shot at close range and an alleged army deserter tortured to the extent that he died in police custody. Such cases revealed a wide range of circumstances in which such treatment had been meted out by the police or service personnel – the very people who are expected to protect and safeguard the fundamental rights of members of a society. Even a thirteen year old boy was not spared.<sup>731</sup>*

At the most vulnerable are, of course, the poor and the marginalised.

*'though complaints of police brutality emerge in relation to individuals from varying societal levels, including lawyers, private sector executives, schoolteachers and other public officials, they impact more cruelly on the marginalised and destitute segments of our society. Hence, torture is often reported in its most brutal form, from remote villages where the police yield considerable power and authority and where victims lack the political or economic clout to fight the injustice committed upon them and their families. This amounts to a severe breakdown of the rule of law perpetuated by the custodians of the law.'<sup>732</sup>*

In the research referred to earlier, which examined 52 judgments of the Supreme Court in relation to alleged torture and/or CIDTP during the years 2000-2006, the following breakdown of the professional status of petitioners was evidenced;

**Case Table 6: Professional Status of Petitioners<sup>733</sup>**

Casual and Semi-Skilled Laborers	9
Unspecified. <sup>734</sup>	11
Military or Police	8
Small Business Owners (or their families)	5
Lawyers	3
Skilled Employees	3
Teachers	2

<sup>729</sup> *ibid*

<sup>730</sup> De Almeida Gunaratne, Jayantha (Dr) P.C. 'Judicial Protection of Human Rights' in State of Human Rights in Sri Lanka 2004, Law & Society Trust, 2004, at page 115. The cases cited in this regard include the following - *Ekanayake vs. Weeramasum, S.C.* (FR) No. 34/2002, S.C. Minutes of 17<sup>th</sup> March, 2003; *Adhikary and Adhikary vs. Amerasinghe and Others, S.C.* (FR) No. 251/2002, S.C. Minutes of 14<sup>th</sup> February, 2003; *Sajeewa Arjuna Senasinghe vs. Karunatilake and Others, S.C.* (FR) No. 431/2000, S.C. Minutes of 17<sup>th</sup> March, 2003; *Harindra Shashika Kumara vs. D.I.G. De Fonseka and Others, S.C.* (FR) No. 462/2001, S.C. Minutes of 17<sup>th</sup> March, 2003; *Sriyani Silva vs. O.I.C. Panjagala, S.C.* (FR) No. 471/2000, S.C. Minutes of 8<sup>th</sup> August, 2003; *Shammugurajiah vs. Ditrak, S.I., Vanunja, S.C.* (FR) No. 47/2002, S.C. Minutes of 10<sup>th</sup> February, 2003; *Konesalingam vs. Major Muthalif and Others, S.C.* (FR) No. 555/2001, S.C. Minutes of 10<sup>th</sup> February, 2003.

<sup>731</sup> *ibid*.

<sup>732</sup> Pinto-Jayawardena, Kishali; Briefing Paper by the Law and Society Trust forwarded to the Special Rapporteur on Torture prior to the Mission Visit of the Special Rapporteur on Torture to Sri Lanka, 29 October 2007.

<sup>733</sup> Pinto-Jayawardena, Kishali and Kois, Lisa in 'Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response', Law & Society Trust, 2008, at p. 17

<sup>734</sup> *ibid*. These refer to petitioners whose occupations are not referred to in the judgments. By inference, the category of 'unspecified' persons will not include professionals as the professional status of a petitioner is invariably referred to in the judgments and most often, determines the amount of compensation to be paid to the petitioners.

Artists	2
Petty Traders	1
Domestic Workers	1

Interestingly, it was also found that the majority of the victim-petitioners were men.

While male victim-petitioners brought the overwhelming majority of cases, there were a number of significant cases in which women brought cases alleging torture and/or cruel, inhuman or degrading treatment. These cases included two cases of extreme sexual violence, one in which the victim-petitioner was raped at a checkpoint<sup>735</sup> and one in which the victim-petitioner was subjected to extreme sexual torture.<sup>736</sup> Sexual torture emerged as a relatively common form of torture of both women and men.

**Case Table 5: Number of Petitioners by Gender**

Adult Male	47
Adult Female	14
Minors	5

Women civilians are targeted due to their ethnicity as a result of the conflict between government troops and the Liberation Tigers of Tamil Eelam (LTTE). Women have been particular victims in this regard as illustrated by the case of Yogalingam Vijitha discussed above. The 'high and severe incidence of rape and other forms of violence targeted against Tamil women by the police and security forces in the conflict areas' has been a long standing concern of international treaty bodies as well as by Special Rapporteurs.<sup>737</sup> It was observed that victims in remote areas may be unaware of their rights and of the manner in which to seek redress.

Most rape victims are internally displaced women, women who are members of the LTTE and female relatives of suspected male members of the LTTE. Children, (as young as 14), have ranked among the victims.<sup>738</sup> As has been observed, although the arrest and torture of children is not a common practice, several chilling reports have been reported of torture of young Tamil children taken into custody on suspicion of being members of the LTTE or in order to force a member of their family to hand him or herself over.

*In October 1997, the JMO in Colombo who examined Sinnerasa Anthonymala, a girl from Jaffna who had been arrested by the navy in July 1995 when she was 15 years old, found evidence of 56 wounds on her body. When Amnesty International interviewed Anthonymala during a visit to Sri Lanka in 1996, she explained how she was held naked and taken for interrogation by the navy up to three times per day throughout the period of her stay at the Kankesanthurai navy camp..... Amnesty International has received other reports of torture of children, including by members of the People's Liberation Organization of Tamil Eelam (PLOTE), an armed group fighting alongside the security forces, in Vavuniya in May 1996 and by the police in Colombo in November 1997.<sup>739</sup>*

<sup>735</sup> See *Velu Arasadeni v. H.P. Kamal Priyantha Premathilake and others*, SC (FR) App. No. 401/2001, 24.02.2002 (holding that the petitioner was "raped by one or more persons").

<sup>736</sup> *Yogalingam Vijitha v. Mr. Wijesekara and others*, SC (FR) App. No. 186/2001, 23.08.2002 (holding that the petitioner's fundamental rights under Articles 11, 13(1) and 13(2) were violated when she was arrested and detained and subjected to torture).

<sup>737</sup> See concerns expressed by the Committee on the Elimination of Discrimination against Women (CEDAW, A/57/38 (Part 1), Paras 256-302) and also reiterated by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (E/CN.4/2004/56/Add.1), 23 March 2004

<sup>738</sup> Amnesty International, January 2002, "Sri Lanka: Rape in custody", AI INDEX: ASA 37/001/2002, p 3, 4 - citing case No 5, Thanagiah Vijayalalitha, Appendix 1) of the Amnesty International Report.

<sup>739</sup> Amnesty International, *Children in South Asia, Searing their Rights*, AI INDEX: ASA 04/01/98 of April 1998.

#### 5.4. The methods of torture (physical and psychological)

*"[T]he facts of this case has [sic] revealed disturbing features regarding the third degree methods adopted by certain police officers on suspects held in police custody. Such methods can only be described as barbaric, savage and inhuman..."<sup>740</sup>*

In this instance, the extreme torture perpetrated on Yogalingam Vijitha was to cover the victim's face with a shopping bag containing chilli powder mixed in petrol, suffocating her. She was made to lie flat on a table and whilst four policemen were holding her, four other policemen had pricked paper pins under the nails of the fingers and toes. She was assaulted with a club and wires and when she fell down, she was trampled with boots. On another occasion, she was hung and assaulted with a club. Most heinously, when she had refused to sign statements prepared by the police, a plantain flower soaked in chilli powder was introduced into her vagina.<sup>741</sup>

This was not an isolated case. Methods of torture commonly resorted to have been described in the following manner;

*...beating with various weapons, beating on the soles of the feet (jalaqa), 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.<sup>742</sup>*

In a research study concluded by the Law and Society Trust recently, examination of reports of judicial medical officers as disclosed in fundamental rights applications before court revealed the extent and methods of torture as stated below;<sup>743</sup>

*"Handcuffs were applied around the wrists and suspended from a rafter by the wrists... S-Lon pipe inserted into the rectum. A piece of barbed wire was inserted through the pipe hole. The wire was moved around after the pipe was removed partially. Chili powder was also introduced through the pipe... Burned with a hot iron... Assaulted on elbows, shoulders, knees and ankles with batons... Positive medical evidence of vaginal penetration... Vaginal penetration by the insertion of plantain flower is possible... Abdominal examination revealed distended tender bladder... Loss of sensation over 8th cervical and 1st thoracic vertebrae... Fracture of the crown of right central incisor tooth... There were many scars of lacerations in varying sizes found scattered on his entire back at various directions... His genitals were found to be swollen and reddened... There were circular scars of burns... There were twenty-two somewhat similar, band like, healing abraded contusions... He developed acute renal failure... He was found to be unconscious... There were two burn injuries on his penis... There was bleeding inside the head which was evacuated by performing a hole on his head..."*

In one case, the injuries found to be established by the Court were as follows; the petitioner had been stripped, hung from the roof by his thumbs, beaten on the head, soles, legs, thigh, hands,

<sup>740</sup> *Yogalingam Vijitha v. Mr. Wijesekara and others*, SC (FR) App. No. 186/2001, 23.08.2002, (citing *Amal Sudath Silra vs. Koditwakka*, [1987] 2 Sri LR 119

<sup>741</sup> *ibid.*

<sup>742</sup>Special Rapporteur on Torture Concludes Visit to Sri Lanka, 29 October 2007, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/F493C88D3AFDCDBEC1257383006CD8BB?opendocument>.

<sup>743</sup> Pinto-Jayawardena, Kishali and Kois, Lisa in 'Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response', Law & Society Trust, 2008, at p. 26

back and shoulders with a hose pipe, and had his testicles and penis squeezed severely, resulting in 38 injuries and rendering him temporarily disabled.<sup>744</sup> In another instance, an artisan was subjected to severe assault by a sub-inspector attached to the Wellipenna police station. A tuberculosis patient who was in the same police station was compelled to spit into his mouth with the police officer perpetrating the torture informing him that he too would die within two months of the same disease.<sup>745</sup>

In yet another instance, the petitioner was handcuffed and suspended from a rafter, burned with an iron, assaulted with batons, raped with an S-Lon pipe, which was inserted in his rectum, after which barbed wire and chilli powder was inserted into pipe, and subjected to other forms of “sadistic treatment which leaves no trace.”<sup>746</sup>

*“The types of torture are of a character that is extremely injurious and painful to any human being. Falanga or bastido is a special nature of beating which was degrading and inhuman. The injuries heal but heal after causing extreme pain without marks or lasting injuries. Sri Lankan police and security officers use an array of outrageous modes of punishment to extract information and in course of such severity victims die. They are dismissed as disappeared from custody and since the custodians know the persons have been killed no serious search is undertaken. Privately, the body of the deceased arrestees is disposed of.”<sup>747</sup>*

In some cases, there has been judicial finding of a violation of Article 11 despite no physical assaults resulting in either temporary or permanent physical impairment.<sup>748</sup> In one instance for example<sup>749</sup>, the degrading treatment complained of by the petitioners was grounded in the nature of the incarceration that they had to suffer – they had been put in an ill ventilated and cramped cell amidst an ‘unbearable stench that emanated from the vomit of intoxicated prisoners’ – as well as the manner in which they had been transported from one police station to another. In finding a violation of Article 11, it was conceded that, pain of mind, provided that it is of a sufficiently aggravated degree, would suffice to prove a rights violation. Both domestic and regional precedent articulating this principle was cited.<sup>750</sup>

Interrogation of persons suspected to be terrorists have occasioned the most brutal torture. Such practices are evidenced during the recent decades. In one investigation, it was found that detainees arriving at Boosa camp showed injuries that were inflicted by torture during interrogation at the army or Special Task Force (STF) camps in the north and east. An Amnesty International Report in 1987 details the testimony of a female detainee released from Boosa camp, who was arrested in Mutur in late 1985 and who witnessed the arrival of another woman<sup>751</sup>

<sup>744</sup> M.P. Prasanam “Saman” v. Jude R.P.C. 14260, and others, SC (FR) App. No. 106/2003, SCM 11.12.2003; compensatory award of Rs 40,000/-.

<sup>745</sup> *Koralalayanage Palitha Thissa Kumara v. Mr. Silva (Sub Inspector), Police Station, Welipenna and others*, SC (FR) App. No. 121/2004, 17.02.2006 (holding that the petitioner’s rights under Article 11 was violated and granting Rs. 25,000/- in compensation and costs).

<sup>746</sup> *Deshapriya v. Captain Weerakoon, Commanding Officer, Sri Lanka Navy Ship “Gemunu” and others*, [2003] 2 Sri LR 99; compensatory award of Rs 150,000/-.

<sup>747</sup> “Disappearances or really deaths through law and order custodians in Sri Lanka”, Sentinel Overview, The Centre for Human Rights and Development (CHRD), 2005, p 16, 17.

<sup>748</sup> *Abeynickreme vs Gunaratne* [1997] 3 Sri LR 225; taking a person into custody and locking him in a cell without justifiable reason to suspect him of having committed an offence constitutes degrading treatment. Other precedent for this principle include *Fernando vs Perera* [1992] 1 Sri LR 411, 420; However rough interrogation *per se* has been held not to fall within the constitutionally prohibited zone – see *Perera vs Siriwardene* [1992] 1 Sri LR 251, 288; At times, the professional status of a petitioner may have a bearing on the determination – thus, an engineer being compelled to remove his shirt, belt and shoes in the presence of his labourers amounts to degrading treatment – *Fernando vs Perera* SC (FR) 98/90 SCM, 25.9.91 – see *Fundamental Rights and the Constitution – II, a Case Book*, RKW Goonesekere, the Law & Society Trust, 2003, at page 42, footnote 6.

<sup>749</sup> *Shahul Hameed Mohammed Nilam and Others vs K. Udugampola and Others*\_SC(FR) Applications Nos 68/2002, 73/2002, 74/2002, 75/2002, 76/2002 SCM 29.01.2004, judgement of (Dr) Justice Shiranee Bandaranayake with Chief Justice Sarath Nanda Silva and Justice P.Edussuriya agreeing.

<sup>750</sup> Particularly *Kumarasena vs Sub-Inspector Sriyantha and Others* (SC Application 257/93 – SC Minutes 23.05.1994) where the court held that although there was no assault causing physical disability, the suffering occasioned was held to be of an aggravated kind and attained the level of severity required for a violation of Article 11. Most notably, *Fernando vs Silva* (Application 7/89 – SC Minutes 03.05.1991) where the Court held that imprisonment of a person without medication and food and without basic amenities for the performance of normal bodily functions was a violation of Article 11. Jurisprudence of the European Court of Human Rights (EUCt) was also considered, specifically *Tyrrer vs UK* (1978, 2 EHHR, 1), *the Greek case* (127 B (1969) Com. Rep. 70, *Campbell and Cosans vs UK* (Case law of the EUCt, Vol. 1, pg 170).

*“[she] was brought to Boosa on [date]. There were injuries on both her wrists and she was unable to fold her fingers. She told me and the other female detainees that she was stripped naked, molested and hung up by her wrists by the Mutur police before she was sent to Boosa.” “She further told us that 14 other girls from her area were taken by Mutur police along with her and that they were stripped naked and raped by the Mutur policemen.”<sup>751</sup>*

Rape is a common form of torture as was the case in Yogalingm Vijitha detailed above. Documenting such cases during 2001, Amnesty International pointed to the prevalence of gender based sexual violations by police, army and navy personnel.<sup>752</sup> In *Nithiyathan Suthabaran v. Nilantha Buddhika Weeraratne*, 2<sup>nd</sup> Lieutenant, Officer in Charge, Army Camp, Mavadvempu, and others,<sup>753</sup> the Court found that the petitioner was severely assaulted, resulting in injuries found to be “grievous and endangering his life,” after nails were driven into his feet, and he was kicked and beaten all over the body, genitals and head, including with the butt of a gun, which left him unconscious and resulted in bleeding inside his head, “which was evacuated by performing a hole in his head.”<sup>754</sup>

Recent UN Special Rapporteur Mission Reports have also given us useful information in this respect. Thus, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak stated that he was ‘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.’<sup>755</sup>

These reports are long standing. For example, in 1982, an Amnesty International mission visit observed that special equipment was used for torture at the Elephant Pass army camp. Prisoners were held upside down from fan hooks, steal fittings were fixed to the walls, where prisoners could be handcuffed at various heights to prevent them from standing, sitting or sleeping. Some claim that they were beaten in police stations and a former detainee explained, how prisoners were subjected to torture in 1982 at the ‘4<sup>th</sup> floor’ of the police station in Colombo.<sup>756</sup> The mission concluded that detainees held under the PTA were tortured in the following ways from June 1981- January 1982; namely being held upside down and beaten, prolonged heavy beating on the head, stomach, back, shoulders, feet with the use of sticks, pipes and fists, stripped naked and beaten on the genitals, needles inserted under the nails of fingers and toes or on the arms, chilli inserted into sensitive parts and being forced to drink heavily salted, chilli infused water, being burnt with cigarettes (in one case having the pubic hair burnt) and being forced to lie on the floor for six months while being chained to the wall.<sup>757</sup>

Also, despite the legal repeal of corporal punishment, this is still practiced.

*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.<sup>758</sup>*

<sup>751</sup> Amnesty International, 20 May 1987, “Reports of torture, ill-treatment and unhygienic conditions in Boosa army camp, Sri Lanka”, AI INDEX: ASA 37/04/87, p2

<sup>752</sup> Amnesty International, January 2002, “Sri Lanka: Rape in custody”, AI INDEX: ASA 37/001/2002, p 3, 4

<sup>753</sup> SC (FR) App. No. 802/99; Rs. 75,000/- was awarded in compensation.

<sup>754</sup> *Ibid*.

<sup>755</sup> *Ibid*.

<sup>756</sup> Amnesty International, 3 May 1983, “Report of an Amnesty International Mission to Sri Lanka”, (31 January- 2 February 1982), p 30, 31

<sup>757</sup> *Ibid*.

<sup>758</sup> *Ibid*, at para. 80.

The context in which corporal punishment was practiced within prison walls was made clear in the following comment;

*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.<sup>759</sup>*

### 5.5. The conditions of detention

As far as conditions of detention are concerned, the combination of severe overcrowding with antiquated infrastructure of certain prison facilities places unbearable strains on services and resources, which for detainees, amount to degrading treatment. Many of the remand prisons in particular were originally built to house a fraction of the prisoners that they currently hold; for example, the Welikada prison was built to hold a prison population of 1,200 prisoners, but is presently holding more than 2,400 convicted and 1,560 unconvicted prisoners, while the Bogambara Prison which was built to hold 600 prisoners is holding 1,513 prisoners.<sup>760</sup>

Consequent to his Mission to Sri Lanka in 2007, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment observed as follows;

*“While the total capacity of all prisons amounts to 8,200, the actual prison population reaches 28,000. That poor conditions of detention can amount to inhuman and degrading treatment is well established in the jurisprudence of several international and regional human rights mechanisms. In Sri Lanka the combination of severe overcrowding with 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, amounts to degrading treatment in my opinion. The lack of adequate facilities also leads to a situation where convicted prisoners are held together with pre-trial detainees in violation of Sri Lanka’s obligation under Art 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.”<sup>761</sup>*

Further, he clearly demonstrated his concerns in regard to conditions of detention prevalent at police stations;

*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.<sup>762</sup>*

The observation by a senior human rights lawyer is also pertinent;

*Under the PTA normal prison rules do not apply .....Torture, denial of proper food and restriction on the time for visitors are amongst the deplorable conditions at police stations and STF camps.<sup>763</sup>*

<sup>759</sup>ibid, at para. 82

<sup>760</sup> Data obtained from the Prisons Department as at 31.12.2001.

<sup>761</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at para. 83.

<sup>762</sup> ibid, at para. 84.

<sup>763</sup> Ganesalingam V.S. “PTA violates international human rights standards”, Home for Human Rights, Beyond the Wall, June-August 2002, p 30

In *Subhash Fernando vs Silva*<sup>764</sup> the horrendous conditions of detention in police custody were explained to Court and accepted in the absence of any rebuttal by the police;

*“the prisoner said that he was kept in solitary confinement incommunicado without being able to communicate with any friend, relation or legal advisor, that he was subjected to constant harassment, that his food was inadequate, that ventilation was inadequate...and that he was without proper sleep as an electric light had been kept burning in his room for 24 hours of the day and that no proper medical and toilet facilities had been given to him...”*

This account exemplifies the conditions of detention in these cases though the severity of the same may vary with the degree of perceived (though not actual) threat. Insofar as conditions of detention in prisons are concerned, there is a clear violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners, (UNSMR) particularly Rule 10. Though in theory, Prison Rules provide for adequate ventilation and floor space, the severe overcrowding of the prisons has resulted in these conditions being violated.

*“Overcrowding in prisons has reached catastrophic proportions resulting in the inevitable violation of UNSMR and deprivation of the rights of prisoners. The problem is not only is there lack of space or accommodation for all these prisoners, it is also that there is insufficient provision of water, sanitary and recreational facilities and essential items of equipment such as bedding, plates, mugs, towels and clothing.”<sup>765</sup>*

Further, the restraint of prisoners during detention also facilitates torture and CIDTP. Specifically, the chaining of prisoners to hospital beds has been a condemnatory practice. In one instance, Rohitha Upali Liyanage was injured when police officers attached to the Wattegama Police Station, beat him and his friend with iron rods allegedly when Rohitha attempted to stop the officers from riding his motorcycle, without his permission, is illustrative in this regard.<sup>766</sup> The beating resulted in Rohitha suffering a fractured leg and other injuries. He was taken to the Wattegama hospital and chained to the bed, consequently being unable to attend court to sign his bail bond. It was only after pressure was brought to bear by local activists that the victim was released from his chains. The supreme irony of an individual with a severe leg fracture being further chained to his hospital bed, ostensibly in order that he not flee the hospital, is clear.

In another instance, a lay litigant (Anthony Michael Fernando) who had been sentenced to contempt of court by the Supreme Court for talking loudly in Court and filing numerous applications and whose detention was later decided to be in violation of his right against arbitrary detention under the International Covenant on Civil and Political Rights (ICCPR), was also treated in a like manner.<sup>767</sup> Following his imprisonment in the Welikada Prison in Colombo upon the order of the Supreme Court, Fernando developed a serious asthmatic condition and was admitted to the Prison Hospital (and thereafter to the National Hospital) where, despite his deteriorating health condition, he was kept chained to his bed on the express orders of the prison authorities. Later, the conditions of his detention were alleviated by interventions from activists. Such inhumane conditions of detention have been documented in other cases as well. In the *Wenelage Rani Fernando case*<sup>768</sup> the death of a father of three minor children (arrested for stealing a bush of plantains) was ruled to be directly due to assault by prison officials.

<sup>764</sup> (SC (FR) 7/89, SCM 3.5.911). Petitioner arrested for alleged violation of an emergency regulation and detained in police custody for fourteen months.

<sup>765</sup> Dharmadasa, H.G. ‘Rights of Prisoners’ in State of Human Rights Report 2003, Law & Society Trust, 2004, at p. 205.

<sup>766</sup> AHRC UA-136-2005/98-2005/97-2005. SRI LANKA.

<sup>767</sup> *Anthony Michael Emmanuel Fernando v Sri Lanka*, CCPR/C/83/D/1189/2003, adoption of views, 31-03-2005). The Committee did not however, rule on that aspect of Fernando’s petition regarding the alleged violation of his right to be free from torture in terms of ICCPR, Article 7 due to his being assaulted by prison guards and by the conditions of his detention, including specifically, the fact that he was kept chained to his hospital bed. The Committee declined to consider this aspect of the petition due to pending cases in the domestic courts at the time that the petition was taken up in respect of these very allegations of his torture and ill treatment. This was understandable due to its strict observance of the rule regarding non-exhaustion of domestic remedies.

<sup>768</sup> *Wenelage Rani Fernando case*, SC(FR) No 700/2002, SCM 26/07/2004, per judgment of Justice Shiranee A. Bandaranayake). The Court specifically commented upon the treatment meted out to a remand prisoner while at the Negombo prison, which “painted a gruesome picture where a hapless prisoner was brutally tortured and left alone, tied to an iron door, to draw his least breath.”

The case law of other jurisdictions clearly mandates that handcuffing of prisoners can never be used for punitive purposes or for longer than is strictly necessary. This prohibition is also contained, impliedly or explicitly in the applicable domestic statutes, including the Prisons Ordinance as well as in international instruments including the Standard Minimum Rules for the Treatment of Prisoners, which was, in fact, was referred to in the *Weneloge case* in a more general context.

The observance of duties prescribed in regard to convicted prisoners, regular magisterial visits and observations by Boards of Visitors (by the government's own concession) are also not being adhered to in practice as discussed. As confidential interviews with senior prisons officials conducted for this Study indicate, the level of knowledge of senior prison officials of statutes such as the UNCAT, the domestic CAT Act is abysmal. So is their diligence in conducting inquiries in respect of allegations of torture and CIDTP by prisoners.<sup>769</sup> Lack of medical personnel and their ready availability remains a problem.<sup>770</sup>

The conditions of those in detention under emergency law have been a long standing concern. In one report issued in 1987, Amnesty International expressed concern regarding conditions of detention for prisoners detained under emergency laws at the Boosa camp.

*Over 2,500 Tamil detainees are reportedly held at the camp without trial and several detainees are reported to have died following torture and subsequent lack of proper medical care. A large number of detainees are, in addition, reported to suffer from scabies, diarrhoea and dysentery.*<sup>771</sup>

The nature of the detention facilities at the Boosa camp was described as follows;

- Boosa Army Camp reportedly consists of 14 'wards', which are enclosures with dimensions of about 70 by 20 feet. According to the authorities, each such ward is meant to accommodate 125 with a maximum of 150 detainees. However, in reality, every ward is reported to hold 185 to 225 detainees. Each ward has a verandah of 70 by 4 feet, which the detainees are only allowed to use during the day.
- The wards have no toilet facilities attached and detainees are locked in from 6 pm till 6 am the following morning.
- These overcrowded conditions and the lack of adequate conditions of hygiene appear to have encouraged the spread of infectious disease and to have given rise to other health problems.<sup>772</sup>

This report, which remains one of the more comprehensive reports, detailing of detention conditions at Boosa, went on to state that scabies and other skin infections are very widespread among the detainees.<sup>773</sup>

In so far as women in detention are concerned, though the strict division of male and female detainees in prisons is in general observed and female prisoners are guarded by female prison personnel<sup>774</sup> overcrowding is a problem in this regard as well.

<sup>769</sup> interviews with prisons officials, 02/11/2008.

<sup>770</sup> Amnesty International, 3 May 1983, "Report of an Amnesty International Mission to Sri Lanka", (31 January- 2 February 1982), at pp 26, 27

<sup>771</sup> Amnesty International, 20 May 1987, "Reports of torture, ill-treatment and unhygienic conditions in Boosa army camp, Sri Lanka", AI INDEXT: ASA 37/04/87, p1

<sup>772</sup> *ibid.*, at p.4

<sup>773</sup> *Ibid.*

<sup>774</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at para. 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.*<sup>775</sup>

Other examples illustrate this problem. The Methsevana State House of Detention at Gangodawila is the one state house of detention for women. Its management comes under the purview of the Social Services Department of the Provincial Council of the Western Province. For many years the House of Detention at Gangodawila has come under severe criticism for its poor standards, maltreatment of inmates including violations of inmates' rights.<sup>776</sup> Receipt of such complaints by the Human Rights Commission of Sri Lanka led to a recent investigation of the institution by its Monitoring and Review Division. A recent study by a group of human rights monitors analyses the results and finds concern with the extreme conditions of unsanitary detention prevalent in the detention facility.<sup>777</sup>

*"The premises around the new and old buildings are in serious disrepair. The open space surrounding the living quarters contains old playground equipment, open sewage and litter including broken glass. The living quarters are cramped and dark, housing up to twenty women in one room, and lack basic necessities. ....The worst conditions plague women living in the psychiatric ward. During the July visit, several women with mental illness were lying on the ground, dressed in threadbare and dirty clothes, surrounded by flies and bugs."*<sup>778</sup>

The Human Rights Commission also observed that due to congestion and poor sanitation, there is heightened risk of spreading communicable diseases and that most women and children are subjected to preventable sickness, due to lack of access to healthy drinking water. The Commission reported that there were many women and children detained at the Methsevana House of Detention without proper legal authority, in violation of their fundamental rights enshrined under Article 13(2) of the Constitution of Sri Lanka. These include inmates, who are kept in custody after they have been released from their sentences, because they have no proper place to go, or because their guardians have not turned up to take them away. Although the Vagrant's Ordinance permits the commitment of a female offender to a house of detention, it also emphasizes that she shall only be detained there, until the expiry of the sentence. Despite this strict limitation stipulated under the ordinance, there were many women serving longer than the period specified in the sentence, the Commission observed. The Commission had raised grave concern over these women (and children) detained at the House of Detention without a proper mandate from a competent court. The other matter that drew the attention of the Commission was the practice by the courts, to send women under a detention order without mention of a date for their release. At the time of the investigation there were been 178 women held in custody indefinitely under this category of whom 54 were detainees suffering from mental illnesses. Of these 54 women, 31 have lived at the House of Detention for over 5 years and one woman had been there for 29 years. The situation created by the overcrowding, lack of space and other facilities is further aggravated by the severe shortage of staff. Although there was an approved cadre of 63 staff members the existing number had been only 24.<sup>779</sup>

<sup>775</sup> *ibid.*

<sup>776</sup> Report of the Human Rights Monitoring Group (HRMG), Consortium of Humanitarian Agencies (CHA), August 2008, at page 20 (unpublished)

<sup>777</sup> *ibid.*

<sup>778</sup> *ibid.*, referring to the findings of the Human Rights Commission

<sup>779</sup> *ibid.*

## 6. The Causes and Contributing Factors to Torture; The Institutional Framework in Practice

### 6.1. The legal framework (e.g. administrative detention, lack of legal safeguards, including Emergency Law) and legal definitions

Legal definitions in the constitutional and criminal law framework are problematic in manifold ways. The constitutional guarantees are limited as they do not contain the right to life in an express and unambiguous way; judicial interpretations thereon are subject to judicial discretion and should be enshrined in specific legislative form. Family members of victims, who die as a result of torture should be declared as entitled to redress and reparation owing to a violation of their own rights as well as that of the deceased victim.

Meanwhile, absence of an offence of enforced disappearances and absence of a deterrent concept such as command responsibility have been key lacunae in the criminal law. Enforced disappearances and extrajudicial executions are inextricably linked to the prevalence of torture and CIDTP and consequently, these issues have been comprehensively examined and addressed by the State as one problem and not in a compartmentalized manner. This linkage stems from the grave concerns expressed by the CAT Committee particularly regarding torture linked with disappearances and the State's response in that regard.<sup>780</sup>

Though the provisions of the CAT Act have been useful in the specific respect of torture and CIDTP, the definition of 'torture' under the Act are defective as they omit the term 'suffering.' The Act also does not expressly direct that superior officers should be held liable for acts of torture committed by their subordinates in circumstances where their consent is indicated or implied. Though, such responsibility could be implied from Sections 2 and 12 of the Act, the Attorney General has failed to initiate such prosecutions. In any event, the provisions of the UNCAT have not been well utilized by the prosecutorial agencies or indeed, by the judiciary.

Insofar as the procedures of ordinary law enabling torture and CIDTP are concerned, we have seen the manner in which safeguards to personal liberty have been gradually whittled down. Detainees, whether under ordinary law or emergency law do not have the right to independent and confidential legal assistance or to medical checks. Under emergency law, though Directives issued by the President in July 2006 affirm the right of a detainee to communicate with family or friends, this is not a right secured by law and is not observed in practice.

Again, though there is a right in theory when arrests are made under the ordinary law, to give reasons for arrest, this fundamental caution is disregarded. Arrests are arbitrary and where persons, who complain against the police are concerned, they are sought to be intimidated by the threat of fabricated cases being launched against them. Arrests are wholly arbitrary under emergency law as there is not even the theoretical safeguard that reasons must be given for arrests.

Amendments made to the Criminal Procedure Code in 2005 and 2007,<sup>781</sup> extended the period of time in which a suspect can be kept in police custody. Extended detention without effective and regular judicial review is a pervasive feature of emergency law and practices. Preventive detention and *incommunicado* detention is a particularly difficult aspect of current emergency regulations and mechanisms such as appeal to an Advisory Committee, (the members of whom are appointed by the President), have been nugatory. The lack of legal safeguards has been aggravated by the fact that magisterial supervision, (as required by law at the initial stage of arrest)<sup>782</sup> as well as during detention thereafter,<sup>783</sup> has been lax in many instances as reflected upon previously.<sup>784</sup> The right

<sup>780</sup> See United Nations Committee against Torture, Second Periodic Report, Second periodic reports of States parties due in 1999, CAT/C/48/Add.2, 06/08/2004, at para. 62.

<sup>781</sup> Code of Criminal Procedure (Special Provisions) Act No 15 of 2005 and 42 of 2007.

<sup>782</sup> Section 36 and 37 of the CCP Act.

<sup>783</sup> Section 115 (1) and (2) of the CCP Act.

to invoke the writ of *habeas corpus* has been rendered futile due to long delays at the preliminary hearings.

There is no systematic review of all 'places of detention' and the existence of some such detention camps is not officially recognised. Visits to 'places of detention' is not systematically carried out by the Human Rights Commission of Sri Lanka regarding which, in particular, the CAT Committee has voiced its concern.<sup>785</sup> There is also no systematic review of interrogation rules, instructions, methods, practices and arrangements for the custody and treatment of persons who are arrested and detained, thus violating Article 11 of UNCAT. Children and women have been particularly affected as a result of these legal lacunae.

### 6.2. The Legal Process

#### 6.2.1. Deficiencies in the process in the Supreme Court

The procedure in the hearing of fundamental rights petitions is beset with difficulties. In the first instance, the determining of such cases may take years. As stated earlier, despite a specific constitutional provision (i.e. Article 126(5)) prescribing a time limit of two months for the determining of these petitions, time limits imposed by law of this nature have been judicially declared to be merely directory.<sup>786</sup>

Further, the application of the one month time limit to the filing of fundamental petitions has meant that poor petitioners from places far away to the capital, where the Supreme Court is situated, have been disadvantaged as sometimes, it is many months before they are made aware of a rights remedy. In extraordinary situations of emergency, as for example during the eighties and early nineties, when thousands of extra judicial executions and enforced disappearances took place in Sri Lanka, the Court permitted the one month rule to be relaxed.<sup>787</sup> Upon a simple letter being sent by the affected person/s to the Registrar of the Court, the authority in charge of every place of detention was judicially directed to allow an Attorney-at-Law authorized by either association to have reasonable access to detainees. The attorneys were authorised to obtain instructions, to swear affidavits, and to prepare applications to Court or representations to Advisory Committees; to prepare and circulate a written statement describing the detainees' rights; and to acknowledge receipt of their applications and representations, and to forward them promptly to the addressee.<sup>788</sup> Thereafter, formal petitions were prepared and filed before the Supreme Court despite the fact that the one month period had lapsed, since the occurrence of the alleged violation. Several thousand petitions of this nature were determined by the judges and individual orders issued in these cases to either indict the detainees or to release them.<sup>789</sup> This was however a measure confined to those times and similar laxity has not been evidenced in ordinary cases.

Moreover and perhaps most importantly - the constitutional remedy lacks effective deterrence. In many cases<sup>790</sup>, the Court has called upon the National Police Commission, the Police

<sup>784</sup> *Republic of Sri Lanka vs Madilayawatte Jayalathge Thilakanutma Jayalath* HC Case No: HC.9775/99, Colombo High Court, HC Minutes, 19.01.2004 (decision of the High Court); *Weeramanana v Attorney General*, (supra) where remand orders had been made even though the Magistrate or the acting Magistrate did not visit or communicate with the suspect. The Court observed that this violated a basic constitutional safeguard in Article 13(2), that judge and suspect must be brought face to face before liberty is curtailed, which safeguard was not an obligation that could be circumvented by producing reports from the police. An earlier view of the Court (*Furnok v Raymond* [1996] 1 Sri LR 217) that remand orders, where they concern a patent want of jurisdiction, cannot be safeguarded under the cover of being 'judicial acts' with consequent immunity from fundamental rights challenge, was agreed with.

<sup>785</sup> United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, at para. 11.

<sup>786</sup> Vide *Silmona v Dayala Silva*, [1992] 1 Sri LR 195

<sup>787</sup> *In re Perera*, SC 1/90; Supreme Court Minutes ("SCM") 18.9.1990.

<sup>788</sup> *Judicial Development of Human Rights: Some Sri Lankan Decisions* Fernando, Mark (Justice) Sri Lanka Journal of International Law, Volume 16, Faculty of Law, University of Colombo, 2004

<sup>789</sup> *ibid*. It was pointed out by Justice Fernando that no firm statistics are available of the cases disposed of during this period but that it is likely that over 10,000 detainees benefited.

<sup>790</sup> *Sriyani Silva vs Iddamalgeda* [2003] 2 Sri LR 63, *Wevalage Rani Fernando case*, SC(FR) No 700/2002, SCM 26/07/2004; *J. Wagaachige Dayaratne vs JGP and Others* SC (FR) 337/2003 SCM 17.5.2004; Sanjeeva vs Suraweera, [2003] 1 Sri LR 317.

Department and the Prisons Department to take stringent steps to subject erring individual officers to appropriate disciplinary action. None of these directions have been implemented. The Attorney General has also been directed in some cases<sup>791</sup>, to consider taking steps under the CAT Act against the concerned police officers and any others who are responsible for the acts of torture perpetrated. Yet indictments have not followed in the generality of cases. In 1997, the Periodic Report submitted by Sri Lanka to the CAT Committee<sup>792</sup> referred, for example, to one instance where indictment was filed by the Attorney General against five police officers under section 356 (abduction), section 333 (wrongful confinement), section 314 (grievous hurt) of the Penal Code in Embilipitiya Case No 77818 consequent to a finding by the Supreme Court of torture being committed by these police officers in a fundamental rights petition.<sup>793</sup> However, though this case was cited in 1997, there is no follow-up in the Government's 2<sup>nd</sup> Periodic Report submitted in 2004<sup>794</sup> as to what exactly happened to this prosecution.

In any event, this is just one singular case; there is no doubt that action taken by the prosecutorial/investigative authorities, consequent to findings of violations of fundamental rights, is rare.

In recent years, the efficacy of the Court's jurisdiction has decreased to an even greater extent. An increasingly more conservative Supreme Court has been reluctant to hold state officers responsible for all but the most heinous of crimes. The Court itself has meanwhile most inexplicably detracted from its own authority by stating that even if police officers are implicated in acts of torture, this should not have any impact on their promotions.<sup>795</sup> Further, on occasion, the Court has been quick to allow applications in terms of Article 11 of the Constitution to be withdrawn,<sup>796</sup> despite protestations of the petitioner and notwithstanding an earlier practice of the Court that particularly Article 11 cases (given the pre-eminent nature of the right infringed) could not be withdrawn easily on the mere whim of counsel or even the petitioner himself/herself.<sup>797</sup> Given these negative trends, it is not surprising that the number of fundamental rights applications before the Court in terms of Article 11 has decreased.

<sup>791</sup> As fort example, in *Yogalingam Vijitha v. Mr. Wijesekara and others*, SC (FR) App. No. 186/2001, 23.08.2002.

<sup>792</sup> CAT/C/28/Add.3 21/11/1997, Sri Lanka, First Periodic Report, at paragraphs 43 and 53

<sup>793</sup> *ibid*, *Wimala Vithayamani v. Lt.Col. L.E.P.W. Jayatilaka and others* (SC (FR) Appln. 852/91, as cited in the Periodic Report

<sup>794</sup> United Nations Committee against Torture, Second Periodic Report, Second periodic reports of States parties due in 1999, CAT/C/48/Add.2, 06/08/2004. Though this is referred to as the 2<sup>nd</sup> Periodic Report in the CAT Committee Records, the Government has referred to it as the combined 2<sup>nd</sup> and 3<sup>rd</sup> Periodic Report, thus occasioning some confusion.

<sup>795</sup> *Keerthi Numan Jayantha Wedasinghe and Indika Hapugoda v. Ranjith Abeysuriya and Others*, SCFR No 392/2004, SCM20.02.2006 per order of Chief Justice Sarath Silva. An earlier order of the Court (per judgment of Justice Mark Fernando, in *Cader v. Mallawa Kumara and Others*, SCM 21/09/2001) had confirmed the culpability of a Head Quarters Inspector (along with other police officers) in regard to inflicting severe torture on a female complainant regarding a land dispute at the instigation of one of the other parties to the dispute. However, an application was later filed by the police officers in respect of their non-promotion by the National Police Commission which non-promotion was based on the judicial finding against them. Considering this application, the Chief Justice ruled that the previous judicial finding should have no impact on the promotion. His later order had been delivered upon the misconceived basis that the judicial finding against one respondent police officer was on his vicarious responsibility as OIC. In actual fact however, this police officer (Indika Hapugoda) was found by the Court in the earlier order (*viz Cader v. Mallawa Kumara and Others* (supra)) to have actually participated in the torture. In any event, the judicial order by the Chief Justice that vicarious liability should have no impact on promotions undermines its own authority and judicial precedents that had expanded the scope of liability.

<sup>796</sup> *Kathibinde Katapollande Gedara Dingiri Banda v. Sri Lanka*, (CCPR/C/D/1426/2005, adoption of views 26-10-2007) demonstrated a rare instance where the petitioner was bold enough to put his complaint on record. An army lieutenant had been tortured by other officers during 'ragging' (initiation process most often seen in universities, but also when persons who are recruited or promoted to the services, where new entrants are required to undergo humiliating, degrading treatment or even torture). Though his complaint was supported by the medical report, the fundamental rights application that he lodged in the Supreme Court through the Human Rights Centre of the Bar Association was withdrawn despite his explicit instructions to the contrary. His complaints to the Chief Justice and the Bar Association were to no avail. He then made an individual communication being made to the UN Human Rights Committee, the Committee found that the State party has violated ICCPR article 2, paragraph 3, read together with article 7. The Magistrate's Court proceedings were directed to be expeditiously completed and the victim granted full reparation. The State party was put under an obligation to take measures to prevent similar violations in the future. As discussed earlier, these views have not been implemented.

<sup>797</sup> *Herath Banda v. SI, Police* [1993] 2 Sri LR 324. The Court referred to its reluctance to arrange rights on a 'hierarchical scale though admittedly (...) Article 11 has special distinguishing features.' In this instance, permission to withdraw the petition was refused in the context of medical evidence clearly supporting the averments of brutal assault.

'in 2004, the total number of fundamental rights applications filed was 626; in 2005, it was 517 thus 109 less than the previous year. By the end of November 2006, the number of applications filed (were) 342, (thus) 175 less than in 2005 and 284 less than in 2004'<sup>798</sup>

*"Many of the lawyers who, in previous years, had undertaken fundamental rights cases on behalf of victims and who had acquired the knowledge and the skills needed in the pursuit of such applications, are now refusing to undertake such cases as they feel that the increase of harassment in their pursuit has reached intolerable levels.*

*Being exposed to heavy levels of intimidation, many of these lawyers feel that it is both unfair to the victims and to themselves, to undertake such cases, which in all likelihood, will lead to unpleasant experiences and also are unlikely to produce a satisfactory result, despite the justifiability and gravity of the complaint. They manifest a 'once bitten, twice shy' approach with regard to the pursuit of such applications.*"<sup>799</sup>

The delivering of judgments themselves under Article 11 has also decreased. During 2005, four judgments were delivered deliberating on Article 11 infringements,<sup>800</sup> out of which the Court found positively for the victim-petitioner in only one.<sup>801</sup> In the year 2006, only two judgments were delivered,<sup>802</sup> both of which declared that Article 11 rights had been violated. Compared to the stream of such judgments in previous years, these statistics well illustrate the lack of public confidence in which this constitutional remedy is now perceived.

## 6.2.2. Deficiencies in the process in the Court of Appeal

Where the legal processes in the Court of Appeal in respect of *habeas corpus* applications is concerned, the extreme delay that occurs in the legal process was rendered the invocation of this remedy to be of little practical effect. The preliminary inquiry before the Magistrates' Court takes many years in the generality of cases and applications filed in the 1980s are still pending in the Court of Appeal. There are no time limits for the final determining of these applications.

## 6.2.3. Deficiencies in the process in the High Courts and Magistrates' Court

The rate of the conviction for grave crimes in Sri Lanka is 4%.<sup>803</sup> Convictions have been handed down only in twelve cases of enforced disappearances and extra judicial executions committed as far back as the eighties.<sup>804</sup> Insofar as convictions specifically pertaining to torture and CIDTP are concerned, only three convictions have been handed down in terms of the CAT Act despite this law being in operation since 1994. Though impressive figures have been put forward by the government in their reporting obligations to treaty bodies,<sup>805</sup> the fact remains that most of these cases are pending and the deterrent effect of the CAT Act has been minimal.

<sup>798</sup> In '*Sri Lanka: State and Rights collapsing amidst growing violence and injustice*', The State of Human Rights in Eleven Asian Nations, Asian Human Rights Commission, Hong Kong, 2006, at page 288.

<sup>799</sup>*ibid*.

<sup>800</sup> SC (FR) Nos/263/01, 231/03, 17/03, 553/02.

<sup>801</sup> *Brahmanage Arun Sherni Sranaga Wijewardana v. Priyasan Anpawula and others*, SC (FR) No 553/02. SCM 27.05.2005 (per Raja Fernando J. holding that the petitioner's rights under Article 11 and 13(2) were violated and awarding compensation in the amount of Rs. 12,000/-).

<sup>802</sup> *Koralalyanage Palitha Thissa Kumara v. Silva and Others* SC(FR) Application No 121/2004, SCM 17.02.2006 and *M.K.P Prasanna Chandralal, AAL. on behalf of Dulakadura Arachchige Nimal Silva v. ASP Ranmal Koditwakku and others* SC (FR) Application No 565/2000, SCM 16.11.2006.

<sup>803</sup> '*The Eradication of Laws Delays*', Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2<sup>nd</sup> April, 2004, at para. 21.0.

<sup>804</sup> CAT/C/48/Add.2 06/08/2004.

<sup>805</sup> The Attorney General has indicated over 100 police and security personnel against whom there was a prima facie case established. The Attorney-General has forwarded indictments in 40 cases against 50 police officers under the CAT Act. In addition, over 300 police officers have been charged for offences of abduction and wrongful confinement. Of those, 12 police officers have been convicted and sentenced. Since August 2002, 68 police officers have been prosecuted in 38 cases of torture' - See United Nations Committee against Torture, Second Periodic Report, Second periodic reports of States parties due in 1999, CAT/C/48/Add.2, 06/08/2004, at paragraph 59.



There are many reasons for this failure. The pre-trial as well as the trial process itself is beset with problems at the very inception of the arrest of a suspect. As stated above, the police do not respect legal procedures and are adept in the circumvention of legal safeguards such as the production of a suspect before a Magistrate within twenty four hours of arrest. Often, the wrong person is produced before the Magistrate. The Magistrate himself or herself does not take the trouble to interrogate the suspect or to confirm the identification of the suspect to ensure that the suspect is not tortured. Lack of impartiality of judges in some cases is also evidenced. For example, in *The Government of the Democratic Socialist Republic of Sri Lanka vs Havabandi Garwin Premalal Silva*,<sup>806</sup> the High Court judge had, on the basis of the case being agitated by non-governmental organisations, declared his distaste of non-governmental organisations.

Meanwhile, deficiencies abound at each and every point of the trial stage. For example, in the Nandini Herath Case dealt with earlier,<sup>807</sup> specifically problematic features of the trial process were as follows:

- the accused were enlarged on bail on the very first date itself,
- the bail order could not be cancelled even when the instances of violation of the order were brought to light,
- the Medical Report by a forensic medical expert, which was favourable to the victim, was not added to the evidence,
- the two towels which were of much evidential value in respect to the allegations of rape and torture, were not sent in for DNA analysis,
- the prison officer who gave evidence of Nandani's recital of her ordeal to him had not brought the relevant record.<sup>808</sup>

The errant officers continued to be in service for a substantial period of time even subsequent to them being charged under the CAT Act, again demonstrating a manifest failure in the process and lapses on the part of the police hierarchy, as well as the supervisory body, the National Police Commission. The accused were thus able to influence the witnesses, again a common factor in trials of this nature, and intimidate the victim's family, her friends and even her lawyer ultimately resulting in their acquittal.<sup>809</sup> The absence of a Witness Protection System encouraged such abuse and intimidation. The unduly extended time taken for the forwarding of the indictments as well as the actual hearing of the case (over four years) is another pertinent factor. This is a common phenomenon.<sup>810</sup>

There is no constitutional or statutory safeguard against protracted trials as stated earlier. In some cases as has already been reflected upon, witnesses have been killed such as in the *Gerald Perera Case*. The CAT Committee has expressed its concern regarding the undue delay of trials, especially in the cases of trials of people accused of torture.<sup>811</sup> ICCPR Article 14 (3) (c) recognises the right to be "tried without undue delay." In *Sundara Arachchige Lalith Rajapakse v Sri Lanka*,<sup>812</sup> the UN Human Rights Committee reiterated its finding that the delay of one and a half years in the disposal of both cases amounted to an unreasonably prolonged delay within the meaning of article 5 (2) (b) of the Protocol

In one analysis, the impact of law delays on the prevalence of torture and CIDTP has been formulated thus;

<sup>806</sup> Case No. 444/2005 (HC), High Court of Kalutara, High Court Minutes, 19.10.2006

<sup>807</sup> Pinto-Jayawardena, Kishali and Kois, Lisa in *Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response*, Law & Society Trust, 2008, at p. 61.

<sup>808</sup> *Ibid*.

<sup>809</sup> *Ibid* - *The Government of the Democratic Socialist Republic of Sri Lanka vs Nanda Warnakulasuriya and others*, HC Case No; 119/2003, Kurunegala High Court, High Court Minutes, 25.06.2007.

<sup>810</sup> *Ibid*.

<sup>811</sup> United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, at para 14.

<sup>812</sup> CCPR/C/87/D/1250/2004, adoption of views, 14-07-2006 (supra).

*"The question of delays in adjudication has been perhaps the most talked about subject regarding the defects of the judicial system in Sri Lanka. However, there has been little attempt to link this with issues such as the increase of crime, social insecurity and loss of faith in the judicial process as a whole. There seems to be a reluctance to make these linkages..... the result is a willingness to accept rather crude solutions to social problems; viz-a-viz; extrajudicial killings, torture and mob violence".<sup>813</sup>*

The government has said that the Attorney General has instructed his officers to give preference to cases coming under the CAT Act. <sup>814</sup> However, here again, there is little evidence of such prioritisation. As stated above, there have been only three convictions and several acquittals under this Act. The vast majority of cases remain pending in the courts with little hope of a successful outcome.

This problem is compounded by the absence of a witness protection system. The *Chamila Bandara Case*, where a young boy suspected of petty theft was cruelly tortured;<sup>815</sup> the *Lalith Rajapakse case* (supra), where the complainant of police torture had to flee his home after learning that the police had planned to poison him; the *Gerald Perera Case*, where though appeals were made to the government to provide him and the members of his family with protection, after he pursued justice for torture inflicted upon him, due to mistaken identity and was thereafter killed days before he was due to give evidence in his CAT trial, in the absence of any witness protection being afforded to him, illustrate the severity of the problem.

The UN Human Rights Committee and the CAT Committee has consistently stressed the need for an effective witness protection programme.<sup>816</sup> Indeed, this need has been acknowledged by senior government officers as well as for example, in an oft quoted question posed by a former Attorney General of Sri Lanka, he asked as to whether it was more important, in a civilized society to build roads to match with international standards spending literally millions of dollars rather than to have a peaceful and law abiding society, where the rule of law prevails?" <sup>817</sup> As stated previously, though the government has apparently drafted a victim and witness protection law recently, the revised draft<sup>818</sup> has not been made publicly available. The draft law has been pending for many months in Parliament without any indication of its enactment into law.

### 6.3. Deficiencies in the institutional framework (e.g. mandate, independence, lack of separation of powers)

The statutory and constitutional framework relating to safeguarding of the independence of the judiciary, which was improved upon by the 17<sup>th</sup> Amendment to the Constitution is not being implemented. Currently, judges to the appellate courts continue to be directly appointed by the President without the concurrence of the Constitutional Council. Further, the practical lack of the separation of powers between the Attorney General's Department and the government is a pertinent fact.<sup>819</sup>

<sup>813</sup> AHRC Third Special Report on Torture: *An X-Ray of the Sri Lankan policing system and torture of the poor*, 2005, at p. 200.

<sup>814</sup> United Nations Human Rights Committee; Sri Lanka, CCPR/CO/79/LKA/Add.1 Comments by the Government of Sri Lanka on the Concluding Observations of the Human Rights Committee, 27/02/2008, at para. 13.

<sup>815</sup> Chamila Bandara - AHRC UA-35-2003.

<sup>816</sup> "The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases", United Nations Human Rights Committee, Concluding Observations on Sri Lanka (2003), CCPR/CO/79/LKA, 01/12/2003, at paragraph 9; United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, at paragraph 15.

<sup>817</sup> 13<sup>th</sup> Kanehara Abhayapala Memorial Lecture as reported by in *The Right to Speak Loudly*, Asian Legal Resource Centre, 2004.

<sup>818</sup> For an old draft of this bill, see *LST Review*, Law & Society Trust, Volume 17 April & May 2007 Joint Issue 234 & 235.

<sup>819</sup> Two cases where officers of the Attorney General have been subjected to extraordinarily severe criticism for subverting the course of justice is in regard to the torture and murder of a journalist, Richard de Zoysa during the eighties (Weerakoon, Batty, (1991) *The Attorney General's Role in The Extra-Judicial Execution of Richard de Zoysa*, Star Press, Published by the author) and in regard to the cover up of the inquiry into the massacre of prisoners at the Welikada prisons (see *"From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay"* (2007) Special Report, No 25, University Teachers for Human Rights (Jaffna) Sri Lanka.

*"It has been our experience that every administration wishes the judgments of the court to be in its favour. Perhaps we cannot fault politicians for this, but the Attorney General should be able to advise the Executive and explain the legal basis of most judgments which have gone against the State. When I was Acting Attorney General, I was asked by the President whether the Supreme Court could review a Cabinet decision and whether a particular judgment was right. I sent him a letter defending the Supreme Court judgment; in the context it was given. Perhaps the Attorney General is no longer free or strong enough to advise the Executive. But this will not give a licence to Executive or Members of Parliament to make insinuations against the judgments of the court or to offer advice to judges at public functions as to how they may discharge their duty. ....I have observed a gradual decline in the independence of the officers of the Attorney General's Department. They are unable to tender correct advice to the State for fear of incurring the displeasure of the executive. State officers do not appear to accept the Attorney General's advice. The cause of this situation is the fear psychosis created by politicization."<sup>820</sup>*

In practice, the independent nature of the officers of the Attorney General have been cast in doubt; for example, one senior state prosecutor and former High Court judge has observed that 'it is disheartening to note that the Attorney General did not act impartially during the late 1980s, especially in *habeas corpus* applications made on behalf of the disappeared. It is well known that the Attorney General's Department had a special 'unit' to handle *habeas corpus* applications, established by then Attorney General Mr. Sunil Silva (who was Mr Siva Pasupathi's successor) and whose impartiality was much in doubt.<sup>821</sup> In two further instances, where the impartiality of the Attorney General was cast in doubt, Parliament was misled in the context of the extra judicial killing of a popular anti government journalist Richard de Zoysa as a result of a report presented by the Attorney General to the then Minister of Justice<sup>822</sup> and also in covering up the inquiry into the massacre of prisoners at the Welikada prisons<sup>823</sup>

Meanwhile, problems in the disciplinary control and removal of police officers implicated in torture and CIDTP, as discussed later on in this segment can be directly traced to the lack of independence of the Police Department from the government. In many instances, such action is halted on the request of politicians. In the first instance, the non-summary inquiry (the first step in the legal process when an offence is committed) consequent to which inquiry a decision is taken by the Attorney General whether to issue indictment, is delayed for years as detailed earlier. During this time, the accused police officer remains at his post and is not even transferred out. He/she can be interdicted only after indictment is served. The problems in this regard are acknowledged by state law officials.<sup>824</sup>

Meanwhile, the militarization of the police discussed previously in this Study has been a feature of the Sri Lanka political-military system for decades. The distinction between the police structure and the military structure has been noticeably blurred with negative consequences for accountability.

Observations made by a former high ranking police officer in the nineties in this regard still holds good for today;

*Asked about the ill-treatment and torture of suspects, the Inspector General of Police admitted that this was a "tradition" but said that in all such cases there had to be an investigation by an officer of the rank of Assistant Superintendent. He said that there was a set procedure to be followed, and disciplinary*

<sup>820</sup> Kulatunge, KMMB (2001) *Disorder in Sri Lanka*, Gunasena Publishers, Colombo, at page 24. The author was a former Acting Attorney General who went on to become a member of Sri Lanka's Supreme Court.

<sup>821</sup> De Silva, Samith, 'A Judicial Response in regard to Imposing Accountability for "Enforced Disappearances", *LST Review*, Law & Society Trust, Volume 17, Issue 234 & 235 April & May 2007, at p. 37

<sup>822</sup> Weerakoon, Batty, (1991) *The Attorney General's Role in The Extra-Judicial Execution of Richard de Zoysa*, Star Press, Published by the author, at page 13

<sup>823</sup> See "From Welikade to Matur and Pottawil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay" (2007) Special Report, No 25, University Teachers for Human Rights (Jaffna) Sri Lanka.

<sup>824</sup> Senior state counsel (now Deputy Solicitor General) Shavindra Fernando, at the National Workshop of the South Asian Treaty Bodies Programme organized by the Law & Society Trust, August 2004, Sri Lanka - refer comment as follows, 'the Establishments Code does not specify disciplinary action for officers undergoing non-summary inquiries'.

*action could be (and had been) taken. On the other hand he said that the Special Task Force, was not subject to his control as Inspector General, although it is administratively part of the police structure."<sup>825</sup>*

In his 2008 Follow-up Report consequent to his Mission to Sri Lanka,<sup>826</sup> the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston observed with concern that any information sought from the Police Department has to be by way of permission from the Secretary of Defence.<sup>827</sup> He had found during his visit that the underlying cause for the police failing to observe the right to life was that the police had become a counterinsurgency force. Police officers were accustomed to conducting themselves according to the broad powers provided to them under emergency regulations, rather than to those provided by the code of criminal procedure.<sup>828</sup>

The lack of separation of powers between the police and the army is significant.

*"...it is highly problematic that the Sri Lanka Police is now subject to the jurisdiction of the Ministry of Defence, Public Security, Law and Order"<sup>829</sup>. Inasmuch as the police are responsible for investigating crimes committed by the military, this arrangement limits the independence of these investigations. And inasmuch as the militarization of the police is part of the problem, this reorganization is surely not a helpful part of the solution."<sup>830</sup>*

Further;

*The problem of human rights abuses are aggravated by the fact that the complicated structure within police departments, the chain of command of the armed forces, paramilitary groups and various civilian and volunteer groups organized by the army. It is evident in some cases that people are transferred to different detention centres without any records of their movements and there is a lack of responsibility between these units of the security forces for the welfare and security of the detainee."<sup>831</sup>*

## 6.4. Deficiencies in Resources, Education and Training

### 6.4.1. Lack of Resources

The lack of proper and adequate infrastructure is a major problem in the legal system.<sup>832</sup> As basic a facility as fax machines are not available in Magistrates' Courts, District Courts and High Courts.<sup>833</sup> The fact that a majority of Magistrate's Courts lack photocopy machines needed to prepare briefs and Court proceedings has been officially acknowledged.<sup>834</sup> Minimum numbers of court registry staff and the inability to provide interpreters and translators during trials has aggravated this situation.

Lack of personnel in the Attorney General's Department has had a distinctly negative impact on the handling of the case load in the criminal division of the Department, as is evidenced by the

<sup>825</sup> Asia Watch, 31 May 1992, "Human Rights Accountability In Sri Lanka", Human Rights Watch, p 12

<sup>826</sup> A/HRC/8/3/Add.3, 14 May 2008, Eighth session of the Human Rights Council, at paras. 56 and 57.

<sup>827</sup> This has been the practical experience currently in all research studies conducted by non-governmental organisations where permission in this regard by the Secretary, Defence is generally refused.

<sup>828</sup> A/HRC/8/3/Add.3, 14 May 2008, Eighth session of the Human Rights Council, at para. 53.

<sup>829</sup> See <http://www.mod.gov.lk/role.html>.

<sup>830</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 52, footnote 33.

<sup>831</sup> News from Asia Watch, March 12, 1991 and Asia Watch, 31 May 1992, "Human Rights Accountability In Sri Lanka", Human Rights Watch, at p.31.

<sup>832</sup> See <http://www.abrchk.net/ua/mainfile.php/2004/716>.

<sup>833</sup> 'Prevalence of Torture in Sri Lanka; Persisting Problems and Outstanding Issues'; Alternative Report of the Law and Society Trust and the Asian Human Rights Commission to the CAT Committee, 2005, *LST Review*, Volume 16 Joint Issue 216 and 217, October and November 2005.

<sup>834</sup> 'The Eradication of Laws Delays', Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2<sup>nd</sup> April, 2004, at para. 5.0.

following assertion made by a committee on 'The Eradication of Laws Delays', while inquiring into the cases of delays in the criminal justice system;

*The Attorney General's Department ("AG's Dept") comprises 123 officers out of which over 60 Officers are assigned to the Criminal Division. The last cadre increase at the AG's Dept was in 1996 during which year the number of files received by the Department stood at 1639. However, as of 2003, the number of advice files received by the Department, in addition to those involving Court appearances amounted to over 6000 files*

*The failure to introduce an increase of cadre to correspond with the growing number of files received by the AG's Dept has seriously impeded its expeditious dispensation of legal advice. Therefore the Committee strongly recommends that additional cadre be recruited to the AG's Dept with immediate effect, with particular reference to the Criminal Division.<sup>835</sup>*

These deficiencies assume critical proportions in the context of law enforcement. The primitive nature of investigative techniques presently used by the police i.e. outdated fingerprinting technology and the lack of rudimentary investigative equipment such as polygraph machines (lie detectors) has also been commented upon by the committee appointed to look into laws delays.<sup>836</sup> Though the Committee Report referred to above does not acknowledge resort to practices of torture by police officers, other factors identified as deficiencies in the current police structure include lack of training and inadequacy of scientific support services (given the dearth of scientific officers in the Government Analyst's Department). The lack of qualified criminal investigators is a problem acknowledged by state law officers in media interviews as well.<sup>837</sup>

As the aforesaid Report by this committee candidly conceded;

*42.6% of all recorded crimes are committed with the Western Province, which although containing almost one third of the total number of Police Stations in the island (100 Police Stations out of an all island figure of 346 Police Stations are situated within the Western Province), is manned by a mere 14% of its total strength. Compounding matters further, the development of personnel for special assignments such as Parliamentary duty, VIP Security etc, is observed to up a considerable percentage of the aforementioned limited human resources available within the Western Province.<sup>838</sup>*

Significantly, as stated in another critical Report, this time from the United Nations Special Rapporteur on Extrajudicial and Arbitrary Executions, 'more than two thirds of today's police officers belong to the 'reserve' rather than to the regular police force.<sup>839</sup> The statutory duty of the reserve police is to assist the regular police<sup>840</sup>, and the reserve police officers have the same powers, duties, obligations, responsibilities and immunities as regular police officers.<sup>841</sup> The practical effect of greater reliance on police officers of the reserve is consequently not a positive development.

Meanwhile, these deficiencies are mirrored in the forensic process. It has been observed that Judicial Medical Officers, who carry out autopsies typically lack the requisite vehicles and equipment.<sup>842</sup>

<sup>835</sup> *ibid*, at para. 3.1.

<sup>836</sup> *ibid*, at para. 1.1. c).

<sup>837</sup> Interview with C.R. de Silva, (former Attorney General), BBC Sinhala Service Sandeshaya, Sunday, 5 September 2004.

<sup>838</sup> 'The Eradication of Laws Delays', Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2<sup>nd</sup> April, 2004, at para. 1.1. a).

<sup>839</sup> "Of the 65,000 policemen/policewomen, 20,000 belong to the regular police force and 45,000 belong to the reserve." UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 50, footnote 30.

<sup>840</sup> Section 24, Police Ordinance.

<sup>841</sup> Section 26D, Police Ordinance.

<sup>842</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 56.

*Proper documentation also requires the appropriate equipment to enable investigations to be carried out with precision and sophistication. Unfortunately in Sri Lanka ultra violet and infrared lamps, x-ray machines, ultra sound scanners that are necessary for identification of hidden injuries, are not provided. In fact, even basic essential equipment which facilitate documentation such as digital cameras, dictaphones and computers are not available and often have to be purchased by the individual forensic pathologists if they want efficiently to carry out their work. In cases of investigations into mass scale human rights violations such as enforced disappearances, DNA profiling is often essential in the attempt of establishing specific identification. However, there are no proper facilities available to the JMOs or at the Government Analyst's Department to enable such DNA profiling. Worse, those university laboratories, which do conduct DNA tests, are more often than not, reluctant to avail their facilities for forensic purposes.<sup>843</sup>*

Officials have called for improvement of forensic science facilities; most recently, a senior state law officer and a forensic science specialist expressed their concerns in this regard, the former stating that though frequent calls have been made for better equipped forensic science laboratories, police makers did not seem interested in implementing these recommendations despite the tremendous gains that it would bring to the criminal justice system.<sup>844</sup>

#### 6.4.2. Lack of Education and Training

As the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston found on his 2005 Mission visit, which concerns were reiterated in 2008, the lack of training is one primary reason as to why torture and CIDTP is prevalent among the police force.

*"...most of them have never received significant training in criminal detection and investigation.....today too many police officers are accustomed to 'investigating' by forcibly extracting confessions and to operating without meaningful disciplinary procedures or judicial review."<sup>845</sup>*

*"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.<sup>846</sup>*

It was remarked that the only significant development was that 'the government had engaged in a proactive programme of recruitment as a result of which 200 new Tamil speaking officers had been trained.<sup>847</sup>

Regardless, the lack of skilled and trained regular police personnel remains a fundamental problem. Similarly, lack of specialised training of Judicial Medical Officers (JMOs) has been identified to be a reason for lack of investigative capacity in the criminal justice system.<sup>848</sup> In one critical comment on the lack of specially trained JMO's, it was pointed out by a forensic science doctor that the practice of less trained medical officers (i.e.; District Medical Officers (DMOs)

<sup>843</sup> Perera, Clifford, 'Review of initiatives adopted for effective documentation of torture in a developing country' in Chapter 16 on 'Absence of Forensic Facilities', Asian Human Rights Commission, *Third Special Report on Torture: An X-Ray of the Sri Lankan policing system and torture of the poor*, 2005, at pp 261 -264.

<sup>844</sup> Deputy Solicitor General Palitha Fernando and Professor Ravindra Fernando reported in 'A call for better forensic facilities', in Chapter 16 on 'Absence of Forensic Facilities', Asian Human Rights Commission, *Third Special Report on Torture: An X-Ray of the Sri Lankan policing system and torture of the poor*, 2005, at p. 271

<sup>845</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 50.

<sup>846</sup> A/HRC/8/3/Add.3, 14 May 2008, Eighth session of the Human Rights Council, at para. 53.

<sup>847</sup> *ibid*, at para. 60.

<sup>848</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 56.

using complicated medico-legal formats that are in use for the documentation of injuries (i.e.; the Medico-Legal Examination Form (MLEF) to document injuries on living persons and the Post-Mortem Report (PMR) formats to document injuries on dead persons) has resulted in valuable information being lost as these officers lack the requisite training in forensic pathology to effectively utilize the formats.<sup>849</sup> These less trained officers ordinarily work in smaller hospitals throughout the country, which are visited by the people of rural areas as the limited number of JMOs are based in the Teaching, General and Base Hospitals of the major cities.<sup>850</sup>

## 6.5. Deficiencies in Systems of Accountability (e.g.; lack of investigation and prosecution)

### 6.5.1. Investigating complaints of torture and CIDTP

States are required, under international law, to 'ensure prompt, impartial and exhaustive investigations into all allegations of violations of torture and ill-treatment and disappearances committed by law enforcement officials. Such violations should, in particular, not be undertaken by or under the authority of the police, but by an independent body.'<sup>851</sup>

In practical terms, the investigation into allegations of torture is handled by the Special Investigations Unit (SIU). Aggrieved parties or their family members make their complaints to the Assistant Superintendent of Police (ASP) or Superintendent of Police (SP) of the relevant area. The ASP/SP records statements of the victims as well as that of witnesses and thereafter forwards the complaint to the legal range of the police. After these complaints are entertained, and recorded, the legal division upon receipt thereof, refers the complaint and any other ancillary information to the IGP, who then forwards it to the SIU with instructions to begin investigations. Since the SIU is directly under the command of the IGP, investigations commence only at the initiation of the IGP. The IGP in his discretion may instead instruct the Criminal Investigations Department (CID) or another special unit of the police to investigate a complaint. These 'special cases' are dealt with by the CID, headed by an Assistant Superintendent of Police and comes under the direct purview of the Deputy Inspector General in charge of the CID.

The SIU is not dedicated to investigating allegations of torture; instead it also investigates other offences allegedly caused by policemen, such as fraud. Its cadre is insufficient<sup>852</sup> and its officers are liable to transfer. In any event, when allegedly offending police personnel are investigated by fellow policemen, the resulting investigations cannot reasonably be expected to be 'independent'. The very fact that police officers investigate their colleagues militates against public confidence in the propriety and efficiency of the investigations. A separate body independent of police interference, to conduct investigations into allegations against policeman is an imperative requirement, which has not received due consideration. The CAT Committee has expressed its concerns that current domestic processes of investigations of torture allegations do not conform to international law standards.<sup>853</sup>

*The Committee expresses its deep concern about continued well-documented allegations of widespread torture and ill-treatment as well as disappearances mainly by the State's police forces. It is also concerned*

<sup>849</sup> Perera, Clifford, 'Review of initiatives adopted for effective documentation of torture in a developing country' in Chapter 16 on 'Absence of Forensic Facilities', Asian Human Rights Commission, *Third Special Report on Torture: An X-Ray of the Sri Lankan policing system and torture of the poor*, 2005, at pp 261 -264.

<sup>850</sup> *ibid*

<sup>851</sup> United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, at para. 12.

<sup>852</sup> Up-to-date statistics regarding cadre allocation in the Police Department is not accessible to the public due to the current freeze on information imposed by the Department to all members of the public and specially non-governmental organisations primarily due to the intensified war. However, in an interview that was conducted by the Law & Society Trust's research officers with the Head of the Special Investigations Unit, on 18<sup>th</sup> May 2004 for the purpose of critiquing the 2003 Government's fourth and fifth periodic report to the UN Human Rights Committee, it was informed that there are about 80 officers including 3 ASPs attached to the SIU, which (at that time) was housed in 2-3 cubicles at the New Secretariat Building at Police Headquarters.

<sup>853</sup> United Nations Committee against Torture, Concluding Observations on Sri Lanka (2005) CAT/C/LKA/CO/2, 15/12/2005, Lanka, at para.12.

*that such violations committed by law enforcement officials are not investigated promptly and impartially by the State party's competent authorities (article 12).*

*The State party should ensure prompt, impartial and exhaustive investigations into all allegations of violations of torture and ill-treatment and disappearances committed by law enforcement officials. Such violations should, in particular, not be undertaken by or under the authority of the police, but by an independent body. In connection with prima facie cases of torture the accused should be subject to suspension or reassignment during the process of investigation, especially if there is a risk that he or she might impede the investigation.<sup>854</sup>*

Observations made by the United Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the deficient nature of criminal investigations are revealing;

*The frequent failure to prosecute police accused of responsibility for deaths in custody is due partly to deficiencies in internal investigation. Complaints about police misconduct are received by the Inspector General of Police (IGP), who selects either the Special Investigations Unit (SIU) or the Criminal Investigation Department (CID) to carry out an internal investigation. Internal investigations into serious incidents typically last from two to four years, and it seems likely that by no means all such complaints are investigated at all. When grave misconduct, such as torture or murder, has been alleged, the investigation is generally conducted by CID. The primary role of CID is assisting local police, and for it to also conduct internal investigations undermines both their actual effectiveness and outside perceptions of impartiality. Reform is needed, and it may be hoped that this can be spearheaded by a strong National Police Commission.'<sup>855</sup>*

In 2008, the Special Rapporteur reiterated his concerns;

*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 Special Rapporteur presented to the Government.<sup>856</sup>*

It was pointed out that though the one positive development in this regard was the National Police Commission (NPC), the NPC's long-term effectiveness was threatened by the lack of a strong constituency supporting its independence and that the NPC has failed to improve police accountability in part because it has lost its independence.<sup>857</sup>

The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak also identified the absence of effective ex officio investigation mechanisms in accordance with article 12 of the Convention against Torture as a predominant factor leading to the inefficacy of the CAT Act.<sup>858</sup>

The police are found to routinely fabricate information and alter reports to support their version of the facts. For example, the Supreme Court has found that:

*A specific feature of the culture of impunity is the blatant disregard with which implicated police officers falsify official documents, including the Information Book. In one case where the court found that Grave Crimes Information Book and the Register/Investigation Book had been altered with impunity and utter disregard for the law, the view was taken that it was unsafe for a Court to accept a certified copy of any statement or notes recorded by the police without comparing it with the original. It was pointed out thus; "It is a lamentable fact that the police who are supposed to protect the ordinary citizens of this*

<sup>854</sup> *ibid*.

<sup>855</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 57.

<sup>856</sup> A/HRC/8/3/Add.3, 14 May 2008, Eighth session of the Human Rights Council, at para. 55.

<sup>857</sup> *ibid*, at para. 55 and 59.

<sup>858</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at para. 77.

country have become violators of the law. We may ask with Juvenal, 'quis custodiet ipsos custodios?' Who is to guard the guards themselves?<sup>859</sup>

In another case, it was judicially observed as follows;

*"In the face of this material and the pack of falsehoods relating to the arrest of the petitioner, the alterations in the GCIB and the false entries therein... The 1<sup>st</sup> respondent has therefore not only infringed the petitioner's fundamental rights guaranteed by articles 13(1) and 13(2) but has also had the audacity to fill in this Court a false affidavit in an attempt to mislead the Court which is a more grave offence."<sup>860</sup>*

The period within which a crime is investigated by the police is susceptible to abuse of the parties associated with this process (namely; the complainant, witnesses and persons implicated in the complaint) in several ways.

In the first instance, investigations into any crime are initiated by the first information that is ordinarily recorded in the Information Book. However, there are many instances of the police refusing to record the first information.

Further, in some cases, entries in relation to the first information are fabricated. In *Rajapakse v Chandra Fernando, IGP and others*<sup>861</sup> manifest irregularities were noted by the Court in the way in which the first information relating to the commission of an offence had been recorded by the police. In this case, the complainant had failed to file a complaint at a police station but had forwarded a written complaint to the police headquarters, which in the opinion of the Court, did not satisfy the requirements of a "first complaint."<sup>862</sup> The Court emphasized the significance of the first information in the process of a criminal investigation and the importance of the correct verifiability of a complaint. This point was of central importance to the judicial ruling that the petitioner's rights in terms of Article 12(1) had been violated.

Section 109(1) of the Code of Criminal Procedure Act (hereafter the Code) states that "every information relating to the commission of an offence may be given orally or in writing to a police officer or inquirer" while subsequent sub-sections require meticulous care to be taken in entering such first information in the Information Book, to be kept by the officer in charge of the relevant police station. The Court's ruling was that such meticulous care had not been followed in this case and that, indeed, the police officers concerned had engaged in fabrication of the documentation. It was opined that the "very commencement of the investigation on the basis of totally hearsay information without any supporting documentary evidence"<sup>863</sup> was contrary to procedure established by law and was a violation of Article 12(1).

## 6.5.2. Prosecuting and punishing perpetrators of torture and CIDTP

### 6.5.2.1. Prosecutions

According to statistics submitted by the Government of Sri Lanka to the United Nations Committee against Torture in August 2004,<sup>864</sup> it was stated that the Attorney-General has forwarded indictments in 40 cases against 50 police officers under the CAT Act. In addition, over 300 police officers have been charged for offences of abduction and wrongful confinement. Of those, 12 police officers have been convicted and sentenced. According to this same information, since August 2002, 68 police officers have been prosecuted in 38 cases of torture.

<sup>859</sup> *Kemistri Kumara Caldera 's case*, S.C. (F.R.) 343/99, SCM 6/11/2001

<sup>860</sup> *Nayana Kumudinie Lasantha Vidanage v. Udaya Senewiratne and others*, SC (FR) App. No. 148/99, 26.09.2001

<sup>861</sup> SC(FR) No 387/2005, SCM 27/03/2006

<sup>862</sup> At p. 14 of the judgment.

<sup>863</sup> At p. 25 of the judgment.

<sup>864</sup> United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2, 06/08/2004, at para. 59.

However, large numbers of these cases are pending or have ended inconclusively. In 2003, the UN Human Rights Committee regretted that "the majority of prosecutions initiated against police officers or members of the armed forces on charges of abduction and unlawful confinement, as well as on charges of torture, have been inconclusive due to lack of satisfactory evidence and unavailability of witnesses, despite a number of acknowledged instances of abduction and/or unlawful confinement and/or torture, and only very few police or army officers have been found guilty and punished."<sup>865</sup>

These concerns were reflected by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak;

*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 led 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..... 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."<sup>866</sup>*

The following observation by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston (2006)<sup>867</sup> pointed to the severity of the problem

*Cases that are referred to the Attorney-General seldom lead to convictions. This is partly due to the lack of evidence gathered, and partly to a judiciary that moves cases along slowly, sometimes tolerating years of delay preceding verdicts. One government official suggested that the judiciary was so overloaded that judges would seize on any plausible excuse to allow a postponement and cut the caseload. He pointed out that if indictments reliably resulted in interdiction, as the law requires, police officers and other government officials would be less likely to seek dilatory adjournments. I regret that I did not have the opportunity to meet with judges, but I note the widespread perception that the courts manage cases inefficiently. Prosecutors must also share the blame for the low conviction rates. The Attorney-General has become increasingly active in prosecuting police torture cases, and he informed me that there have been 64 indictments, 2 convictions, and 2 or 3 acquittals (most cases are pending). Time will tell whether this is the beginning of accountability or a further exercise in shadow-boxing."<sup>868</sup>*

In some instances, judicial reprimands regarding the manner in which prosecutions are conducted have been forthcoming as was the case in the Gerald Perera acquittal<sup>869</sup> where the High Court faults the Attorney General for first indicting the officer-in-charge of the Wattala Police Station and then withdrawing his name from the indictment, as well as for not calling evidence of some witnesses seen as being vital for the prosecution case.

*"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 Merryn Perera was taken into custody at mid day, his wife and Provincial Council member Thiagi Alvis were at the room of the Officer-in-Charge of the Wattala Police when a person named S.I. Renuka and another police officer held Merryn Perera and*

<sup>865</sup> United Nations Human Rights Committee, Concluding Observations on Sri Lanka (2003), CCPR/CO/79/LKA, 01/12/2003, at para. 9.

<sup>866</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Mission to Sri Lanka, 1-8<sup>th</sup> October 2007, A/HRC/7/3/Add.6, 26 February 2008, at paras. 51 and 52.

<sup>867</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 58.

<sup>868</sup> *ibid*; the Special Rapporteur noted: 'I should note that the deficiencies in the system of criminal justice are not mitigated by the more effective process for vindicating the fundamental rights guaranteed by the Constitution, including the right to life and to freedom from torture.'

<sup>869</sup> *Republic of Sri Lanka vs Suresh Gunaseena and Others*, HC Case No 326/2003. The Attorney General is also reprimanded for failure to call witnesses whose evidence may have been vital for the prosecution case.

brought him to the Officer-in-Charge's room. However these two officers are not prosecution witnesses. If Gerard Meryn 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.<sup>870</sup>

Meanwhile, State counsel often does not turn up for these prosecutions, given the lack of personnel in the Department of the Attorney General, which results in the prioritization of some case and the bypassing of others.

In the *Nandini Herath Case* referred to earlier, this problem was well reflected;

“.....the lackadaisical attitude of the prosecutors is obvious from the very indictments filed in the cases in issue. There was no description whatsoever of the offence committed in any of the three indictments filed connected to this offence. It is a moot point that the outcome of the case may well have been quite different if a competent special prosecutor had been assigned to conduct the trial. In actual fact, the cases were handled by four or more state counsel attached to the Kurunegala High Court for whom these cases amounted to additional prosecutorial burdens.”<sup>871</sup>

Despite government claims that there is a special unit dealing with torture cases in the Attorney general's Department, this claim seems not to be borne out in reality;

“In its reports to the UN Human Rights Committee and to the C.A.T Committee, the State referred to a special unit [Prosecution of Torture Perpetrators Unit (PTP Unit)] in the Attorney General's Department. Closer scrutiny reveals that there is no separate Unit dealing with torture cases and the Unit is only an administrative convenience with neither specially assigned staff or separate premises. The torture cases are distributed among 4 - 5 State Counsels, who also handle other criminal cases. It was observed during our work that the AG does not seem to monitor to investigations conducted by the Special Investigations Unit (SIU) of the Police Department. Neither is the progress of an investigation reported to the AG.”<sup>872</sup>

In certain instances, despite evidence of grievous torture being disclosed, prosecutions do not ensue. Jagath Kumara's case<sup>873</sup> (where Kumara was arrested, detained and tortured by the Payagala police station officers in June 2002 and died at the Welikada prison thereafter), the perpetrators were not prosecuted even though the information and related files were handed over to the Attorney General. A major reason for this situation is that prosecutors depend solely on police investigations for the establishing of a prima facie case on which indictment is issued. In many cases, good investigations are simply not forthcoming by police officers, who are essentially, investigating their own colleagues, whether the matter concerns a case of torture or enforced disappearances.

Meanwhile, indictments take several years to be served on the accused. One problem may be that the indictment is served to the headquarters and not to the station, where the accused police officer is based.<sup>874</sup> Thus, delay is occasioned during the time that the indictment is sent from the

headquarters to the relevant police station. Even after indictment is served and the case commences in the High Court, proceedings may drag on for years allowing ample time for the accused police officers to threaten, intimidate or kill witnesses.

The situation is the same in regard to the prosecution of other crimes such as extra judicial executions as a result of torture engaged in by army officers. Only a marginal number of prosecutions have been upheld at the appellate court level. In contrast, several cases have remained pending for over decades and the victims/witnesses have either been coerced/threatened into withdrawing the complaints or have fled the country. This pattern is very common in cases where sexual violence is alleged. Few perpetrators have been punished; one notable exception was in the *Krishanti Kumaraswamy Case*, which involved the rape and murder of a schoolgirl by soldiers attached to the Chemmani checkpoint, where the responsible junior soldiers were convicted.<sup>875</sup> Other cases have not afforded such positive stories.

In March 2000, the UN Special Rapporteur on Violence Against Women expressed concern regarding the lack of serious investigation into allegations of gang rape and murder of women and girls.<sup>876</sup> In response, the government provided details on the progress of the investigations of two of four individual cases listed by the Special Rapporteur. The government stated that “every case of alleged criminal conduct committed by the armed forces and police has been investigated and the perpetrators prosecuted, although there may have been unavoidable legal delays.”<sup>877</sup> However, this is manifestly not the case. In what is commonly known as the *Mannar Women Rape Case* for example, a pregnant woman Vijikala Nanthakumar and a mother of three, Sivamani Weerakoon were arrested on 19<sup>th</sup> March 2001 and raped/tortured by officers of the Counter Subversive Unit (CSU) of the Mannar police.

The victims were medically examined only eighteen days after the alleged rape. It was concluded that “there were no positive findings to establish sexual intercourse”<sup>878</sup>, though the medical officer found several injuries consistent with the allegations of torture, police investigations commenced. Twelve police officers and two navy officers were arrested, but were later released on bail.<sup>879</sup> This release on bail is a common feature in such trials. Though the victims persevered in seeking justice for several years, the long drawn out nature of the trial at the High Court resulted in their finally succumbing to the pressure and the intimidation.<sup>880</sup>

The case of Ida Carmelita is also a good example of the same. Here, the victim, (a former member of the LTTE), was gang raped and killed by five soldiers at Pallimunali, Mannar on 12 July 1999, after having surrendered to the police. The two witnesses, who identified the perpetrators fled to India due to death threats. As is the common practice, though some suspects were arrested, they were later released on bail and the case remained pending.<sup>881</sup> In another illustration, Sarathambal Saravanbavananthakurukul, a 29 year old woman was gang raped and killed by navy soldiers on 28 December 1999 at Pungudutivu. Despite the orders of the President to carry out immediate investigations, it was reported that “very little [was] being done to pursue the matter.”<sup>882</sup> There has been no progress in the case since then.

Examining these instances, Amnesty International has identified the following obstacles in regard to successful prosecutions, namely; victims or the witnesses being threatened by the perpetrators, insufficient medical evidence due to poor quality of preliminary examination, or due to the delay in taking the victim to the doctor, lack of impartiality of those who engage in investigations, ex-

<sup>870</sup> *Republic of Sri Lanka vs Suresh Gunasena and Others*, HC Case No 326/2003, HC Minutes 02.04.2008, at p 27. (English translation of the original judgment written in Sinhala).

<sup>871</sup> see Pinto-Jayawardena, Kishali and Koiso, Lisa in ‘Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response’, Law & Society Trust, 2008, at pp 63-64.

<sup>872</sup> ‘One Year On: The Continuation of State Sponsored Violence: An Alternative Report to the United Nations Human Rights Committee’ in LST Review, Law & Society Trust, Volume 15 Joint Issue 208 & 209 February & March 2005

<sup>873</sup> *ibid.*, at page 18 – situation existent as at August 2002.

<sup>874</sup> *ibid.*

<sup>875</sup> High Court of Colombo, Case No 8778/97, Bench of Three Judges, The appeals against the convictions were dismissed in the appellate process - 2/2002 TAB, SC Minutes 03.02.2004 .

<sup>876</sup> Amnesty International, January 2002, ‘Sri Lanka: Rape in custody’, AI INDEX: ASA 37/001/2002, at pp 3, 4

<sup>877</sup> *ibid.* (quoting UN Document E/CN.4/2001/73/Add 1, paragraphs 51 to 57.), at pp 3 and 4

<sup>878</sup> *ibid.*, at pp 1, 2

<sup>879</sup> *ibid.*

<sup>880</sup> One woman has fled to India while the other has refused to proceed with the case – see ‘From Welikade to Matur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay’ Special Report, No 25, Teachers for Human Rights (Jaffna), Sri Lanka, 2007.

<sup>881</sup> Amnesty International, January 2002, ‘Sri Lanka: Rape in custody’, AI INDEX: ASA 37/001/2002, at pp 7-9

<sup>882</sup> *ibid.*

police investigating police, slow action by the local authority (normally the police) to investigate, political and other influences upon the investigation, the withdrawal of the complaint or the lack of cooperation of the victim due to the pressure from family or the community because of cultural taboos associated to rape, difficult access to court for the victim who lives in rural areas and the fear of the police to take action against perpetrators belonging to the security forces.<sup>883</sup>

As observed earlier, the Attorney General has failed to exercise his powers regarding appeals against acquittals handed down by the High Courts in respect of trials under the CAT Act as was manifested most clearly in the *Gerald Perera Case*.

### 6.5.2.2. Disciplinary Action

#### A. The Police

In one pertinent judicial quote, it was observed that the prevalence of torture and CIDTP in Sri Lanka continues due to the absence of effective disciplinary action against perpetrators particularly in the police ranks;

*“As this Court has observed in previous judgments, this situation exists because police officers continue to enjoy immunity from appropriate departmental sanctions on account of such conduct. It is hoped that the authorities will take remedial action to end this situation.”*<sup>884</sup>

*“The duty imposed by Article 4(d) [of the Constitution] to respect, secure and advance fundamental rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim no exemption. At least, he may make arrangements for surprise visits by specially appointed Police officers, and/or officers and representatives of the [National] Human Rights Commission, and/or local community leaders who would be authorized to interview and to report on the treatment and conditions of detention of persons in custody.”*

*“A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation if not also of approval and authorization.”*<sup>885</sup>

Disciplinary procedures within the police department, despite adequate Departmental Orders and numerous directions in this respect (such as that quoted above) from the Supreme Court are fundamentally inadequate. Further, the extreme politicisation of the service has led to promotions and commendations being awarded, not as a matter of merit, but as a matter of political influence. All these have been major factors that have led to the police service abandoning its original rationale of serving the public. The concept of command responsibility has also lost its value with this deterioration of the police service. Though this concept has been articulated by the Supreme Court on more than one occasion<sup>886</sup>, it has not filtered down to the actual working of the police department.

It is common for police officers, including senior police officers, who have been found by the Supreme Court to have violated the rights of citizens by way of torture, illegal arrest and illegal detention, to continue to serve in their positions. In several recent cases, the Supreme Court has ordered the NPC to hold disciplinary inquiries into the conduct of policemen impugned in those cases. However, these directions appear not to have been adhered to. The Court also has pointed to the responsibility of higher-ranking officers to enforce discipline and prevent human rights

<sup>883</sup>Ibid

<sup>884</sup>Per Justice KMBB Kulatunga in *Abasin Banda vs Gunaratne* ((SC (FR) 109/95, SCM 3.11.1995).

<sup>885</sup>Per Justice Mark Fernando in *Sanjeewa vs Suraweera*, [2003] 1 Sri LR 317.

<sup>886</sup>*Sanjeewa vs. Suraweera*, [2003] 1 Sri LR 317; *Sriyani Silva vs Iddamalagoda* [2003] 2 Sri LR 63.

violations by their subordinates. Notwithstanding, the police persist in committing grave abuses and the manner in which they are dealt with has not significantly changed.

In one of the most grievous violations of rights in recent years, (referred to earlier in this report), the Officer-in-Charge (OIC) and several other policemen of the Wattala police station, were found by the Supreme Court to have grossly violated Gerald Perera's fundamental rights under Article 11 of the Constitution which guarantees freedom from torture, cruel, inhuman or degrading treatment/punishment. The Court awarded a hereto unprecedented amount of compensation and medical costs to the victim (totalling to about Rs. 1.6 million) for violation of his rights.

In this case, Justice Mark Fernando stated that ;

*“The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in police custody shows no decline. The duty imposed by Article 4(d) [of the Constitution] to respect, secure and advance fundamental rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim no exemption. At least, he may make arrangements for surprise visits by specially appointed Police officers, and/or officers and representatives of the [National] Human Rights Commission, and/or local community leaders who would be authorized to interview and to report on the treatment and conditions of detention of persons in custody. A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation (if not also of approval and authorization).”*<sup>887</sup>

However, in spite of this specific finding by the Court, most of these officers (including the OIC) continued to hold office in the same capacity at the very moment that Gerald Perera was murdered days before he was due to give evidence at a High Court trial. The trial was instituted by the Attorney General's Department against some of those very same police officers under the CAT Act.

It is contended by the police that interdictions of police officers purely on the basis of being found culpable in fundamental rights violations on 'affidavit evidence' is not fair, as this does not amount to proof beyond all reasonable doubt. However, it may be said in counter reply that this is scarcely an adequate reason, as to why the IGP cannot initiate disciplinary inquiries against such police officers and make the results of such an inquiry (irrespective of whether it exculpates such officer or finds him culpable) known to the public. As ironic as it seems for the Supreme Court to find in favour of a State officer (under Article 12 of the Constitution), whom the Court itself has found to have violated another's rights under Article 11 of that very same constitutional document, the IGP seems reluctant to take any disciplinary measures against alleged torture perpetrators, in the absence of a common policy between the different organs of the State.<sup>888</sup> This problem has been compounded by the Court itself declaring in some instances, that the findings of the Court in fundamental rights cases should not hinder promotions.<sup>889</sup>

<sup>887</sup>with Edussuriya, J. and Wigneswaran, J. agreeing in *Sanjeewa vs Suraweera*, [2003] 1 Sri LR 317

<sup>888</sup>*we are now wondering whether we can, in fact, interdict a person who is found violating FR by the Supreme Court before indictment is served under the CAT Act. These are matters however, that can be settled only through a policy decision. There should be a greater effort to hold senior officers responsible in regard to torture cases, – over the last few decades, we have lost the concept of responsibilities of senior officers.* Vide DIG Thangavelu, head, Legal Division of the Sri Lanka Police, at the LST South Asian NGOs and the UN Human Rights Treaty Regime Project (Treaty Bodies Project) National Workshop, August 2004

<sup>889</sup>*Keerthi Nawan Jayantha Wedasinghe and Indika Hapugoda vs Ranjith Abeysuriya and Others*, SCFR No 392/2004, SCM20.02.2006. per order of Chief Justice Sarath Silva. This case concerned a Headquarters Inspector who had been inflicted severe torture on a female who had complained against a local area businessman in respect of a land dispute. She had been arrested, detained and tortured by police officers of the Nittambuwa police station on the instigation of the businessman who had links to the police. Despite the finding of the Court (per judgment of Justice Mark Fernando, in *Cader vs Mallawa Kumara and Others*, SCM 21/09/2001) that the police officers had subjected her to torture, Chief Justice Silva, considering an application filed by two police officers in respect of their non-promotion by the National Police Commission, ruled that the previous judicial finding should have no impact on the promotion. The Chief Justice apparently seems to have proceeded on the basis that one respondent police officer had been implicated on the basis of his vicarious responsibility as OIC and that therefore, his promotion ought not to be affected. However, the responsibility of this

Meanwhile, in some instances it has been sought to use the long delays in trial proceedings as a reason to reverse the interdictions of police officers, who have been charged with offences under the general penal law, regarding their involvement in enforced disappearances and other human rights abuses, including torture. Such cases have been pending in courts since the eighties. When these police officers were interdicted upon being indicted as required by the Establishments Code, the Police Department issued a circular reversing the interdictions. This action was then taken to court on a public interest basis and the Court of Appeal upheld the interdictions after quashing the circular issued by the Department<sup>890</sup>

Even when inroads are made on the impunity afforded to police officers in this regard, the victories are few and their effect is almost immediately negated. For example, due to the decades long inefficacy relating to disciplinary action within the Police Department, the NPC was vested with the constitutional duty of enforcing discipline within the police force under the 17<sup>th</sup> Amendment to the Constitution. The first NPC did engage in some commendable steps during its first term, such as the interdiction of police officers indicted for torture and preventing the political transfer of police officers during the pre-election period. Since its official inauguration in November 2002, the NPC concerned itself with matters relating to promotions, particularly the filling of about 4000 vacancies to important posts, which remained vacant due to inaction under the earlier system of administration. Resolving this problem of vacancies was deemed as a priority in order to get the system to function properly. The promotion scheme itself was, however, subjected to much public criticism (and challenged in court).

In so far as the disciplinary control of police officers is concerned, the NPC decided early on, to delegate the disciplinary control of police officers below the grade of Chief Inspector to the IGP. Such delegation was justified on the basis that it was considered necessary for the IGP to administer his own department. The IGP in turn referred the cases to his subordinate officers, or to a special investigation unit.

However, as police officers continued to investigate other police officers, no effective change took place in the rampant indiscipline of the service. In addition, as the higher ranking officers who earlier oversaw the conduct of such inquiries were accustomed to making settlements between complainants and alleged perpetrators rather than conducting inquiries in an objective manner, most complainants were rightly distrustful of these inquiries. Till the end of 2003, the functions of the NPC in this regard were limited; it merely entertained complaints and referred them to the Police Department for investigation. Details of specific instances in which disciplinary action had been taken against any offending police officer were not publicly available. It appeared that if any action has been taken, it had been done purely on an *ad hoc* basis and after the lapse of several years. Very few disciplinary inquiries were completed, and the outcome of even those inquiries that have concluded was not known.

**Table containing details of disciplinary inquiries pending and completed by the Police**

**Department for 2003**<sup>891</sup>

Year	Complaints received	Inquiries pending	Inquiries completed
2003	156	3	11

Increased public criticism was then evidenced. In mid 2004 therefore, the delegation to the IGP was revoked by the NPC (in its first term itself) which then took on the task of conducting the disciplinary inquiries relevant to all ranks of police officers itself.

However, this revocation caused the senior hierarchy in the Police Department, including the IGP to severely castigate the NPC. Due to the tensions that then arose between the Police Department and the NPC, powers of disciplinary control of police officers below the rank of Chief Inspector were returned to the IGP. This is a good example of an instance, where the NPC sought to exercise independent accountability in regard to the Police Department, in turn having it hampered by the establishment.

Currently, the IGP continues to exercise discipline in regard to police below the rank of Chief Inspector. However, the disciplinary action taken by the IGP (on powers delegated by the NPC as aforesaid) is minimal. In one illustrative case, the Officer-in-Charge (OIC) of the Wattala police station, who was found to have consented and acquiesced in the torture of Gerald Perera by the Supreme Court<sup>892</sup> was only lightly reprimanded following a disciplinary inquiry held by the IGP.<sup>893</sup> The inquiry procedure itself in this instance is alleged to have been irregular.<sup>894</sup> Yet, there is no possibility of challenging this matter before the NPC as the power in this regard has been delegated to the IGP and whilst such delegation remains, the NPC can have no control, unless the affected police officer himself or herself appeals to the NPC. It is however self evident that where a police officer has escaped punishment following a disciplinary inquiry conducted by the IGP, he or she would certainly not appeal against this order to the NPC. This has caused dissatisfaction in the ranks of the Police Department, itself as other police officers are resentful of the fact that a few favoured police officers are allowed to escape the consequences of their actions.<sup>895</sup>

Meanwhile, the NPC exercises disciplinary control over the following gazetted ranks only; Senior Deputy Inspectors General of Police, Deputy Inspectors General of Police; Senior Superintendents of Police; Superintendents of Police; Assistant Superintendents of Police and Chief Inspectors of Police. A Disciplinary and Legal Division established within the NPC is entrusted with the task of preferring charges against police officers based on preliminary investigation reports and recommendations of the IGP.<sup>896</sup> Inquiries are held by tribunals of inquiry appointed by the NPC which finally takes the decision regarding appropriate disciplinary action.<sup>897</sup> The inquiries are conducted by retired public servants drawn from a panel appointed by the Ministry of Public Administration.<sup>898</sup>

During 2007, 67 draft Charge Sheets had been received from the IGP, 40 Charge Sheets had been issued, out of which inquiries had commenced in 24 cases. Six inquiries had been concluded.<sup>899</sup> Out of the Charge Sheets issued before 2007, 53 inquiries had been concluded during 2007. However, the actual disciplinary action taken, the nature of the offence in question and other relevant data are not disclosed.

police officer (Indika Hapugoda) was not limited to vicarious liability but involved actual committal of acts of torture as borne out by the facts of *Cader vs Mallawa Kumara and Others* (ibid). In any event, this finding of Court that liability (even if vicarious) should have no impact on the promotion scheme of police officers offends the very essence of the *sui generis* jurisdiction that the Court is vested with, in terms of fundamental rights violations and results in negation of the Court's own authority.

<sup>890</sup> *Pathirana vs D/G(Personnel & Trainings) and others, C.A. Writ Application No 1123/2002, CA Minutes 09.10.2006*. The Court quashed the relevant police circular on the basis that it was *ultra vires* the Establishments Code which stipulated that where legal proceedings are taken against a public officer for a criminal offence or bribery or corruption the relevant officer should be forthwith interdicted by the appropriate authority.

<sup>891</sup> Interviews conducted by research officers of the Law & Society Trust with the head of the SIU during 2004 for the 'Follow-Up Report' to the Concluding Observations of the UN Human Rights Committee to Sri Lanka's Combined Fourth and Fifth Periodic Report, 2003.

<sup>892</sup> *Sanjeewa v Suraweera*, [2003] 1 Sri LR 317

<sup>893</sup> Confidential interviews conducted with senior police officers on 12/12/2008. The interviewees wished to remain anonymous due to a 'gag order' imposed on the Police Department by the Secretary of Defence in regard to releasing any information on the functioning of the Department to outsiders.

<sup>894</sup> *ibid*

<sup>895</sup> *ibid*

<sup>896</sup> Annual Report of the National Police Commission, 2007, at pp 67- 68

<sup>897</sup> *ibid*, at p 68

<sup>898</sup> *ibid*, at p 69

<sup>899</sup> *ibid*, at p 68



Where the NPC's Public Complaints Procedure, effective from January 2007,<sup>900</sup> is concerned, the Annual Report of the NPC pertaining to 2007 indicates that around 1,940 complaints had been received from the public; the highest number of complaints (31%) related to police inaction. Misuse of power and partiality amounted to 25% and 12% respectively. In some areas such as Galle and Badulla, unlawful arrest and detention came third highest on the list while in the Matara District, assault occupied the third position.<sup>901</sup> Investigations into 888 complaints were concluded during 2007 and disciplinary action instituted against 51 police officers; 3 officers were interdicted pending inquiries and court proceedings were initiated against 6 police officers, one officer was fined under summary disciplinary procedure, 05 officers were transferred on disciplinary grounds and 22 police officers were warned.<sup>902</sup>

The Progress Report of the PCID in reference to January to December 2008 meanwhile indicated that 1,380 complaints had been received during this period; while the highest number continued to be in relation to police inaction (32%), 92 cases related to assault (7%). Only 06 deaths in police custody and 36 cases of torture (3%) had been reported to the PCID.

In this regard, 629 complaints had been finalised, out of which 81 complaints had been withdrawn, 70 complaints had been proved to be false, 93 complaints not proved due to lack of evidence and 28 complaints had been amicably settled. Legal action had been instituted only in 5 cases; no police officers were dismissed from service, one police officer was interdicted and charge sheeted, 14 officers were charge sheeted and 22 police officers were warned. No police officers were summarily punished or transferred.

The number of complaints against the police received at the officers of the NPC in fact, seem to indicate a downwards trend since 2004; for example, in 2004, (even with the actual Rules of Procedure not being in place and where the NPC entertained complaints at its district offices), it received a total of 2250 complaints, out of which 224 complaints amounted to torture and/or assault.<sup>903</sup> During 2005, some 2,419 complaints were received, out of which assault and torture amounted to 87 and 187 complaints respectively.<sup>904</sup>

The progressive decrease in the number of complaints being submitted to the NPC in later years could be justifiably linked to the public's increasing lack of faith in the NPC as well as public concern regarding the independent nature of the NPC consequent to the appointments being made directly by the President from 2006 onwards as earlier discussed. During 2006 itself for example, only 1,078 complaints were received.<sup>905</sup>

Meanwhile, the distinction drawn in later reports of the NPC between torture and assault is not logically defensible, as assault in all cases amounts to torture. Separation of the two in the categorisation of complaints, results in the number of complaints classified as amounting to torture, being artificially lowered.

It has been pointed out by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the General Assembly in February 2008 that, 'no conclusions could be drawn in regard to (the Rules of Procedure) its implementation in practice.'<sup>906</sup> It has also been observed that the police disciplinary process is least effective when dealing with more senior officers.

*'Statistics relating to "departmental lapses" show that disciplinary proceedings are almost exclusively initiated against low-ranking officers. There is a determined unwillingness to hold police officers with*

*command responsibility accountable for torture and killings engaged in by their subordinates, whether at the disciplinary or at the criminal level. This applies to both internal and external accountability mechanisms. In 2001, constables were found responsible for 86% of "departmental lapses"; superintendents were found responsible for only 0.04% of such lapses.'*<sup>907</sup>

The inefficacy of these Rules of Procedure has been a major cause for the perpetuation of torture. Resource difficulties abound; currently, there are only three investigating officers attached to the NPC's Public Complaints Investigation Division (PCID) and the investigation work of the PICD is greatly limited in this regard.<sup>908</sup>

The negation of the authority of the NPC is applicable to other contexts as well. For example, the NPC made a direction some years back that police officers indicted under the CAT Act should be interdicted forthwith. However, this decision was heavily critiqued by the police hierarchy including the then Inspector General of Police and the NPC was engulfed in a storm of controversy. Commenting on this controversy, the Report of UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on his 2005 Mission to Sri Lanka provides us with some interesting details;

*In March the National Police Commission (NPC) provided the Inspector General of Police (IGP) with a list of 106 officers to be interdicted (suspended), pursuant to the Establishment Code, due to their indictments for torture. I received varying accounts of the subsequent events from persons inside and outside of Government. Some insisted that no one had yet been interdicted; others that some had been interdicted but only after a delay of many months. According to the IGP, he did not move immediately because of the need to double-check the list provided by the NPC against his own files to avoid any errors. He reported to me that he found a few such errors and then proceeded to interdict the remaining officers. To have interdicted the officers based solely on the NPC's list would, he insisted, have compromised the due process rights of the officers. But this reflects a fundamental misunderstanding of the institutional structure set up by the Seventeenth Amendment. The IGP was given a purely consultative role subordinate to the NPC's power to discipline officers; while the NPC may well make mistakes, those are its responsibility. Unless the NPC's independence is ensured in practice, its great potential will remain unrealized.'*<sup>909</sup>

## B. The Army

The doctrine of command responsibility has also become a problematic concept in the police force, so it is within the army. This has led to another reason as to why torture and CIDTP is facilitated, because when the command structure breaks down, fear of disciplinary consequences is lost.

In some instances, army officers accused of gross human rights violations have been tried before a court martial, rather than brought before a court on criminal charges, which violates international law standards.<sup>910</sup> One such notable instance was in regard to the 12<sup>th</sup> of June 1991 massacre of sixty seven civilians at Kokkadicholai in the Batticaloa District, following the deaths of two soldiers, due to an explosion of a device set by the Liberation Tigers of Tamil Eelam (LTTE). After the appointment of a fact finding Presidential Commission of Inquiry to inquire into the massacre<sup>911</sup>, it was recommended by the Commissioner that even though the offences were punishable in terms of the Penal Code, due to the finding that there was no evidence

<sup>907</sup> (*Sri Lanka Administration Report, 2001.*) quoted by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 57, footnote 38.

<sup>908</sup> Confidential interviews with NPC officials, 22.01.2009

<sup>909</sup> *Supra*, at para. 65.

<sup>910</sup> *If special or military courts have jurisdiction over serious human rights violations where these are rife, it is extremely unlikely that the perpetrators will be brought to trial or – if brought to trial – that they will be convicted. Such courts often use truncated procedures and lack the professional competence and independence of the civilian courts. Military courts tend to lack independence and impartiality because they are under the military command structure – often the same structure which is suspected on carrying out human rights violations' in 'Disappearances and Political Killings. Human Rights Crisis of the 1990's, A Manual for Action', Amnesty International, (1994) (abbreviated version published by the Nadesan Centre, Colombo), at page 27*

<sup>911</sup> Final Report of the Kokkadicholai Commission of Inquiry, (Sessional Paper No 11 – 1992).

<sup>900</sup> Gazette No 1480/8 – 2007 January 17, 2007

<sup>901</sup> Annual Report of the National Police Commission, 2007, at p 71

<sup>902</sup> Annual Report of the NPC, 2007, at page 72.

<sup>903</sup> Annual Report of the NPC, 2004, at page 19

<sup>904</sup> Annual Report of the NPC, 2005, at page 32.

<sup>905</sup> Annual Report of the NPC, 2006, at page 37.

<sup>906</sup> A/HRC/7/3/Add.6, 26 February 2008, at paragraph 25

against any particular soldier or soldiers as such, “the offenders cannot be brought before a criminal court of law”<sup>912</sup>, but that the army should undertake its own investigations and impose sanctions in military law<sup>913</sup> against the perpetrators. The seventeen army men were subsequently acquitted by a military court, which only found the senior officer responsible for failing to control his men. This officer was later dismissed.<sup>914</sup>

As commented upon earlier, in *Dingiri Banda’s Case*,<sup>915</sup> a Lieutenant in the Gajaba regiment of the Sri Lanka Army was tortured as part of a so called ragging ceremony by two identified army officers of a superior rank. An internal inquiry was during which Dingiri Banda was not permitted to present evidence and the Court, comprising officers from the Gajaba Regiment, even though the Court found that the two perpetrators had acted offensively and scandalously, thereby causing disrepute to the Army) were merely temporarily suspended. They were later promoted to the rank of captain in the Sri Lankan Army.

### C. Prison Officials

In one instance of a death of a prisoner reported in January 1991, Amnesty International observed that even though several investigations, including a magisterial inquiry, a police inquiry and an inquiry by the prison authorities were to be conducted, but the results of which had still not been made public by the end of the year.<sup>916</sup>

#### 6.6. Detention practices (e.g. arbitrary detention, isolation)

As already examined above, detention practices such as *incommunicado* detention have greatly facilitated torture and CIDTP. Efforts taken to monitor ‘places of detention’ have been inefficacious. Some years back, it was agreed that human rights monitors such as the officers of the Human Rights Commission of Sri Lanka should be allowed to inspect police stations, in order to ensure that torture is not permitted to be committed upon the premises. However, this most commendatory move has been negated by the fact that only specified places in police stations such as the cells were permitted as open for inspection and that only after permission from the prison authorities, which defeats the very purpose of the inspection. The fact that torture takes place not in the cells, but in other places within the precincts of the police stations, such as the kitchens and the toilets was disregarded. The resistance emanating from the high levels of the Police Department to any form of accountability for abuses committed by police officers, however mild, is extremely high. Monitoring of detention places under emergency is not conducted at all in practical terms through, as stated previously, Magistrates are enabled to visit such places.

#### 6.7. External factors (e.g. pressure to resolve crimes promptly, corruption, violent society)

The arrest, detention and torture of individuals, who have a criminal record and therefore have a convenient cover for pinning crimes on them in cases, where there otherwise is a lack of suspects has been well documented; *Palitha Thissa Kumara’s Case*<sup>917</sup> and *Lalith Rajapakse’s Case* (supra) where the latter was severely beaten on 19 and 20 April 2002 by officers from the Kandana Police Station and remained in a coma for 3 weeks<sup>918</sup>, are good examples in this respect. While public pressure to effectively address the high rate of crime is manifest, the response on the part of the

<sup>912</sup>ibid.

<sup>913</sup> In case of a summary trial before a military court, the punishment is of a disciplinary nature, such as reduction in rank, withholding of promotions or delay in promotions. In case of a court martial, the punishment can be imprisonment or discharge from service.

<sup>914</sup> Abeysikera, Charles. (1993), ‘Human Rights 1992 - A Dismal Record’, *Pravada*, Social Scientist’s Association, Colombo

<sup>915</sup>*Rathihinde Katupollande Gedara Dingiri Banda vs Sri Lanka*, CCPR/C/D/1426/2005, adoption of views 26-10-2007.

<sup>916</sup> Amnesty International, January 1992, ‘SRI LANKA: Summary of human rights concerns during 1991’, AI INDEX: ASA 37/01/92, p 5, 6

<sup>917</sup> *Konlatiyangge Palitha Thissa Kumara v. Mr. Silva (Sub Inspector), Police Station, Welipenna and others*, SC (FR) App. No. 121/2004, 17.02.2006 (holding that the petitioner’s rights under Article 11 was violated and granting Rs. 25,000/- in compensation and costs).

<sup>918</sup> AHRC UA-19-2002. Rajapakse was accused of petty theft. No complaint had however been filed.

police department is not to engage in systematic and sustained law enforcement efforts, but rather to allow police officers to penalize marginalized individuals, who cannot defend themselves or persons accused of nothing more than petty theft. Ironically, many actual major criminals escape without sanctions; the linkages between the police and the underworld, including drug barons are reported commonly in the newspapers.

Corruption prevalent among the police is an aggravating factor. A Transparency International Sri Lanka public perception survey<sup>919</sup> recently revealed that the police are publicly considered to be one of the most corrupt public services in the country. A total of 70.4% of those interviewed were dissatisfied with the criminal justice system and felt that the police is to blame.<sup>920</sup> In several cases documented by activists referred to earlier in this Study, individuals were commonly beaten up for refusing to give money to police officers by way of bribes for carrying on illicit liquor sales; when these sales were stopped and the bribes ceased, they were subjected to abuse.

### 7. Mechanisms and practices with regard to preventing and punishing acts of torture

#### 7.1. State mechanisms and practices with regard to preventing torture

##### 7.1.1. Curriculum of police, prosecutors and judges

###### 7.1.1.1. The Police

It is maintained by the government that Human Rights is now a compulsory subject in the training curricula for recruits of all ranks at the Police College and for aspirants for promotion to higher ranks within the police force.<sup>921</sup>

However, it has been acknowledged that the lack of effective training, commitment and leadership within the police force has wielded a significantly negative impact on the quality of investigations carried out by the police. <sup>922</sup> The following deficiencies are apparent within the structure and functioning of the Police Training College.<sup>923</sup>

a) The right type of personnel has not been appointed to the Training College. The personnel charged with the responsibility for training have been selected at random. Many of them have neither the qualifications nor the aptitude that is required of a teacher and a trainer. In fact, many of the personnel in charge of training do not have the inclination, much less the motivation to perform the role that is expected of them. Moreover, it has been found that officers unwanted elsewhere have been posted to the Police College. There have been only a handful of officers in the training field from its inception, who have had a sense of total commitment.

b) Apart from the lack of qualifications etc., there is no infusion of new thinking into the curriculum. Officers initially unsuited have functioned in the training institute for a long period, so that they are not aware of the new problems that Police officers face in the field from time to time. They have not had the benefit of an exposure to the ever changing realities in the field.

<sup>919</sup> ‘In pursuit of Absolute Integrity: Identifying Causes for Police Corruption’, Transparency International, Sri Lanka, 2006.

<sup>920</sup> ibid, at p. 70.

<sup>921</sup> Report of a two member team of the CAT committee consequent to an inquiry conducted from 19 August to 1 September 2000 in Activities of the Committee Under Article 20 of the Convention : Sri Lanka. 17/05/2002. A/57/44, paras.117-195. (Inquiry under Article 20), at point 140. It is further stated in this regard as follows; ‘Education on respecting, protecting, safeguarding and promoting human rights is given prominence at “In Service” lectures and seminars for all ranks including Human Rights awareness lectures coupled with investigational skills development programmes. The resource personnel who conduct these courses include experienced criminal investigators, Commissioners of the National Human Rights Commission, officers of the Attorney- General’s Department and foreign experts. Diploma courses on human rights are also conducted and the successful participants in those courses are given due weightage at interviews conducted for promotions. This arrangement is to motivate participants to be knowledgeable on higher standards of human rights.’

<sup>922</sup> ‘The Eradication of Laws Delays’, Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2<sup>nd</sup> April, 2004, at point 1.1. a).

<sup>923</sup> As was pointed out by another committee in the Police Service Report of 1995, at pages 19 - 22.

c) Training requires honing of skills. Facilities should be provided for the training of these officers selected for the Police College so that they are initiated into the latest techniques etc. of training. Expatriate experts could be brought down so that the local trainers can be trained by them. Also, opportunities for following training courses abroad could be afforded. Officers who are thus trained should be required to serve in the Police College for a specified period thereafter.

<sup>924</sup>

d) Replacements are not given in time to fill the vacancies caused by transfers, retirement etc., so that the full teaching cadre is not available for training. The committee was informed that there is a reluctance on the part of the Police officers to take up postings in the Training College, mainly because officers in the field enjoy greater benefits financially and also other benefits of non-monetary nature through the social contacts they have, when posted in the field. The present allowances paid hardly compensate for these disadvantages. Under the present system of promotions, officers of the Police College are at a disadvantage vis a vis their colleagues in the field in the matter of promotions, rewards, hardship allowances, and other perquisites. Serving in the Police College is not adequately reckoned for purposes of promotion.

e) The curriculum at the Police College has to be related to the functions that a Police officer is called upon to perform today. These functions are much wider and complex today than what they were at the time of Independence. However, over the years the curriculum has seen little or no change. The present curriculum gives emphasis to training in the observance and the enforcement of the law, physical fitness and self defence capability, combat and weapon training and traffic control and supervision. This curriculum is thus weighted towards instruction in the field of law enforcement. New areas have now assumed importance, such as the need for an attitudinal and behavioural change in Police officers, Police Public Relations, including the relationship with the M.P, knowledge and awareness of Human Rights of the members of the public, English Language teaching etc. which are not at present, adequately covered or not covered at all. In many third world countries, the curriculum for Police Training is wider and has greater relevance to today's needs.

f) The modern equipment that is a *sine quo non* for effective training, such as audio visual equipment, is sadly lacking or insufficient.

g) The evaluation and review of programmes of training now conducted and the response of the trainees to such courses is not currently undertaken. It would be necessary to do so in order to assess the benefit that trainees had acquired from the training.

h) As regards the Police Higher Training Institute (PHTI), it is yet in an embryonic stage and should be fully developed to serve the originally intended role. Refresher and familiarisation courses have been given priority, so that promotions can be given on time. Other courses and workshops on Court work, mini detective work and traffic are few, and are sandwiched among other programmes. The PHTI has turned out to be an examination branch for the Police Department. It should be detached from the institute and given an independent status.

i) Research and planning for higher training to achieve high standards of vigilance, control and detection of crime and all other aspects of Police duties, to adopt the most modern techniques and practices in vogue in other countries should be undertaken by the PHTI;

j) Review of courses and programmes as well as evaluation of the clientele groups that received higher training should also be undertaken as a continuous and ongoing exercise.

<sup>924</sup> *ibid.* In this connection, the committee states that it was surprised to learn that an officer who underwent special training abroad was on his return, posted not to the Police College, but to another division of the Police, and that too, was not at the instance of that officer.

Recent training programmes of the PHTI have been undertaken in consultation with the Sri Lanka Foundation Institute (SLFI) which was established in 1974 as the community education project of the Sri Lanka Foundation (SLF) and the Friedrich-Ebert-Stiftung (FES).<sup>925</sup> However, the nature and impact of these training programmes have not been noticeably successful. In addition, even the best training has its limits when the practice in the field is for police officers to disregard the law and their superiors also indulge in such habits. This was well articulated in the following comment:

*"We train officers as best as we could. However, what amount of training can withstand the pressures that they face when they go to the field and see their superiors engaging in and indeed, encouraging them to break the law? What use is training when the line of command responsibility is broken by politicians who reverse orders of superior officers? There is no way that any amount of training can cope with this problem. Until the practical situation improves, there is not much that we can achieve even if we have training programmes of the most excellent quality."*<sup>926</sup>

#### 7.1.1.2. The Army

The preventive methods put into place by the Army to guard against human rights violations have been enumerated as follows:<sup>927</sup>

- a) Screening of personnel prior to enlistment
- b) Human rights and Humanitarian law education
- c) Monitoring cells
- d) Improving communication in Tamil language and assistance in investigations, disciplinary action and suspension/dismissal from service.

An education programme formulated on these lines was introduced in 1991. Upon enrolment, new recruits have to sign a pledge to respect human rights, emphasizing the importance of such a responsibility.<sup>928</sup> Training for instructors is conducted with the collaboration of the International Committee of the Red Cross (ICRC) and it is affirmed that from a survey conducted in 2002, affirmed that 48% of army personnel received the benefit of this training.<sup>929</sup>

Meanwhile, a separate Directorate at Army Headquarters to deal exclusively with International Humanitarian Law has been established in 1997 with its role and tasks being to oversee implementation of International Humanitarian Law (IHL) and the Law of War by the armed forces. The Directorate is also planning and implementing a dissemination programme on a regular basis for all ranks in operational areas and in training institutions and working out syllabuses for IHL and the Laws of War to be taught to Army personnel ranging from recruit to Captain level with the purpose of introducing these as compulsory subjects at promotion examinations. In 2001, the mandate of this directorate was broadened to include the subject of Human Rights.<sup>930</sup>

*"As a further measure, we have established Human Rights cells in every divisional head quarters. These cells accept any human rights complaint, investigate and inform Army HQ, the HR directorate and*

<sup>925</sup> See United Nations Committee against Torture, Second Periodic Report, Second periodic reports of States parties due in 1999, CAT/C/48/Add.2, 06/08/2004, at para. 51.

<sup>926</sup> Comments made by a curriculum director of the Police Higher Training Institute in a confidential interview; 03/04/2008.

<sup>927</sup> Brigadier Mohanthe Peiris, then head, Legal Division of the Sri Lanka Army at the National Workshop of the South Asian Treaty Bodies Programme organized by the Law & Society Trust, August 2004, Sri Lanka. *'Military leaders face a certain dilemma. They need to perform a certain mission, look after their unit, ensure the unit performs efficiently and in a timely manner, but simultaneously they have to also maintain order and ensure obedience. Thus human rights (HR) education provides them with the insight that the ends should be balanced with the means used by them in achieving their goals and that they have autonomy of command but also remain responsible for their actions. They must act speedily but only according to standing operational procedure and their actions must be legitimate. In other words, their actions must tally with the short-term goals of the mission as well as the long-term goals of the nation.'*

<sup>928</sup> *ibid.*

<sup>929</sup> *ibid.*

<sup>930</sup> United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 187 onwards.

*finally the Army Commander. The function of the cells is to monitor allegations of HR violations, supervise, train, interview persons in custody and ensure that proper registers are maintained for purposes of transparency and accountability. There is a twenty-four hour service accessing complaints. Fortnightly reports are also submitted to the Army Commander on the complaints and the progress made on these complaints.*<sup>931</sup>

These measures are currently functioning. However, the efficacy of these measures is disputed by the practical reality as discussed above.

### 7.1.1.3. Judiciary and Prosecutorial Officers

The Judges Institute holds training programmes for High Court judges and in the past, some training programmes have been held in collaboration with the Faculty of Law, University of Colombo. As far as we are able to discern, there has not been specific training in connection with the provisions and objectives of the CAT Act. The Law College meanwhile holds diploma programmes for attorneys-at-law including state law officers. The emphasis in such training on prosecutorial duties in the context of rights protection is marginal.

### 7.1.2. National human rights plan/Human Rights or anti-torture policies

In its Reports to the treaty bodies, it is claimed that the formation of a Permanent Inter-Ministerial Standing Committee as well as an Inter-Ministerial Working Group (IMWG) is central to institutional measures taken by the government to address human rights concerns.<sup>932</sup> The IMWG is co-chaired by the Ministers of Foreign Affairs and Defence. Senior officials from the police, the armed forces, the Attorney General's Department and other law & order agencies also participate. According to procedure, it is asserted that as soon as an urgent appeal (from the Special Rapporteurs) regarding torture or CIDTP is received by the Ministry of Foreign Affairs, it is immediately forwarded to the police department and the Attorney General's Department and a report is thereafter submitted at the IMWG wherein the relevant action that has been taken is noted and informed to the UN bodies.<sup>933</sup> The practical impact of this IMWG is however limited.

Further, an advisory group comprising of civil society leaders was supposed to meet regularly with representatives of key government ministries and institutions and put into place a committee that would undertake initiatives such as making 'surprise visits to police stations with a view of ascertaining if any suspect in custody is held illegally or has been subjected to torture.<sup>934</sup> However, this effort was not at all productive and in recent months, civil society representative resigned from the advisory committee citing lack of good faith on the part of the government.

Other policies of the government aimed at addressing torture and CIDTP include the establishing of a Central Police Registry, containing computerized current information relating to all arrests and detention of suspects under the provisions of the Emergency Regulations and a hotline to answer requests for information.<sup>935</sup> In addition, it is claimed that posters in Sinhala, Tamil and English languages are exhibited in all police stations setting out the rights of detainees

<sup>931</sup> *ibid.*

<sup>932</sup> United Nations Human Rights Committee; Sri Lanka, CCPR/CO/79/LKA/Add.1 Comments by the Government of Sri Lanka on the Concluding Observations of the Human Rights Committee, 27/02/2008, at para. 6.

<sup>933</sup> Samedha Ekanayake, Ministry of Foreign Affairs, presentation at the National Workshop of the South Asian Treaty Bodies Programme organized by the Law and Society Trust, August 2004, Sri Lanka.

<sup>934</sup> United Nations Human Rights Committee; Sri Lanka, CCPR/CO/79/LKA/Add.1 Comments by the Government of Sri Lanka on the Concluding Observations of the Human Rights Committee, 27/02/2008, at para. 6.

<sup>935</sup> United Nations Committee against Torture, Second Periodic Report, Second Periodic Reports of States parties due in 1999, CAT/C/48/Add.2, 06/08/2004, at paragraph 29, 'In this regard, a circular dated 20 January 2001 has been issued and distributed among all Officers in Charge of Police Divisions. The circular directs all Police Officers who arrest and detain suspects under the provisions of the Emergency Regulations and the Prevention of Terrorism Act, shall expeditiously forward the information relating to such arrests and detentions, to the Divisional Police Headquarters (situated at the office of the Officer-in-Charge of the relevant Police Division). The Divisional Headquarters, in turn shall transmit the information (perfected in a "Data Capture Form") by facsimile, to the Central Registry, maintained at Police Headquarters in Colombo.'

and that the Police Headquarters has circulated instructions to all police stations which set forth principles of command responsibility, under which the supervisory officers will be held responsible for torture by their subordinates if it had been facilitated due to lack of supervision or negligence on the part of such superior officer.

The Human Rights Commission of Sri Lanka's (HRCSL) strategic plan (which has been put forward as the human rights plan of the government) for 2007 – 2009 includes the following goals:

1. establishing stronger institutions and procedures for human rights protection and a human rights culture among all authorities, awareness and accountability;
2. Guaranteeing the development of the commission into an efficient organisation, able to fulfil its mandate to promote and protect human rights for everyone in Sri Lanka;
3. ensuring public awareness on fundamental and other human rights and a willingness and capacity to enforce them
4. Ensuring a final resolution – equality in dignity and rights of all the people in the country, resulting from respecting and protecting fundamental and human rights of all in Sri Lanka.

The following activities are prioritized in the said plan:

- a) To protect human rights and uphold the rule of law and strengthen monitoring mechanisms.
- b) To strengthen the HRC Act.
- c) To create a Bills Watch team.
- d) To improve and adopt new techniques to handle fundamental rights cases
- e) To develop an appropriate human rights education system through developing strong human rights networks among government institutions, INGOs, NGOs and UN Agencies.

None of these activities have been accomplished so far. The severe decrease of constitutional and statutory legitimacy of the current HRCSL will be examined below.

### 7.1.3. Plans for legal/justice/penal reform, etc

The most important document regarding legal/justice/penal reform in recent years has been the Report titled '*The Eradication of Laws Delays*', by a *Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts*,<sup>936</sup> referred to previously. Two important recommendations have been made in this Report to meet the problem of torture and CIDTP during interrogation, arrest and detention. First, it has been recommended that Magistrates take on a greater supervisory role in the investigation process and that Section 124 of the CCP Act be amended for that purpose. The second recommendation is as follows;

*The Committee recommends the incorporation of (there needs to be) a mandatory legal provision requiring Magistrates to visit Police Station at least once a month for the purpose of ensure the detention and interrogation of suspects according to law. It is also suggested that provision be introduced to empower Magistrates to visit Police Stations at any time, in order to inspect and/or monitor the lawful detention and interrogation of suspects.*<sup>937 938</sup>

However, these safeguards will be rendered nugatory if Magistrates are not conscious of their overwhelming duty to prevent torture and CIDTP; magisterial dereliction of duty in this regard

<sup>936</sup> '*The Eradication of Laws Delays*', Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2<sup>nd</sup> April, 2004, at point 13.1.

<sup>937</sup> *ibid.*, at para.16

should be visited with severe disciplinary consequences. In its Report, this committee has also recommended the rejuvenation of the practice of day-to-day trials and further suggested that the Attorney General be empowered with the right to request a Magistrate to take up specific trials and non-summaries without delay.<sup>939</sup> To all intents and purposes, these suggestions have not been made into law as yet. Meanwhile, a Witness Protection Authority is also stressed to be imperative.<sup>940</sup>

While these are the positive segment of the committee's recommendations, some other recommendations are more contested as for example, its recommendation that the time limitation of 24 hours within which a person should be held in police custody should be extended. It was pursuant to this recommendation that an amendment was effected to the CCP Act in 2005 and further extended in 2007 for two more years, where the police was allowed pursuant to certain conditions to detain for a further twenty four hours provided that the aggregate does not exceed forty eight hours.<sup>941</sup> The recommendation that an accused person should be afforded a statutory right to have access to a lawyer, while in police custody<sup>942</sup> was also included in this amendment referred to in detail previously in this Study.

#### 7.1.4. Institutions conducting visits to places of detention

As pointed out earlier in this Study, though there is provision for a Board of Visitors to conduct visits to places of detention, these visits are not conducted regularly nor attended with any measure of efficacy. As pointed out, recommendations made by one such Board as far back as 1996 are, by the Government's own admission, yet being considered.

### 7.2. State mechanisms and practices with regard to punishing acts of torture

#### 7.2.1. Mechanisms receiving complaints of torture and CIDTP (The HRCSL and the NPC)

##### 7.2.1.1. The Human Rights Commission of Sri Lanka (HRCSL)

The Human Rights Commission of Sri Lanka (HRCSL) is established in terms of Act, No 21 of 1996 (hereafter the HRC Act). Independence from government should be a sine qua non of a good Human Rights Commission. However, the provisions of the HRC Act are themselves problematic in terms of the independence and authority of the HRCSL for the several reasons analysed below.

One of the central functions of the HRCSL is to investigate fundamental rights violations and monitor the adherence of government agencies to rights standards.<sup>943</sup> Ideally however, the HRCSL should be empowered to investigate not only 'fundamental rights violations, but (given that the concept of 'fundamental rights' refers only to those rights recognised by the 1978 Constitution which omits key rights such as the right to life and the right to privacy), the wording of these provisions should be changed so as to reflect the HRCSL's obligation to investigate violations of human rights (as per international human rights standards that the Sri Lankan State has adhered to in terms of international human rights treaties).

Further, the HRC Act permits a person or persons to petition on behalf of aggrieved person/s.<sup>944</sup> However, this provision should be expanded to permit any person/groups to bring to an infringement or an imminent infringement of human rights to the attention of the HRCSL in the

<sup>939</sup> *ibid*, at para. 21.0.

<sup>940</sup> *ibid*, at para. 22.

<sup>941</sup> Code of Criminal Procedure (Special Provisions) Act No 15 of 2005 and 42 of 2007.

<sup>942</sup> *Supra*, at para. 19.3.

<sup>943</sup> Sections 10, 11 and 14 of the HRC Act

<sup>944</sup> Section 14 of the HRC Act

public interest. In addition, Section 14 of the HRC Act should be further amended to allow the investigation of abuses by non-State actors.

The HRCSL's powers of investigation (even at a time when the HRCSL was performing to the full strength of its capacity and statutory authority, which is not currently the case), have marginal impact, due primarily to the lack of its enforcement powers as well as its inability to put into place, clear policies and practices in relation to investigations.

The limited capacity of the HRCSL to conduct detailed criminal investigations into complaints of grave human rights violations, such as enforced disappearances, extra judicial executions and torture has been prevalent for decades. It is not discernible that any recommendation of the HRCSL in pursuance of its general power of investigation has led to prosecution in a specific case. Some of the serious deficiencies in the investigation process by the HRCSL, as testified to by complainants, who have filed cases of grave human rights violations (including torture and enforced disappearances) before this body, are as follows; failure to take action on complaints and not explaining the reason for not taking action, calling for further particulars and then abandoning the inquiry with no follow up of the requests for further information and no further action being taken and, conducting investigations at police stations or at a military camp, where a witness or family member of the victim is asked to come to the same police station/army camp, where the violation had taken place.

Other problems include intimating to the perpetrators about a complaint that is made against them by a victim and giving the particulars of the victim, without providing any form of witness protection to the victim, conducting inquiries in such a manner that the victims have no other options but to agree to a settlement and the stopping of investigations, due to interventions on behalf of an alleged perpetrator by affluent or powerful persons.

The most pervasive problem, however, is the absence of proper preliminary inquiring procedures on the part of the HRCSL. There appears to be no uniform procedure in place for the taking down of complaints and the gathering of all available evidence. Further, there is no procedure for the examination of documents at police stations and preparing a reliable dossier on which further action can be reliably taken. As such, the HRCSL is unable to take any serious action against perpetrators. In the past, the HRCSL had failed to develop proper procedures for the conduct of investigations into cases of torture and HRCSL and district co-ordinators were known to settle torture cases for minimal amounts of money. Responding to significant public concern, a policy decision was taken in 2004, during which time the body was perhaps most active that the HRCSL would not mediate/conciliate complaints regarding Article 11, (freedom from torture). Thereafter, the HRCSL distanced itself from the earlier complaints, where its officers were becoming complicit partners in the prevalence of torture by custodial officers. However, the implementation of good procedures in respect of investigations still remains a problem.

Even good investigations and monitoring would be of little effect if concrete results are not evidenced from its findings. In many cases, government authorities have simply refused to comply with the direction of the HRCSL, which aspect will be adverted to below.

Where monitoring of human rights violations is concerned, though the HRCSL is mandated to monitor the welfare of detained persons,<sup>945</sup> here again, the purpose of such authority is subverted in many ways. Thus, powers of inspection permitted to HRCSL officers are weak. They have long had difficulty in obtaining access to army camps and recent police circulars have permitted HRCSL officers to inspect only the cells of police stations and not the entire precincts of the station including the toilets and the kitchen, which are often the very places where detainees are taken and tortured or 'disappeared.' In this context, the authoritative interventions of the HRCSL

<sup>945</sup> Sections 11(d) and 28(2) of the HRC Act

into identifying perpetrators of enforced disappearances and other grave human rights violations, such as torture, have been minimal.

Amnesty International noted in a June 1999 report that the frequency of visits to places of detention by the HRCSL as per their statutory mandate during 1998 was on average, around eight times in the year and questioned as to whether such infrequent visits can act as an effective deterrent against torture.<sup>946</sup>

Though directives and regulations have been issued under order of the president at various intervals proclaiming that the HRCSL be informed of arrests made under the PTA or emergency regulations,<sup>947</sup> this has not been implemented practically. Instead, what normally happens is that the HRCSL officers 'ring around various camps and police stations to trace the whereabouts of people taken into custody.'<sup>948</sup> This practice appears to be prevalent even now.

The following comment by a former Chairperson of the HRCSL makes this abundantly clear;

*"We (...) don't have a clear policy on protection and that is something that has been raised, but again we don't have enough resources. We intervene to make the police provide protection. At the end, the National Human Rights Commission, as an informal body makes recommendations."*<sup>949</sup>

On many instances, officers of the HRCSL have been obstructed from carrying out their duties as was exemplified when two officers of the HRCSL were harassed, intimidated and manhandled by officers at the Paiyagala Police Station at least on two occasions in June 2004 when they had visited the police station to inquire into complaints made by persons, who were allegedly tortured at the same station.<sup>950</sup>

The HRCSL has only exceptionally engaged in investigations that have named specific individuals as perpetrators. There have not been any prosecutions launched as a result of their findings as discernible from information in the public domain. In 2003, a critical Report of the Committee on Disappearances in the Jaffna Region<sup>951</sup>, during the tenure of the previous Commission, identified perpetrators by name, including a notorious army officer, then Commander of the Navatkuli Army Camp. However, no prosecutions followed. In fact, this senior army officer is presently serving at an even more powerful position in the military hierarchy. Significantly the Committee encountered an obstructionist attitude on the part of the military authorities, leaving it to conclude that this may be due to 'a mix of inefficiency, indifference and an unwillingness to cooperate for fear that incriminating evidence may be revealed.'<sup>952</sup>

The HRCSL's (virtual) predecessor, the Human Rights Task Force (HRTF), which (despite being established in terms of regulations that were far less expansive than the HRC Act), has been consistently abrasive in actively investigating, inquiring and naming perpetrators as contrasted to the HRCSL. For example, the HRTF named four army men as being credibly implicated in the enforced disappearance of 158 persons from the Vantharamoolai refugee camp on 5<sup>th</sup> September 1990<sup>953</sup>, but complained bitterly that no further action had been taken towards investigation/prosecution.<sup>954</sup> Similarly trenchant observations were made by the HRTF in respect

of the disappearances of the Embilipitiya schoolchildren examined in detail above.<sup>955</sup> In fact, it was the HRTF's initial interventions (coupled with international pressure) that forced the prosecution and investigative machinery to move in regard to the case.

The HRCSL is currently empowered only to conciliate and mediate in terms of fundamental rights violations as recognised in Sri Lanka's Constitution Under the HRC Act, if a party does not comply with a recommendation made by the HRCSL, all that it can do is report it to the President, who shall then place such a report before Parliament.<sup>956</sup> The success of this procedure inevitably depends on political will, which has been significantly lacking in many instances. It is problematic that the Executive can make regulations in regard to the operational aspects of the NHRC and that Section 31 of the HRC Act confers powers on "the Minister" to make regulations regarding implementation, including conducting investigations.<sup>957</sup> This is a provision that should be repealed.

Yet again, Section 15(3) (b) of the HRC Act states that in selected cases, where inter alia, conciliation or mediation has not been successful, the HRCSL may refer the matter "to any court having jurisdiction to hear and determine such matter in accordance with such rules of court as may be prescribed." Such Rules of Procedure have however yet not been prescribed by the Supreme Court.<sup>958</sup> Consequently, HRCSL has been scoffed at for its lack of substantive power in cases where individuals or bodies cited before the HRCSL fail to pay heed to its directions. In particular, the police and the military have flouted the authority of the HRCSL. Relevant rules that would have permitted the HRCSL to refer cases to the appropriate court should be prescribed by the Supreme Court as statutorily mandated without further delay.

The public legitimacy of the HRC has been in issue in recent times, due to the unconstitutional appointments of its current members. The 17<sup>th</sup> Amendment to the Constitution stipulated that the nomination of the Commissioners be in the hands of the Constitutional Council (CC) with the technicality of the appointments being vested with the President. However, with the deliberate negation of the CC from 2006 by Parliament/Presidency, (resulting in the body ceasing to function), the current Commissioners were directly appointed by the President; indeed, two former Commissioners, both senior law academics, declined re-appointment despite persuasion from government officials, due to the unconstitutional nature of the appointments. Another nominee, reputed for his work as a human rights activist, also declined appointment. None of the current Commissioners have a proven background of sensitivity to rights protection.<sup>959</sup> Resource flow to the Commission has also been adversely affected as a result of the HRC being perceived as an unconstitutional body.

In mid 2006, the current Commissioners decided to stop inquiring into the complaints of over 2000 enforced disappearances of persons "for the time being, unless special directions are received from the government" due to the fact that "the findings will result in payment of compensation, etc."<sup>960</sup> This decision was later revoked due to public protests.

<sup>946</sup>"Sri Lanka; Torture in custody" Amnesty International, AI Index: ASA 37/10/99, at page 30 of the summary. It was observed in this same report that the powers of the HRCSL to receive and investigate reports of torture are rarely used and victims not informed of the progress of their complaints.

<sup>947</sup> Section 28(1) of the HRC Act

<sup>948</sup>"Sri Lanka; Wavering commitment to human rights" Amnesty International, AI Index ASA 37/08/96, at page 28. It is observed in this report that notification of arrest at the national level seems to work in some way, though not in a systematic manner.

<sup>949</sup> Interview by the London based REDRESS with Chairperson of the Human Rights Commission of Sri Lanka, Dr Radhika Coomaraswamy in the Repetition Report Issue 5 May 2005, a bi-annual journal of the Redress Trust.

<sup>950</sup> Asian Human Rights Commission; UG-04-2004; SRI LANKA.

<sup>951</sup> Human Rights Commission of Sri Lanka, (2003) Report of the Committee on Disappearances in the Jaffna Region, October 2003, Colombo

<sup>952</sup> *ibid*, at page 18

<sup>953</sup> HRTF Annual Report 10 August 1992-10 August 1993, at page 23

<sup>954</sup> HRTF Annual Report 10 August 1993-10 August 1994, at pp 14-15

<sup>955</sup> HRTF Annual Report, 10 August 1991 – 10 August 1992 at page 27, specifically names a soldier and the school principal as being implicated in the abductions of the schoolchildren.

<sup>956</sup> Section 15 (8).

<sup>957</sup> Pinto-Jayawardena, Kishali, 'Sri Lanka's National Human Rights Commission; One Step Forward, Two Steps Back....'(2006) FORUM ASIA Report to the Asia Pacific Forum of National Human Rights Institutions, Bangkok.

<sup>958</sup> *ibid*.

<sup>959</sup> A palpable lacunae in the HRC Act is the prescribing of inadequate criteria in the choosing of Commissioners; thus, all that Section 3(1) of the HRC Act states is that the Commissioners may be chosen from among 'persons having knowledge of or practical experience in, matters relating to human rights.' Amnesty International *Proposed Standards for National Human Rights Commissions* (1993) states that Commissioners must be "...chosen from among men and women who are independent of government and are known for their integrity and proven expertise and competence in the field of protecting and promoting human rights. They should be drawn from a variety of disciplines including relevant professional groups and the non-governmental sector."

<sup>960</sup> Note of the Secretary to the HRC dated 29 June 2006. Consequent to widespread outrage, the Minister of Human Rights issued a statement that the Commission has authority to inquire into the recorded cases of disappearances and that it does not need any direction from the government to that effect. The Commission thereafter withdrew from its earlier position. However, the incident did not augur very well in regard to its commitment in pursuing the inquiries.

Equally disturbingly, the Commissioners prescribed by internal circular that complainants should file their complaints before the HRCSL within three months of the alleged violation taking place. Such a limitation should not have been imposed by the HRCSL given that the enabling Act, No 21 of 1996 which established the HRCSL, prescribed no such time limit. Consequently, the restriction which substantively detracted from the right afforded in terms of the Act to appeal to the HRCSL could not have been limited by administrative fiat of the HRCSL. This arbitrary rule is particularly problematic in its application to complaints of torture and CIDTP. Then again, the HRCSL recently ruled that persons held in detention under emergency have no right to confidential legal representation. The HRCSL's method of functioning in its current term of office has meanwhile been extremely confrontational vis a vis non-governmental organisations, going to the extent of the Commissioners recently threatening a staffer of the Law and Society Trust who attempted to obtain information regarding the workings of the Commission, with contempt of court.

Given the totality of these actions which demonstrates the lack of independence of the HRCSL as it is currently constituted, the United Nations International Coordinating Committee (ICC) of National Human Rights Institutions has recently downgraded the status of the Sri Lankan HRCSL from "A" to "B." In its report,<sup>961</sup> 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.

#### 7.2.1.2. The National Police Commission (NPC)

As stated previously, the NPC comprises a body of seven persons who is firstly, vested with the powers of appointment, promotion, transfer, disciplinary control and dismissal of all officers other than the Inspector General 962 and secondly, required ("shall) to establish procedures to entertain and investigate public complaints and complaints from any aggrieved person made against a police officer or the police service...[italics added]<sup>963</sup> The NPC, (in its first term) the members of which were nominated by the Constitutional Council, attempted to enforce some measure of discipline such as the interdiction of police officers indicted for torture and preventing the political transfer of police officers during the pre-election period.

The unconstitutional appointment of its members in the NPC's second term led to this commission losing its public credibility as a result. Though this second NPC did adopt a public complaints procedure<sup>964</sup> as constitutionally required, its working has been unsatisfactory. Though media reports state that some police officers have been found guilty in the course of investigations by the NPC and have been reprimanded, transferred or charge sheeted, there has been little deterrent impact on the police force.

<sup>961</sup> Report and recommendations of the Sub-Committee on Accreditation, December 2007.

<sup>962</sup> Vide 17<sup>th</sup> Amendment, Article 155G (1)(a).

<sup>963</sup> Vide 17<sup>th</sup> Amendment, Article 155G (2).

<sup>964</sup> These Rules of Procedure were based on a draft submitted by an independent team of lawyers to the NPC in its first term, as stated previously. The draft used other similar models from around the world, including particularly the United Kingdom's Independent Police Complaints Commission (IPCC). The IPCC, established by the Police Reform Act of 2002, is a non-departmental public body which is government funded but operates completely independently. Apart from its chair and deputy chair, it has fifteen commissioners all of whom, (except one), work full time in supervising a staff of four hundred 400 investigators, caseworkers and support staff. It has separate and independent investigators, (not police officers 'released' from the police service), and can decide either to supervise police investigations into serious complaints or independently investigate them itself. The independent quality of its investigative staff and the direct disciplinary control that it has exercised over offending police officers are two primary factors that have secured its credibility.

## 7.2.2. Medical documentation of torture and CIDTP

### 7.2.2.1. The role of the Judicial Medical Officer

Regrettably, Judicial Medical Officers (JMO's) have been found to be complicit in covering up evidence of torture resorted to by custodial officers. For example, in a recent rare case of disciplinary standards being strictly enforced by the Sri Lanka Medical Council (SLMC), the then Kalutara JMO was suspended for three years as a result of medical negligence regarding the cruel and inhuman treatment of a suspect by the Payagala police. In this instance, MulleKandage Lasantha Jagath Kumara had been arrested by the Payagala police on June 12, 2000 and was assaulted inhumanely by the police officers during five days in which he was kept illegally in custody. He later died at the Welikada prisons as a direct result of this assault. The then JMO, Kalutara, Dr W.R. Piyasoma had conducted the medical examination of Lasantha Kumara, when he was produced by the Payagala police, but had failed to observe minimum standards.

Upon a complaint being filed against him to the SLMC, several charges were framed against Dr Piyasoma including examining the suspect in the presence of the police officer, which deprived the suspect of an opportunity to provide details without fear as to the manner of the assault, failure to take the detailed history of the patient, to record the names of the alleged assailants, failure to diagnose the serious injuries sustained by the patient while noting only the less serious injuries and failure to recommend his admission to hospital.

The Professional Conduct Committee (PCC) of the SLMC, after concluding on the culpability of Dr Piyasoma on these charges, points out that if Dr Piyasoma had taken the needed action demanded of him as a medical professional, he may well have saved Jagath Kumara's life instead of indirectly contributing to his death. Consequently, the PCC decided to erase the erring doctor's name from the medical records only for a period of three years, stating that even though the breach of professional standards should have led to a permanent erasure from the medical register, this punishment was being mitigated, due to Dr Piyasoma's age and considering that this was his first indiscretion. This manner of mitigation by the SLMC, however, does not set a good example or an effective deterrent to other similarly culpably negligent JMO's. Other cases such as this are manifest; witnessing the death of Garlin Kankanamge Sanjeeva (whom the police stated committed suicide inside the police station) is one example. Here too, the medical report pertaining to his death was impugned, but no action was taken against the medical officer involved.

Then again, the torture of a minor, (the *Chamila Bandara Case*) from 20th to 28th July 2003 at Ankumbura Police Station, (due to his being implicated in a petty crime) highlighted glaring lapses on the part of one medical professional who (as later inquiries disclosed) had issued a medical report without even examining the victim. Initially Chamila was not produced before a JMO, despite being admitted to the Kandy hospital for treatment. It was only, after being re-admitted to the Peradeniya Hospital that he was given a proper medical examination. Doctors then concluded that the use of his left arm was impaired. However, a later examination by another medical professional contradicted these other medical reports by finding physical injuries incompatible with the nature of the torture described by Chamila. This subsequent report was found to have been written out by a doctor, who had not seen Chamila Bandara.

This case is remarkable in that it disclosed collusion, not only by a medical officer, but also by the district area co-ordinator of the HRCSL, who (taking into account, only the police version); found that there had been no torture. Due to strong pressure brought by local activist groups, the HRCSL held a second inquiry manned by a retired judicial officer, which concluded that there had, indeed, been torture of this boy. Years later, indictment was filed in the High Court and the trial is pending. Even where JMO's attempt to carry out their duties to the best extent of their professional standards, they are hampered by inadequate facilities.

*The Judicial Medical Officers (JMOs) who carry out most autopsies typically lack the requisite vehicles, equipment and specialized training. The range of obstacles to a prompt and effective examination means that too much evidence simply bleeds out onto the floor. Investigations are also impeded by the lack of effective witness protection. This makes witnesses especially reluctant to provide evidence on crimes committed by police officers, and led several interlocutors to joke that it would be better to be a victim than a witness. Inadequate investigations result in evidence insufficient to sustain a conviction. Various police and forensic training programmes have been supported through development assistance initiatives. In the absence of any detailed evaluations, my impression is that they have been worthwhile but regrettably limited in scope.* 965

### 7.2.2.2. Irregularities in the process of examination and documentation

The irregularities in the examination process have been dealt with in Section 4.1. D) above. Insofar as documentation is concerned, as stated previously, two medico-legal formats are used for the documentation of injuries; namely, the Medico-Legal Examination Form (MLEF) to document injuries on living persons and the Postmortem Report (PMR) to document findings of the deceased.

The fact that there is no ‘compelling requirement in the Medico-Legal Examination procedure to make it mandatory for a doctor to have a record of the identity of the examinee produced before him’<sup>966</sup>, is a lacuna in the law. The forms are themselves inadequate as compared to the formats used in developed jurisdictions for the documentation of torture.<sup>967</sup>

*“The consequence of using limited formats is that in the courts information contained within these limited formats can result in much information being left out. In Sri Lanka courts judges place heavy reliance on medical reports of the victims. When important information is left out due to the limitations of the formats, courts are compelled to rely on the limited information offered. This often works to the detriment of the torture victim and in favour of the perpetrators. It should also be noted that by and large local courts take a rather conservative approach and interpret the information in such a manner as to cast a heavy burden on the victims to prove their allegations of torture.”*<sup>968</sup>

Meanwhile, proper DNA profiling facilities are not available and computerized formats are not afforded to medical professionals to enter data, with the end result being that they are compelled to handwrite their reports.<sup>969</sup>

### 7.2.3. Redress, compensation and rehabilitation to torture victims

Primarily, the one form of compensation awarded has been by the Supreme Court in the exercise of its fundamental rights jurisdiction.<sup>970</sup> However, the amounts have been inconsistent, at times large and at times, pitifully small.<sup>971</sup> In some cases, the compensation judicially determined is not

<sup>965</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 56.

<sup>966</sup> Thangavelu, Jeyakumar, ‘Equal Access to Justice: Where Should it begin to ensure Human Rights’, AHRC Third Special Report on Torture; An X-Ray of the Sri Lankan policing system and torture of the poor, 2005 at pp55 and 56.

<sup>967</sup> Perera Clifford, *Review of initiatives adopted for effective documentation of torture in a developing country*, in Chapter 16 on ‘Absence of Forensic Facilities’, AHRC Third Special Report on Torture; An X-Ray of the Sri Lankan policing system and torture of the poor, 2005, at P. 258, 259 and 260

<sup>968</sup> *ibid*

<sup>969</sup> *ibid*

<sup>970</sup> Judges have differed among themselves as to the legal basis of such awards of compensation - vide *Saman v. Leeladasa* [1989] 1 Sri LR 1. Also, see *Rasool v. Cader* [1993] 2 Sri LR 33; *Karunaratne v. Rupasinghe* SC(FR) 71/90, SCM 12.6.1991; *Samanilleke v. Perera* [1990] 1 Sri LR 318 and *Sirisena v. Perera* [1991] 2 Sri LR, 97.

<sup>971</sup> In some instances, the Court has declined to grant high awards as seen in *Erandaka and Anor vs Halwala, OIC, Police Station, Hakmana*, [2004] 1 Sri LR, 268) where the petitioners were assaulted while in prison as evidenced by the medical records. The State was held liable for payment of compensation in the sum of Rs 25,000 each to the two petitioners, in the absence of the identification of the particular prison officers responsible for the assault. Also, *Adibikary and Adibikary vs. Amarasinghe and Others*, S.C. (FR) No. 251/2002, SCM 14<sup>th</sup> February, 2003), another recent case again involving a police assault on a lawyer where the Court ordered a paltry Rs. 20,000/- as compensation and Rs. 5,000/- as costs to be paid by the State. In contrast, in *Shahul Hameed Mohammed Nilam and Others vs K. Udugampola and Others* (SC(FR) Applications Nos 68/2002, 73/202, 74/2002, 75/2002, 76/2002 SCM 29.01.2004), the

even paid as in *Gerald Perera’s Case*, where, the medical reimbursements ordered to be paid to him by Court, (though amounting to an unusually high award of compensation)<sup>972</sup> had not been paid at the time of his death. In all these cases, what emerges are the poignant stories of victims and their families, who undergo the perils of litigation in situations, where often, even the most massive sums of compensation cannot redress the pain that they have suffered.<sup>973</sup>

Even in cases where compensation is ordered to be paid by the Supreme Court, sometimes personally from the respondent officers, this has had no visible effect. Such amounts are, on occasion, paid from a compensation fund set up by the Police Department – this has undermined the deterrent effect of the judicial order.<sup>974</sup>

Generally, there have been wide disparities evidenced between awards of compensation with little sustained reasoning as to the different levels in which compensation has been awarded.<sup>975</sup> Two recent cases, which involved the death of victim petitioners, due to torture, which are extraordinary due to the high levels of compensation awarded.<sup>976</sup> As the recent research study examining 52 judgments of the Supreme Court involving allegations of torture and/or CIDTP found, awards were considerably higher depending on the professional status of the petitioners<sup>977</sup>;

**Case Table 7:  
Average Compensation Based on Professional Status<sup>978</sup>**

Lawyers	Rs. 250,000/-
Military or Police <sup>979</sup>	Rs. 76,666/-
Small business & trade	Rs. 58,000/-
Unspecified	Rs. 52,777/-
Casual & Semi-Skilled Laborers <sup>980</sup>	Rs. 29,375/-
Skilled Employees	Rs. 16,500/-

State was directed to pay each petitioner a sum of Rs 750,000 with the 1<sup>st</sup> respondent Superintendent of Police ordered to personally pay each petitioner whose rights were found to have been violated, a sum of Rs 50,000. The high awards of compensation was despite the fact that no physical assault was found on the facts of the case. The basic rationale on which such compensation is given has also seen a continuing conflict of judicial opinion, namely whether compensation is awarded as a deterrent or as a solatium - see *Saman vs Leeladasa*, [1989] 1 Sri LR 1.

<sup>972</sup> *Id*; an exceptional compensatory award of Rs. 800,000/-, plus reimbursement of medical costs, given to a cook at the Colombo Dockyard in the case of *Sanjewan. Sarawana* [2003] 1 Sri LR 317 – *The Gerald Perera Case*.

<sup>973</sup> Pinto-Jayawardena, Kishali ‘Judicial Protection of Human Rights’ in State of Human Rights Report, 2005, Law & Society Trust, 2006, at page 19.

<sup>974</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 58 of his Report; ‘...In the last two years, the Supreme Court has awarded compensation in a number of such cases. But while reparations are an important component of effective remedies, they are not a substitute for prosecution. In Sri Lanka the Court determines what portion of the compensation shall be paid by the State and what portion by the convicted officer. In one prominent case, involving the killing of WMGM Perera, less than a quarter of the compensation awarded was to be paid by the persons responsible, while the State paid the rest. The State’s contribution undercuts the deterrent effect of the Court’s fundamental rights jurisdiction and further emphasizes the importance of effective prosecution and punishment in cases of official torture and summary execution.’

<sup>975</sup> See Pinto-Jayawardena, Kishali and Kois, Lisa in ‘Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response’, Law & Society Trust, 2008, at pp15 -24

<sup>976</sup> *Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Paitiyagala and Others*, [2003] 2 Sri LR 63 (finding violations of Articles 11, 13(2) and 17, and awarding Rs. 800,000/- in equal shares to the petitioner (wife of deceased) and their dependent child) – per Justice MDH Fernando and *Lama Hewage Lal (Deceased) Rani Fernando (Wife of Deceased Lal) and others v. Officer-in-Charge, Minor Offences, Seedunu Police Station and others*, [2005] 1 Sri LR 40 (finding violations of Article 11 and 13(4), and awarding 1,000,000/- in equal shares to the wife of deceased and her three dependant children – per Justice Shirani Bandaranayake

<sup>977</sup> *Wagayathige Dayaratne v. T.E. Anandranja and others*, SC (FR) App. No. 337/2003, 17.05.2004) where the Court held in favor of the petitioner, a senior lawyer, after he was assaulted on the street, wrongfully arrested and illegally detained. Compensation by the State was set at Rs. 500,000/- despite relatively mild injuries (two contusions and complaints of joint pain) and a brief period of detention (20 minutes).

<sup>978</sup> Pinto-Jayawardena, Kishali and Kois, Lisa in ‘Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response’, Law & Society Trust, 2008, at p.18.

<sup>979</sup> This average does not take into account the exceptional compensatory awards granted in the case of *Shahul Hameed Mohamed Nilam and others v. K. Udugampola, and others*, SC (FR) No. 68/2002, SC (FR) No. 73/2002, SC (FR) No. 74/2002, SC (FR) No. 75/2002, SC (FR) No. 76/2002, 29.01.2004 (presenting a particularly unique fact pattern in which five members of military intelligence were arbitrarily arrested and detained and subjected to inhuman and degrading treatment, and resulting in unusually high compensation of Rs. 800,000/- for each petitioner).

<sup>980</sup> Again, this average does not take into account, exceptional compensatory awards such as in the Gerald Perera Case.



Some high awards were also evidenced, where military personnel<sup>981</sup> were victims in an Article 11 violation.

However, the decision on the award seems to have been influenced by the Justice writing the decision rather than the individual facts of each case.<sup>982</sup>

**Case Table 8:  
Average Compensation According to the Justice who Drafted the Opinion<sup>983</sup>**

Justice Mark Fernando	Rs. 156,250
Justice Edussuriya	Rs. 25,714
Justice Shirani Bandaranayake	Rs. 20,735
Chief Justice Sarath Silva	Rs. 20,000

In some cases, compensation has sometimes been awarded at a level as low as Rs. 5,000/- even in cases involving severe torture.<sup>984</sup>

Meanwhile, the research also disturbingly found that the amount of compensation awarded in cases in which there was a Sinhala petitioner or Sinhala petitioners – Rs. 208,057 – was more than three times higher than the compensation awarded in cases in, where the petitioner was Tamil – Rs. 63,750. Although averages do not represent what any one petitioner received as compensation, as averages are impacted both by unusually high and low awards, the research points out that the comparison nonetheless reveals a notable disparity worthy of further inquiry.

**Case Table 9: Average Compensation Based on Ethnicity<sup>985</sup>**

Sinhala Petitioners	Rs. 208,057
Tamil Petitioners	Rs. 63,250

**Case Table 10: Constitutional Violations Found by the Court  
(Tamil Petitioners)**

<sup>981</sup> See *Shaul Hameed Mohamed Nilam and others v. K. Udugampola, and others*, SC (FR) No. 68/2002, SC (FR) No. 73/2002, SC (FR) No. 74/2002, SC (FR) No. 75/2002, SC (FR) No. 76/2002, 29.01.2004 (finding violations of Articles 11, 12(1), 13(1) and 13(2) and awarding Rs. 800,000/- to each of five members of a Sri Lankan military intelligence “long range reconnaissance patrol who successfully argued that their rights under Article 11 had been violated as a result of being arbitrarily arrested, detained, paraded in front of the media and detained in degrading conditions. Significantly, no finding of actual physical torture was found in this case.

<sup>982</sup> Pinto-Jayawardena, Kishali and Koiso, Lisa in *‘Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response’*, Law & Society Trust, 2008, at p23

<sup>983</sup> Only those Justices who wrote three or more decisions are included. Unusually high awards were excluded when computing compensation averages.

<sup>984</sup> For cases where meagre amounts of compensation have been awarded, see *Manickam Thavarasa v. Officer-in-Charge, STF Camp, Thirukkonil*, SC (FR) App. No. 09/2002 (finding that the petitioner had been severely assaulted and burned all over his body and awarding Rs. 20,000/- in compensation); *Priyantha Dias v. Ekanayake, Reserve Police Constable, Police Station, Polpithigama and others*, [2001] 1 Sri LR 224 (finding that the petitioner had been assaulted, causing 23 injuries all over his body, including 22 abrasions and a laceration on his penis and awarding Rs. 30,000/- in compensation); *Samarakkody Arachchige Don Sripathi v. SJ Nadana Wijesinghe and others*, SC (FR) App. No. 213/2001, 31.05.02 (finding that the petitioner had been rendered an invalid after he was assaulted repeatedly with an iron rod and his hands were placed on a bed head and smashed with an iron rod and awarding Rs. 50,000/- in compensation); and *R.M.P. Prasanna “Saman” v. Jude R.P.C. 14260, and others*, SC (FR) App. No. 106/2003, 11.12.2003 (finding that the petitioner had been stripped, hung from the roof by his thumbs, beaten on the head, soles, legs, thigh, hands, back and shoulders with a hose pipe, and had his testicles and penis squeezed severely, resulting in 38 injuries and rendering him temporarily disabled and awarding Rs. 40,000/-) *Paranasagaram Balasekaram v. Officer-in-Charge, JOOSP Army Camp, and others*, SC (FR) App. No. 547/98, 03.05.2000 (finding that “[t]he intensity of the attack appears to have descended from ferocity to sadism,” and awarding Rs. 15,000/- in compensation); *Nithiyannaban Suthabaran v. Nilantha Buddhika Weeraratne, 2<sup>nd</sup> Lieutenant, Officer in Charge, Army Camp, Marudivempu, and others*, SC (FR) App. No. 802/99 (finding that the petitioner was severely assaulted, resulting in injuries found to be “grievous and endangering his life”, after nails were driven into his feet, and he was kicked and beaten all over the body, genitals and head, including with the butt of a gun, which left him unconscious and resulted in bleeding inside his head, “which was evacuated by performing a hole in his head,” and awarding Rs. 75,000/- in compensation).

<sup>985</sup> For the purposes of this comparison, only Sinhala and Tamil petitioners were included as there were very few petitioners of other ethnicities, thus making it difficult to arrive at averages.

Article 11 only	6	55%
Articles 11 & 13(1)	1	9%
Article 11 & 13(2)	2	18%
Articles 11, 13(1) & 13(2)	2	18%

**Case Table 11: Constitutional Violations Found by the Court  
(Sinhala Petitioners)**

Article 11 only	11	42%
Articles 11 & 13(1)	2	8%
Article 11 & 13(2)	3	12.5%
Articles 11, 13(1) & 13(2)	5	19%
Other violations	5	19%

### 7.3. Non-governmental mechanisms and initiatives aimed at preventing torture and CIDTP

#### 7.3.1. Visits to places of detention (e.g. ICRC, lawyers)

The International Committee of the Red Cross (ICRC) undertakes visits to prisons and places of detention and issues reports in this regard, some of which have been referred to previously in this Study. These visits are made upon agreement being reached in this regard between the ICRC and the government, whereby the ICRC is granted unrestricted access to prisons. Lawyers too visit the prisons, generally in particular individual cases in regard to their clients or from non governmental organisations. Nongovernmental organisations such as the Consortium of Humanitarian Agencies engage in regular programmes aimed both at improving conditions of detention as well as providing legal aid to prisoners.

The problem however continues in regard to places of detention under emergency laws to which regular access is not allowed and the identity of such places is also publicly unknown to a great extent.

#### 7.3.2. Capacity building/advocacy within the criminal justice sector

Nongovernmental organisations have been working long and consistently on the reform of the criminal justice system including reform of the police service and have submitted extensive documentation in this regard such as the draft Public Complaints Procedures submitted by the Asian Human Rights Commission to the National Police Commission. The AHRC’s partner grassroots networks in Sri Lanka have been minutely documenting cases of torture and CIDTP and have built up an exhaustive data base in this regard. Institutions such as the Law & Society Trust have supplemented these efforts by sustained research into the legal responses in relation to torture and CIDTP.

However, the impact of such advocacy on the criminal justice system has been limited, primarily due to the resistance of governmental institutions to implement programmes of reform.

#### 7.3.3. Training by International and national non-governmental organisations

Among the international non-governmental organisations who conduct human rights awareness programmes for the armed forces, the police and other public servants, the International Committee of the Red Cross (ICRC) occupies a particular place; training programmes have continued and expanded to include law enforcement officers, members of special task forces,

paramilitary units, public servants and Sri Lanka Red Cross workers. Booklets in English, Sinhala and Tamil on the Law of War and manuals of instructions have also been printed as part of these programmes and distributed to the police and the forces. The Centre for the Study of Human Rights of the University of Colombo also conducts programmes to provide human rights education for the armed forces and the police with a view to sensitising those groups to the value of human rights and to point out the limits of their powers.<sup>986</sup>

#### 7.4. International initiatives and programmes aimed at preventing torture and CIDTP

##### 7.4.1. Multilateral donors (e.g. UN, EU, World Bank)

The World Bank has been implementing programmes such as the ‘Access to Justice’ project which have had minimum impact. The United Nations in turn has made some efforts to engage in building the capacity of activists to effectively use the international treaty body system to address torture and CIDTP, but these have not been consistent. The ICRC has also engaged in building knowledge and awareness of international humanitarian law by holding seminars and by hosting moot courts in universities.

##### 7.4.2. Bilateral donors

The US Agency for International Development (USAID), through the Asia Foundation, has been implementing programmes such as the ‘RESIEST’ project which endeavours to engage in capacity building of nongovernmental organisations on torture and CIDTP, hold awareness raising programmes such as popular theatre and put together a data base of violations in this regard.

### 8. Identification of possible areas of intervention in order to prevent acts of torture and CIDTP.

#### 8.1. Legal Reforms (e.g. The Constitution and specific statutes)

##### 8.1.1. Reforms of the Constitution<sup>987</sup>

- 1) That the Right to Life is included as a constitutional guarantee and that the subordination of the Presumption of Innocence (Article 13(5)) to emergency law is abolished with Article 15(1) being amended for this purpose. Further that the subordination of Article 13(6) (relating to the prohibition on *ex post facto* laws) to emergency law is abolished along with the similar subordination of the safeguards in relation to arrest and detention contained in Article 13(1) and (2) with Article 15(7) being amended for this purpose.
- 2) That the time limits to the filing of applications invoking the jurisdiction of the Court in an alleged rights violation are abolished and *locus standi* rules are specifically broadened to permit public interest litigation.
- 3) That the Court is given the power of judicial review to, *inter alia*, examine statutes such as the Public Security Ordinance (PSO) and the Prevention of Terrorism Ordinance (PTA) for their conformity to the provisions of the Constitution.

<sup>986</sup> *ibid.*

<sup>987</sup> These recommendations are limited to those impacting on the protection against torture and CIDTP and do not encompass the broad reach of constitutional reforms that may be urged in general. This same observation is pertinent to the proposed statutory reform, in particular relating to the amendment of the PSO and the PTA

- 4) That the Communications of Views of the United Nations Human Rights Committee (UNHRC) handed down in terms of the Committee’s consideration of individual communications under the First Optional Protocol to the International Covenant on Civil and Political Rights shall have the force of law, binding on all organs of government.
- 5) That the right to protection against protracted trials is specifically included as a constitutional guarantee.
- 6) That the right to confidential legal assistance to suspects as well as the right to medical assistance, while arrested or detained, is specifically included as a constitutional guarantee.
- 7) That the immunity conferred upon Presidential actions in terms of Article 35(1) is abolished.
- 8) That Parliament is not given the sole authority to determine the impeachment of appellate court judges, but that a degree of authority is vested in this respect in an independent body constituted separately from political representatives. Further, that a transparent and accountable procedure for dismissal and disciplinary control of judges of the lower courts is formulated.
- 9) That the 17<sup>th</sup> Amendment to the Constitution is implemented forthwith in order that the procedures in regard to the nominations and/or approvals to nominations required to be made by the Constitutional Council are mandatorily followed prior to the appointments. Further, that the 17<sup>th</sup> Amendment is specifically amended to unequivocally require the President to make the appointments of the six nominated members to the Constitutional Council once the nominations are sent to him/her and that the President is similarly compulsorily required to make the appointments of the members of the constitutional commissions once the said nominations are sent to him/her by the Constitutional Council.
- 10) That, in view of conflicting judicial opinion on this point, the Supreme Court is explicitly given the authority to examine/review decisions made by the Attorney General in the exercise of his/her powers in *inter alia* granting sanction to proceed with a prosecution or, (in the contrary), refusing such sanction as well as in instances of refusing to appeal against acquittals.

#### 8.1.2. Statutory Reforms

##### 8.1.2.1. CAT Act

- 1) That Section 12 of the CAT Act is amended to include the term “suffering” in the definition of ‘Torture’.
- 2) That the CAT Act is amended to incorporate the principle of universal jurisdiction and the principle of *non-refoulement*.
- 3) That the implicit inclusion of the principle of command responsibility in the CAT Act is given specific statutory expression.
- 4) That the right to compensation is specifically awarded to the victim and/or the dependant.

### 8.1.2.2 ICCPR Act

- 1) That a statutory right to life is included.

### 8.1.2.3 Code of Criminal Procedure Act

- 1) That the right to confidential legal representation is made available to a suspect as well as the right to independent and immediate medical assistance and the right to inform family members about the arrest. A provision should stipulate that a lawyer and an interpreter be present during interrogations.
- 2) That Section 124 of the CCP Act is amended in order to authorize Magistrates to rigorously supervise criminal investigations.
- 3) That the full gamut of rights in a criminal trial detailed in ICCPR article 14 is statutorily reflected, including particularly the general duty on the prosecution to disclose to the defence all information, which it intends to use and even which it does not intend to use, but could assist the accused in his/her defence. This may, however, be subject to the limitation excluding privileged information and when information is delayed due to the investigation not being complete.<sup>988</sup>

### 8.1.2.4 Penal Code

- 1) That enforced disappearance is declared a criminal offence clearly distinguishable from related offences such as abduction and kidnapping, and punishable by appropriately severe penalties.
- 2) That a provision enforcing command responsibility is incorporated.
- 3) That the minimum age of criminal responsibility is raised to an internationally acceptable level.

### 8.1.2.5 PSO/PTA and Rules/Regulations made hereunder<sup>989</sup>

#### In General

- 1) That Sections 16 and 17 of the PTA and comparable Emergency Regulations (ER)<sup>990</sup> which allow confessions given to police officers above the rank of an Assistant Superintendent of Police (ASP) to be admissible in court are repealed. In the alternative and in the minimum, that Section 16(1) of the PTA and comparable Emergency Regulations (ER) are amended to shift the burden of proof away from the accused in establishing the voluntary nature of such a confession.
- 2) That Section 10 of the PTA and Sections 3, 8/21(3) of the PSO (ouster clauses shutting out the jurisdiction of the Court to examine the constitutionality of regulations and/or orders made under these statutes) are repealed.<sup>991</sup>

<sup>988</sup>Wijepala's Case (*Damwatte Lyanage Wijepala v The Attorney General*, SC Appeal No; 104/99, SCM 12.12.2000)

<sup>989</sup> Recommendations made in relation to reforms to both legal provisions and policy/practices.

<sup>990</sup> In this part of the analysis, the term 'ER' is used for Emergency Regulations in general, which recommendations apply in all their force to relevant aspects of the 'EMPPR' that are currently in operation.

<sup>991</sup> This recommendation is made in acknowledgement of the fact that though the Supreme Court, has, in many instances, declared the existence of pre-1978 statutory ouster clauses unconstitutional, the law should be explicitly amended for greater certainty

- 3) That the power of the Secretary of Defence to make preventive detention orders is abolished and this power is given to a judicial officer to be exercised on objective grounds and on defined criteria.
- 4) That the overlapping jurisdictions between Emergency Regulations (ER) under the PSO and the PTA are minimized.
- 5) That a register of all persons detained under emergency laws is maintained at the District Secretary's office as well as at the offices of the local government bodies, and that this is regularly updated.
- 6) That the Prison Rules be made applicable to all detainees under the emergency laws.
- 7) That immunity granted for acts done in good faith by the police or army officers under the Emergency Regulations (ER) and the PTA is removed. Further, that indemnity legislation not to be made applicable to acts, which are grave offences or violations of human rights.
- 8) That the practice of unauthorised 'places of detention' is done away with and that persons detained under emergency are detained in fiscal custody from the inception of the detention. The period of detention should not exceed six months in the generality of cases and not more than one year in exceptional situations.
- 9) That the legal safeguards contained in the ordinary criminal procedure laws are applied to cases of detention under Emergency Regulations (ER), particularly the following:
  - a. That reasons are given for arrest at all times and that suspects are taken before a judicial officer within twenty four hours of arrest without exception;
  - b. That confidential legal assistance and medical assistance is available as of right to suspects;
  - c. That extension of detention is on reasonable suspicion shown on an objective basis and determined on defined criteria by an independent judicial mind;
  - d. That appeals against detention are not made to a government committee, but rather before an independently constituted judicial body;

#### *In specific relation to the PSO and ER*

- 1) That Section 5 of the PSO be amended in order to stipulate that all regulations made under the PSO satisfy the tests of necessity and/or expediency and/or proportionality as determined objectively and in accordance with international standards relating to the deprivation of rights during emergency;<sup>992</sup>
- 2) That Emergency Regulations (ER) made under the PSO are scrutinized in advance by an independent team of experts to ensure that they do not infringe basic constitutional guarantees. The right to be free from arbitrary arrest and detention, the right to be free from torture and CIDTP, the rights to freedom of expression and assembly as well as other constitutional rights should be given preeminence in this regard;
- 3) That Emergency Regulations (ER) are immediately published in the newspapers upon promulgation for the benefit of the public and further that a preamble in each regulation should explain the reason for its promulgation.

<sup>992</sup>This recommendation is made in acknowledgement of the fact that though the Supreme Court, has, in many instances, declared that all regulations made under the PSO should be necessary and proportionate, the law should be explicitly amended for greater certainty

- 4) That the Presidential Directives of 7 July 2006 detailing fundamental safeguards in relation to arrest and detention are incorporated as part of the legally enforceable emergency law and its breaches are made punishable by appropriately severe penalties.
- 5) That the bypassing of the authority of the Magistrate's Courts in relation to inquests as allowed under emergency law is reversed and judicial authority is restored in this regard;
- 6) That a change of the place of detention is promptly notified to the family of the arrested person<sup>993</sup> and that the following safeguards are observed in all cases –
  - a. That suspects are detained at authorized places of detention only;
  - b. That a receipt of the arrest is issued by the arresting officer to a family member or friend of the person arrested and a copy of the receipt is given to the detainee in all cases of arrests;
  - c. That particulars of detainees held at temporary camps is entered in the registers of the main Army Camp/Police station as well;
  - d. That provision is made requiring the Officer-in-Charge to fax a report pertaining to relevant investigations including nature of the charges to the Magistrate at least two hours before the arrestee is produced in court for the first time;

- c. Adopt a mandatory provision in a relevant law requiring a doctor conducting a Medico-Legal Examination to have a record of the identity of the examinee produced before him;
- d. Provide Judicial Medical Officers with training, equipment and other facilities;

- 4) That the practice of allowing police officers to accompany suspects, when taken before a Judicial Medical Officer, is discontinued forthwith and that alternative arrangements are devised instead. That strict sanctions are imposed against Judicial Medical Officers, who collude with the police in covering up torture and CIDTP and that they be stripped of their licences
- 5) That Judicial Medical Officers should be required to provide the relevant reports, including the Post Mortem Report and all Medico-Legal Reports within one month of the incident of torture or CIDTP without exception.
- 6) That the current Medico-Legal forms should be revised in the context of modern formats and documentation in regard to torture and CIDTP.
- 7) That video recording facilities are afforded to record confessions and police interrogations and access to such recordings are made available to the legal defence. Further, that the time and place of all interrogations of suspects are recorded together with the names of all those present, and that this information be made available for purposes of judicial/administrative proceedings.
- 8) That a comprehensive State Policy on Reparation, Redress and Compensation be formulated in adherence to international standards following adequate public consultations and is thereafter effectively implemented.
- 9) That state policy and practices reflect political will in prosecuting and punishing, with due diligence under the applicable laws, in particular the Penal Code and the CAT Act, those armed forces personnel/deserters from the armed forces and police officers involved in grave human rights violations including rape and sexual offences and that, in specific relation to sexual violence, this should involve the following:

- a. The establishing of a group of experts from relevant disciplines to engage in the through analysis/examination of fundamental rights, Supreme Court rulings and other court rulings against members of the police force and/or armed forces in respect of the committal of acts of sexual violence. Further, this group of experts should recommend further measures to the appropriate disciplinary authorities and all necessary measures aimed at protecting the victim/s, their families and witnesses;
- b. The compulsory following of the directive requiring female officers to be present for the purpose of frisking women at checkpoints. Any failure to comply with this directive should lead to the officer in charge being held responsible and subject to disciplinary action. Women and children's desks should be established in police stations in conflict areas, manned by personnel, who have the language skills needed to deal with complaints and the training needed to handle cases of sexual violence and other forms of gender-based violence. They should work together with local citizens' committees so that the local community is familiar with their work;
- c. Government monitoring mechanisms (i.e. the NCPA, HRCSL and the NPC) should set up comprehensive data gathering systems within their units on violence against women/children. Such data should be available for public scrutiny. Attention should also be given to collecting data on trafficking, given the paucity of such research at present;

### 8.1.3. Enactment of New Laws

- 1) That a Victims of Crime and Witness Protection Law is enacted forthwith, the provisions of which are in conformity with international standards and having, most particularly a dedicated Protection Division (independent from the Police Department) with a team of competent investigators.
- 2) That a Contempt of Court Act and a Freedom of Information Law is enacted incorporating standards of modern laws relating to contempt and that, particularly, in the latter act, the right of *bona fide* access to court records is included.

### 8.2. Reforms to Laws and Institutional Practices in relation to the criminal justice sector

- 1) That an effective and independent investigation mechanism in accordance with article 12 of the UNCAT is implemented in regard to allegations of torture and CIDT as well as other grave human rights violations.<sup>994</sup>
- 2) That the practice of production of suspects in the residences of Magistrates or Acting Magistrates is disallowed.
- 3) That the following is adhered to in terms of the forensic legal process
  - a. Establish a Human Identification Centre (HIC) to train forensic pathologists and scientists in all aspects of identification and to provide modern state of the art techniques, including DNA profiling, computerized facial reconstruction and photo comparison, video superimposition and anthropometric analysis;
  - b. Create a data base containing the profiles of criminal suspects on a Divisional or Area basis;

<sup>993</sup> As recommended in Final Report of the Commission of Inquiry into Involuntary Removal and Disappearances of Certain Persons (All Island), Sessional Paper No. 1 – 2001, p. 84

<sup>994</sup> This recommendation is reiterated in the proposed reforms relating to the police below.

- d. Special courts should be set-up, presided over by retired judges to try cases of violence against women, in an attempt to solve the pervasive problem of delays in processing court cases.
- e. The proposed Juvenile Justice Procedure Act (2003) should be enacted and implemented forthwith.

### 8.3. Reforms to Laws and Institutional Practices (e.g. in relation to the judiciary, the prosecution, the police, the prison system and other relevant departments)

#### 8.3.1. The Courts

##### In General

- 1) That decisions/judgments/orders of all Courts be of public record and available as of right to a citizen acting *bona fide* in the public interest.
- 2) That sufficient resources are allocated in order to effectively engage in the regulation of courts. That additional Magistrates' Courts are established and in particular, additional Juvenile Justice Courts are established throughout the country.
- 3) That adverse judicial findings in *habeas corpus* petitions not to be confined to payment of damages by the State alone, but to include disciplinary action against the officers responsible. That all respondents in *habeas corpus* petitions be required to deposit the sum awarded in Court pending appeal, and the obligation to pay the award be made available against their assets and estate.

##### Specific Recommendations

###### A. At the High Court level

- 1) That demonstrably effective policy decisions are taken to minimize laws' delays in the hearing and determination of cases by the day-to-day trial of criminal matters in the High Courts.
- 2) That specific training in connection with the provisions and objectives of the CAT Act is provided for High Court judges.
- 3) That High Court commissioners are appointed from both the official and unofficial bar for designated periods of service in the High Courts.<sup>995</sup>

###### B. At the Magistrates' Court level

- 1) That a mandatory legal provision is incorporated in a relevant statute requiring the Magistrates to visit police stations at least once a month.<sup>996</sup> Also a record of the Magistrate's monthly visits and comments to be maintained at the place of detention, as well as, at another publicly accessible place, such as the offices of the HRCSL and/or local government offices
- 2) That a provision is introduced in a relevant statute empowering the Magistrates to visit Police Stations at any time, in order to inspect and/or monitor the lawful detention and interrogation of suspects.

<sup>995</sup> As recommended in the Final Report of the Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, *'The Eradication of Laws Delays'*, Final Report, 2<sup>nd</sup> April, 2004, at para 7.

<sup>996</sup> *ibid.*, at para 16.

- 3) That Magistrates are routinely trained in the asking of suspects brought from police custody or from prisons as to how they have been treated, and even in the absence of a formal complaint from the defendant, order an independent medical examination. That Magistrates are trained specifically in regard to the importance of detainees not being allowed to languish in pre-trial detention and the relevance of the Bail Act in this regard. That magisterial dereliction of duty in this regard is visited with severe disciplinary consequences.
- 4) That a request for a medical examination for torture made orally, in writing or through a Attorney-at-Law, be accepted by the Magistrate and appropriate orders be made for the conduct of such examination.
- 5) That where a Magistrate has reason to suspect that torture has been inflicted, the Magistrate be empowered to request the Deputy Inspector General of the area to conduct an independent inquiry.

#### 8.3.2. The Department of the Attorney General

- 1) That the office of an independent Prosecutor is created with powers to supervise and direct investigations into allegations of human rights violations, including particularly, allegations of torture, extra judicial executions and enforced disappearances. That such Prosecutor examine with particular concern, instances of fabricated cases being lodged against torture victims by police officers in the Magistrates' Courts and take appropriate remedial and disciplinary/legal action. In the alternative, that the Attorney General actively prosecutes cases of grave human rights violations including torture and CIDTP and further, intervenes in pursuance of his/her statutory powers, to prosecute police officers implicated in filing fabricated charges against victims of torture.
- 2) That the Attorney General prosecute police officers for torture above the rank of inspector of police and that indictments are filed on the basis of command responsibility implicit in the CAT Act.
- 3) That specific time limits are imposed for the forwarding of indictments.
- 4) That a dedicated unit of State Counsel and above ranked personnel (as opposed to a Unit being categorized as a mere 'administrative convenience') is formed to diligently pursue torture cases.
- 5) That the cadre of the Department in the criminal section is increased.

#### 8.3.3. Reforms in other Departments

That adequate resources and personnel are provided to the Government Analyst's Department and that the staff is given the necessary training.

#### 8.3.4. The Police Department and the Army

##### In General

- 1) There must be comprehensive training of the members of the police and the security forces in human rights and humanitarian norms in order to ensure non-abuse as well as greater supervision of troop activities by those adequately trained in human rights norms. The training should focus on the explicit understanding that they have a right to disobey

or refuse to participate in activities that violate norms of human rights as well as a duty to report such breaches in conduct.

- 2) All police/army officers indicted under the Penal Code/CAT Act or subjected to disciplinary inquiries or court martial, as the case may be, should be immediately interdicted.
- 3) Judgments of the Supreme Court holding police/army officers culpable of rights abuses are entered into the personal records of the said police officers, and such entries should have a bearing on promotions of those officers.
- 4) Disciplinary procedures against erring army/police officers should result in effective sanctions that are of public record.

### Specific Recommendations

#### A. The Police

- 1) That investigations conducted into abuses by police officers are undertaken by an independent team of highly trained and competent police officers who have a demonstrable record of integrity in service and who function independently from the Police Department. In the alternative, that the officers of the Special Investigations Unit (SIU) of the Police Department are recruited on the basis of their excellent record in service, are made non-transferable, and that the Unit is allocated sufficient resources and manpower;
- 2) That the strength of the police force be increased, that police officers undergo extensive training, based on a curriculum that incorporates human rights education and training in criminal detection, investigation and interrogation techniques and that Crime Scene Officers are appointed for every Police District.<sup>997</sup>
- 3) That Tamil and Tamil speaking police officers be recruited to work in police stations situated in majority Tamil speaking areas.
- 4) That the Police Department should be removed from the purview of the Ministry of Defence.
- 5) That indictments be served to the police station, where the accused police officer is based.
- 6) That the following steps are taken in regard to the Police Training School;
  - a. That the same rewards and benefits enjoyed by officers based in stations are granted to the officers attached to the Police Training School.
  - b. That adequate staff be recruited to the Police Training School.
  - c. That modern equipment for effective training, such as audio visual equipment be provided to the Police Training School.
  - d. That a panel of officials engaged in training police personnel be appointed to evaluate the effectiveness of the existing training programmes and to revise the curriculum.
  - e. That the Police Higher Training Institute be detached from the Police Department and given an independent status.

#### B. The Army

<sup>997</sup> As recommended in the Final Report of the Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, 'The Eradication of Lax Delays', Final Report, 2<sup>nd</sup> April, 2004, at para 1.1. f).

- 1) That the record of cases relating to officers implicated in grave human rights violations (whether required to stand trial before a Military Court of Inquiry or not) shall be referred to the independent Prosecutor for determination as to whether such internal processes have resulted in effective sanctions and if not, for immediate prosecution in terms of the criminal law.
- 2) That the conferment of police powers on the army under Emergency Regulations (ER) is done away with.

#### 8.3.5. Prisons

- 1) That hand cuffing of prisoners is not resorted to for punitive purposes or for longer than is strictly necessary.
- 2) That the legal prohibition of corporal punishment is strictly implemented
- 3) That the severe overcrowding/lack of space in prisons is minimized and that detainees should not be locked up in basic cells without sufficient light or ventilation, particularly when held under Emergency Regulations (ER)
- 4) That rules of natural justice be followed in conducting inquiries under Sections 81 (2) and (4) of the Prisons Ordinance.
- 5) That the basic facilities of prisons and other places of detention is improved and that detainees have access to adequate and regular medical assistance.
- 6) That an adequate number of staff is assigned to the prisons, the prisons are increased in number and more resources are allocated.
- 7) That non-violent offenders be removed from confinement in pre-trial detention facilities and subjected to non-custodial measures, that there is strict separation of remand and convicted prisoners, that there is strict separation of juvenile and adult detainees and the deprivation of the liberty of children is restricted to an absolute minimum.

#### 8.4. Oversight bodies

##### In General

The constitutional commissions should be reconstituted pursuant to the nominations of their members being on the recommendation of the Constitutional Council as mandated by the 17<sup>th</sup> Amendment to the Constitution

##### 8.4.1. The National Police Commission

- 1) That the NPC take back its delegated powers from the IGP in respect of the disciplinary control of police officers below the rank of Chief Inspector.
- 2) That referral of complaints for inquiry to the police officers themselves in Segment B. and C. of the Rules of Procedure (Public Complaints) is stopped forthwith, and that the NPC itself is empowered through a team of dedicated and competent investigators, to inquire into the complaints. That the NPC is given adequate resources and personnel in this respect.

- 3) That the NPC consistently adhere to the norm of immediately interdicting police officers indicted under any law without exception.

#### 8.4.2. The Human Rights Commission of Sri Lanka

- 1) That the HRCSL is empowered to investigate not only fundamental rights violations, but violations of human rights.
- 2) That any person/groups are allowed to bring to an infringement or an imminent infringement of human rights to the attention of the HRCSL in the public interest.
- 3) That Section 14 of the HRC Act is amended to allow the investigation of abuses by non-State actors.
- 4) That decisions/recommendations of the HRCSL are vested with legal force.
- 5) That HRCSL be required to act speedily on any complaint about a violation of human rights of a person, provide reasons in cases of failing to take action and be restricted from abandoning actions without consulting the victim or his/her family members.
- 6) That HRCSL should conduct the investigations at a separate place and not at the same police station/army camp where the victim was subjected to torture.
- 7) That strict sanctions are imposed on HRCSL officers engaging in collusion with alleged perpetrators of human rights violations or those officers who *mala fide*, disclose the particulars of the victim to the alleged perpetrators.
- 8) That a proper preliminary inquiring procedure on the part of the HRCSL is established, including a uniform procedure for the taking down of complaints and the gathering of all available evidence and a procedure for the examination of documents at police stations.
- 9) That powers of 'surprise' inspection of all places of detention permitted to HRCSL officers are effectively implemented and that they are required to visit 'places of detention' regularly and submit reports which are of public record.
- 10) That the requirement that HRCSL be informed of arrests made under the PTA or emergency regulations is strictly enforced and that effective disciplinary/legal action is taken against offenders.
- 11) That Section 31 of the HRC Act (allowing the Minister to make regulations in regard to, *inter alia*, the conducting of investigations) is repealed.
- 12) That Rules of Procedure authorizing the HRCSL to refer cases to the appropriate court are prescribed by the Supreme Court forthwith.
- 13) That no time limits are imposed on the filing of complaints before the HRCSL in regard to grave human rights violations, including torture and CIDTP.
- 14) That the activities of the HRCSL comply with the Principles relating to the status and functioning of national institutions for protection and promotion of human rights (Paris Principles).

#### 8.5. Recommendations to the Government in terms of International Treaty Obligations

- 1) That the Government ratify OPCAT.
- 2) That the Government submit to article 22 of UNCAT.
- 3) That the Government ratify the Rome Statute of the ICC without reservations or declarations.
- 4) That Periodic State Reports are submitted to treaty bodies without delay and that the Concluding Observations of these treaty bodies are effectively disseminated and implemented.

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