



INTERNATIONAL
COMMISSION
OF JURISTS

**INTERNATIONAL COMMISSION OF JURISTS SUBMISSION
TO THE COMMITTEE AGAINST TORTURE
ON THE EXAMINATION OF THE COMBINED THIRD AND FOURTH
PERIODIC REPORTS OF SRI LANKA UNDER THE CONVENTION
AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING
TREATMENT OR PUNISHMENT**

Committee against Torture

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ICJ submission to the Committee against Torture on the Examination of the combined Third and Fourth Periodic Reports of Sri Lanka

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The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the examination by the Committee against Torture (the Committee) of the combined Third and Fourth Periodic Reports of Sri Lanka under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention).

EXECUTIVE SUMMARY

In this submission the ICJ provides alternative replies to some of the questions raised in the List of Issues to be considered during the examination of the combined Third and Fourth Periodic Reports of Sri Lanka, taking place on 8-9 November 2011. The ICJ addresses the issues concerning: the definition of torture; the crime of enforced disappearances; rights on arrest or detention; *habeas corpus*; contemporary issues at the provincial level; *non-refoulement*; witness protection legislation; reparation mechanisms for victims; and the prohibition on the admission as evidence of information obtained by torture.

The ICJ concludes with a list of recommendations about what steps Sri Lanka should undertake in order to improve its adherence to the Convention. The ICJ urges the Committee to call on the Sri Lankan authorities to make amendments to the Convention against Torture Act so that it is compatible with the Convention's provisions, to implement legal safeguards for individuals detained under the Emergency Regulations and the Prevention of Terrorism Act. In addition, robust measures must be enacted to safeguard full fair trial guarantees. Finally, a comprehensive State policy on remedy and reparation, including compensation and rehabilitation, must be adopted to ensure effective redress to victims of torture.

INTRODUCTION AND METHODOLOGY

The ICJ is a non-governmental organisation founded in 1952, dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. The ICJ takes an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law. It provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level.

This submission does not represent a full alternative report, but focuses on aspects of the questions in the List of Issues regarding the following grouping of Convention provisions: Articles 1 and 4, 2, 3, 12 and 13, 14, and 15.¹ This submission does not purport to respond to other questions raised by the Committee. The ICJ does not express a view one way or another on the remaining issues, nor concerning other articles, or other features of articles, in the Convention.

The research and recommendations underpinning this submission are largely drawn from two in-depth studies, the first of which was compiled by Kishali Pinto-Jayawardena, currently the ICJ senior legal advocate in Sri Lanka. This study, entitled *The Rule of Law in Decline: Study on the Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka*, examines the causes and

¹ Committee Against Torture, *List of issues to be considered during the examination of the combined third and fourth periodic reports of Sri Lanka* (CAT/C/LKA/3-4), UN Doc CAT/C/LKA/Q/3-4 (2011).

prevalence of torture in Sri Lanka.² Data for this study was collected through interviews, case law and comprehensive surveys of legislation, regulation and police departmental rules. The study offers detailed recommendations that, if comprehensively adopted, would facilitate the Government's compliance with the Convention and the recommendations of the Committee and lower the incidence of torture and other cruel, inhuman or degrading treatment or punishment (CIDTP) in Sri Lanka.

The second more recent study, written jointly by Kishali Pinto-Jayawardena and Dr Jayantha de Almeida Guneratne, a senior Sri Lankan constitutional lawyer, focuses on the efficacy of the writ of *habeas corpus* as a constitutional remedy for enforced disappearances and arbitrary detention. Entitled *Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times*, the study examines 880 orders, substantive judgments and relevant pleadings, analysing the practical functioning of the writ as a viable remedy.³ The study, published in April 2011, serves as the first comprehensive analysis of the writ of *habeas corpus* in Sri Lanka.

LEGISLATIVE FRAMEWORK

1. Constitutional prohibition of torture and other cruel, inhuman and degrading treatment

The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 (the Constitution) prohibits torture under Chapter 3, Article 11, providing that: "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 11 is an entrenched safeguard and as such can only be amended with approval of a two-thirds majority of Members of Parliament or by a simple majority in a public referendum.

The Constitution does not expressly recognise the right to life and, until 2003, this omission had significant implications for the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. For example, if a person was tortured and then died as a result of the torture, the constitutional remedy for the torture did not extend to the death. In addition, family members were prevented from bringing a claim on behalf of a victim who had died because Article 126(2) of the Constitution only granted standing to persons who were direct victims of the violation.

In 2003, however, the Supreme Court inferred the right to life as flowing from Article 13(4) of the Constitution, which provides 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".⁴ This interpretation has since allowed dependants, next-of-kin, and intestate heirs to bring applications before the Court to obtain remedy for a victim killed as a result of torture.

2. The Convention against Torture Act

The incorporating domestic legislation for the Convention is the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1994 (Convention

² Kishali Pinto-Jayawardena, *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 in Sri Lanka*. (Rehabilitation and Research Centre for Torture Victims, April 2009).

³ Kishali Pinto-Jayawardena and Jayantha de Almeida Guneratne, *Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times*. (Law and Society Trust, January 2011).

⁴ The Constitution of the Democratic Socialist Republic of Sri Lanka. Article 13(4); *Sriyani Silva v Iddamalgoda* [2003] 2 Sri LR 63, per Justice Mark Fernando; *Wewalage Rani Fernando Case*, SC (FR) No 700/2002, SCM 26.07.2004, per Justice Shiranee Bandaranayake (above note 2) p.37.

against Torture Act). Torture is defined in Article 12 as:

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

The modalities of criminal responsibility are set out in Article 2 which include: (i) acts of torture; (ii) attempts to commit torture; (iii) aiding and abetting torture; and (iv) conspiring to commit torture.

Article 3 removes the defence of acting on an order of a superior officer or public authorities. Article 3 also removes the defence of exceptional circumstances such as a state of war, state of emergency or time of political instability.

Article 4 confers jurisdiction on the High Court to hear and try cases under the Convention against Torture Act. Article 4 also confers jurisdiction on the High Court to hear and try offences committed in a place outside of Sri Lanka where the offender is a Sri Lankan, the victim is a Sri Lankan or the offence is committed on a ship or aircraft registered in Sri Lanka.

ICJ ALTERNATIVE REPLIES TO THE LIST OF ISSUES

In these alternative replies, the ICJ refers to aspects of the Committee’s List of Issues. Where relevant, reference is made to Sri Lanka’s combined Third and Fourth Periodic Report. As at the date of this submission, no formal documentation was available setting out replies from Sri Lanka to the Committee’s List of Issues.

Articles 1 and 4

List of Issues, paragraph 1:

1. In view of the statement in the appendix to the State party’s periodic report, paragraph 9, that the definition of torture in the article 12 of the Convention against Torture Act No. 22 of 1994 would “necessarily include any suffering that is caused to any person,” please clarify whether any person has been charged or prosecuted under the Act for inflicting suffering or mental pain. If so, please provide details. Does the State party specifically criminalize enforced disappearance? If so, please provide the text of the relevant legislation.

1. *Definition of torture*

In its combined Third and Fourth Periodic Report the Government said that: “[it] is of the view that the words ‘severe pain whether physical or mental’ invariably encompass ‘suffering’ both in its physical and mental forms”.⁵ The Sri Lankan Government has further asserted that: “[i]t is increasingly evident that in the interpretation of domestic law giving effect to Sri Lanka’s international obligations, the Court would necessarily give expression to the provisions of the relevant international legal instruments”.⁶ However, one does not find

⁵ Sri Lanka, *Combined third and fourth periodic reports of States parties due in 2007*, UN Doc CAT/C/LKA/3-4 (2010), p.15.

⁶ Above note 5, Annex, para 10.

support for this assertion in the jurisprudence of the High Court of Sri Lanka on torture cases. There has yet to be one conviction on the basis of inflicting suffering or mental pain.

It is significant that of the small number of convictions stemming from the Convention against Torture Act, none have involved an act of “suffering.” The factual contexts of the three convictions were straightforward, involving primarily physical injuries. And although one conviction, *Republic of Sri Lanka v Edirisinghe*, did not involve serious physical injuries, it could not be said that the conviction was handed down on the basis of inflicting suffering or mental pain.⁷

In one case, a victim was subjected to considerable suffering when a police officer forced a tuberculosis patient to spit into his mouth. The accused was ultimately acquitted with little or no reference to the issue of suffering in the judgment.⁸

Surveying the High Court cases, it is not clear that the term “suffering” has been interpreted to be subsumed or invariably encompassed in the terms “severe pain whether mental or physical”. In the absence of any convictions for acts of “suffering”, the ICJ recommends that the Sri Lankan Government consider amending the definition of torture to bring it in line with Article 1 of the Convention.

2. *Crime of enforced disappearance*

In its Concluding Observations on the Second Periodic Report of Sri Lanka, the Committee observed with grave concern the number of enforced disappearances and the linkage between torture and enforced disappearances.⁹ As also noted in the *Rule of Law in Decline Study*, “[e]nforced disappearances and extrajudicial executions are inextricably linked to the prevalence of torture and CIDTP and consequently, these issues have [to] be comprehensively examined and addressed by the State as one problem and not in a compartmentalized manner”.¹⁰ Without a specific offence of enforced disappearance, there will continue to be a significant gap in the investigation and prosecution of torture through impunity for enforced disappearances.¹¹

There is no specific offence or definition of enforced disappearance under Sri Lankan criminal law. Equally, there is no fundamental rights violation that explicitly encompasses enforced disappearances in the Constitution.

In 2005, however, the Supreme Court in *Kanapathipillai Machchavallavan v Officer in Charge Army Camp Plaintrain Point, Trincomalee and Three Others*, held that an enforced disappearance could constitute a violation of Article 13(4) of the Constitution.¹² The Court held that where State authorities arrest and detain a person and where the whereabouts of that person are subsequently unknown, a presumption can be made that the State was responsible for the “disappearance”, resulting in an Article 13(4) violation.¹³ The Supreme Court ruling is a welcome step in the right direction, recognising the right to life as well as enforced disappearance as a fundamental rights violation under the Constitution. It is regrettably

⁷ Above note 2, p.92.

⁸ Above note 2, p.93: “In acquitting the accused, the High Court judge treat[ed] minute contradictions in the victim’s evidence as going to the root of his credibility, [made] a factually incorrect assertion regarding an earlier fundamental rights petition filed by the victim and engag[ed] in numerous *ad hoc* criticisms of non-governmental organizations from the Bench”.

⁹ Committee Against Torture, *Conclusions and Observations of the Committee against Torture on the Initial Report of Sri Lanka (CAT/C/28/Add.3)*, UN Doc A/53/44 (1998), para 249.

¹⁰ Above note 2, pp.165.

¹¹ *Ibid*, p.43.

¹² *Kanapathipillai Machchavallavan v Officer in Charge Army Camp Plaintrain Point, Trincomalee and Three Others* [2005] 1 Sri LR 341, per Shirani Bandaranayake J.

¹³ Above note 3, pp.48-53.

noted, however, that the reasoning in *Machchavallavan* case has not been reflected in the more recent cases of the Supreme Court.¹⁴

Article 2

List of Issues, paragraphs 2(a) and (b):

2. According to the State party's periodic report (CAT/C/LKA/3-4, para. 17), the Presidential Directions issued in July 2007 detail the steps that should be taken to guarantee rights of persons in police custody from the very outset of detention. Please provide information on the content of these directives, measures taken to implement them, and the role of various bodies including the National Human Rights Commission (NHRC) in monitoring their effectiveness. With reference to paragraphs 27–32 of the State party's periodic report and paragraphs 13–38 of its supplement, please provide further information on the steps taken, and procedures in place, to ensure, in law and in practice that:

(a) All persons deprived of their liberty are guaranteed the right to be informed of the reason for arrest, the access to a lawyer of their choice, and the right to be assisted by an interpreter, when required. Please clarify how the State party assesses whether, in practice, all persons detained are afforded the right to inform a family member of their arrest within a short period of time following their apprehension. Please clarify whether all detainees have the right to have a lawyer present during all interrogations. Please indicate whether legal aid is made available to all detained persons and the number of legal aid attorneys in the territory of the State party, disaggregated by location. Please comment on allegations that there is a shortage of Tamil-speaking court-appointed interpreters in many locations in the State party's territory;

(b) All detainees promptly receive an independent medical examination and any medical records noting injuries which are consistent with allegations of torture and ill treatment are systematically brought to the attention of the relevant prosecutor. How are detainees provided information on their right to demand an independent medical examination by a doctor and to ensure the accuracy of medical reports, including the right to see the reports?;

(c) All detained persons are guaranteed the ability to challenge effectively and expeditiously the lawfulness of their detention through habeas corpus. Please also indicate the number of claims for habeas corpus filed during the reporting period and the number that were successful;

This part of the ICJ's alternative replies addresses three clusters: (1) rights on arrest or detention; (2) *habeas corpus*; and (3) contemporary issues at the provincial level.

1. Rights on Arrest or Detention

1.1 Right to be informed of the reason for arrest

On 7 July 2006, the President and Commander-in-Chief of the Armed Forces and the Minister of Defense issued Directives to the Heads of the Armed Forces and the Police Force stating that: "...any officer who makes an arrest or order of detention must, according to the above Directives, within 48 hours from the time of arrest or detention, inform the HRC [Human Rights Commission] of such arrest or detention and the place of custody or detention".¹⁵

¹⁴ Above note 2, p.37.

¹⁵ Above note 5, para 17.

In the Annex to Sri Lanka's combined Third and Fourth Periodic Reports, the Government provided further details of additional steps that should be taken, namely:¹⁶

- (a) The person making the arrest should identify himself to the person arrested or to a relative, provide the reason for the arrest and to present a written document to the spouse, parent or relative acknowledging the fact of arrest;
- (b) The name and rank of the arresting officer, the name and date of arrest and the place at which the person will be detained should be specified in the written document;
- (c) If the written document is not available, a note should be made in the Information Book at the relevant Police Station indicating why it was not possible to issue the document;
- (d) The person arrested should be afforded reasonable means of communicating with a relative or friend;
- (e) If the arrestee is a woman or child, a person of their choice is allowed to accompany them to the place of questioning;
- (f) As far as possible, women and children should be placed in the custody of a Women's Unit of the Armed Forces or the Police Force or in the custody of another women military or police officer.

The Government has stated that the Directive was disseminated to all police stations in three languages (Sinhala, Tamil and English), and prominently displayed to ensure arrestees were aware of their rights. The Government also claims that steps have been taken to give wide publicity to the Directive in the mass media.¹⁷

In the vast majority of cases, however, the Directive has not been implemented. Arrestees are rarely informed of the reason for their arrest. Police almost invariably fail to identify themselves, often appearing in plain clothes at the time of arrest. There is almost never any written document detailing the reason for arrest. Family members are rarely informed of arrests. Finally, the National Human Rights Commission (NHRC) is not regularly informed of arrests made under the Prevention of Terrorism Act (PTA) or Emergency Regulations (ER).¹⁸

The NHRC faces significant barriers in accessing detention centres and prisons. NHRC officers are not given free access to army camps. In a recent police circular, NHRC officers were restricted from visiting certain parts of police stations: they were only allowed to visit certain cells, but not the toilets and kitchen where detainees are often tortured or made subject to enforced disappearance.¹⁹ In any case, visits by NHRC officers have been infrequent²⁰ and inconsistent.

The ERs further undermine legal safeguards. The Defence Secretary is empowered to enact regulations allowing for arrest on the basis of preventive detention,²¹ as well as broad powers of search, seizure, arrest and detention of any persons who are seen to be committing an offence under the ER.²² Although Courts initially held that the Defence Secretary as well as the Government were entitled to take extraordinary measures to safeguard national security, including arresting persons under the ER without disclosing the reason for their arrest, there has been movement towards restraining these measures to ensure they are not more stringent than necessary. In *Sunila Rodrigo v De Silva*, the reasons for arrest had not

¹⁶ Above note 5, Annex, paras 29–32.

¹⁷ Above note 2, p.50.

¹⁸ Ibid, p.196.

¹⁹ Ibid.

²⁰ Ibid; see also Amnesty International, *Sri Lanka: Torture in Custody*, AI Index: 1 June 1999, ASA 37/10/99, p. 30.

²¹ Emergency (Miscellaneous Provision and Powers) Regulation No 1 of 2005 as contained in Gazette No 1405/14 (EMPPR 2005).

²² Regulation 20(1) of the EMPPR 2005.

been given and it was later made clear that the arrest had taken place based only on a general suspicion not backed up by any evidence. Justice ARB Amersinghe held that:²³

“[The Defence Secretary’s] 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.”

The Court therefore cautioned 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”.²⁴

Unfortunately, the Supreme Court has since given conflicting judgments on the right of a suspect to be given the reasons for arrest under the ER. In 2003, the Court held, in *Konesalingam v Major Matalif*, that the petitioner’s right was violated when he was arrested, without being told the reason, and kept in detention for one month.²⁵ In the same year however, the Court took the view in another case that the arrest of a cleaner without any reason did not constitute a violation of Article 13(1) rights.²⁶

The ERs were recently withdrawn by the Government, inviting the possibility of improvement. However, the provisions of the PTA, with similarly broad powers of arrest and detention, remain in force.

It is also not uncommon for police to completely disregard legal safeguards and due process in the course of arresting and detaining ordinary civilians. In the *Rule of Law in Decline* the following case is cited:²⁷

The fate that befell Nandini Herath, arrested on 8 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 Wariyapola police station for three days, where she was raped and subjected to severe torture, cruel, inhuman and degrading treatment...There was no female officer present. 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.

In some cases, police fabricate charges against victims of police torture in an attempt to intimidate them into withdrawing their complaints or cases. In such cases, the reason for arrest is not given at the time of arrest and detention and is only later disclosed to the victim when a charge has been fabricated against him or her.²⁸ Despite the alarming frequency at which persons are arrested and detained on fabricated charges, there has never been a single case prosecuting police for levying fabricated charges.²⁹

1.2 Right to a lawyer of choice; and right to have a lawyer present during all interrogations

In its Concluding Observations in 2005, the Committee recommended to Sri Lanka that: “[t]he State party... take effective measures to ensure that the fundamental legal safeguards

²³ *Sunil Rodrigo v De Silva* [1997] 3 Sri LR 265, as reprinted in above note 2, p.121.

²⁴ *Ibid.*

²⁵ *Konesalingam v Major Mutalif*, SC (FR) No. 555/2001, SC Minutes of 10.02.2003.

²⁶ *Shammugarajah v Dilruk, S.I. Vavuniya and Others*, SC (FR) No. 47/2002, SC Minutes of 10.02.2003 cited at above note 2, p.121.

²⁷ Above note 2, p.118.

²⁸ *Ibid.*

²⁹ *Ibid.*, p.120.

for persons detained by police... include... access to a lawyer".³⁰ During his country mission to Sri Lanka in 2007, the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment noted a continued lack of fundamental safeguards including access to a lawyer.³¹ Despite this, no mention of the right to a lawyer or the right to have a lawyer present during interrogations was made in Sri Lanka's Third and Fourth Periodic Reports.³²

There continues to be no constitutional right to counsel for suspects in police custody. Under statutory law, a special category of detainees, including those arrested for murder, may be held for up to 48 hours and during that time are provided access to counsel.³³ However, this right is not more generally available under the Code of Criminal Procedure Act (CCP Act) and as such constitutes a serious *lacuna* in the law.

In recent times, it has not been uncommon for lawyers who visit police stations with their clients to be assaulted. There have also been instances of collusion between criminal lawyers and police who have obstructed a suspect's ability to obtain counsel.³⁴

With respect to individuals detained under the ER and the PTA, the situation is even worse. Prior written permission is required from the Inspector General of Police for a lawyer to be able to visit a detainee.³⁵ Even where permission is granted, a police officer sits beside the lawyer throughout the interview, hampering lawyer-client confidentiality.³⁶ For example, in the case of Yoga Vijitha, who was held at the Terrorist Investigation Division, she could not disclose information about her alleged torture to her lawyer during her meetings with him because there were five police personnel seated with her.³⁷ The Supreme Court has not taken a strong stance on this issue, save for a case in 1997, where it held that a suspect detained under the ER should be allowed access to legal counsel. The reasoning in this judgment, however, was *obiter dictum* and does not as such constitute binding law.³⁸

The NHRC recently issued a statement that the absence of lawyer-client confidentiality was not a violation of fundamental rights.³⁹ This comment was made in the context of a case where police officers insisted on remaining within earshot of two lawyers who had attempted to confer privately with their clients at the Boosa detention camp.⁴⁰ The order stated that there had been no violation of a fundamental right and that: "some international laws and standards have not been incorporated into our law... [and] the Sri Lankan

³⁰ Committee Against Torture, *Conclusions and Recommendations of the Committee against Torture on the Second Periodic Report of Sri Lanka (CAT/C/48/Add.2)*, UN Doc CAT/C/LKA/CO/2 (2005), para 8.

³¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, *Mission to Sri Lanka*, UN Doc A/HRC/7/3/Add.6 (2008), para 36.

³² Above note 5, paras 27-32, Annex (paras 13-38).

³³ Criminal Procedure Special Provisions Act 2005; and Act No 42 of 2007.

³⁴ See, for example, *Gnanamuttu v Military Officer, Ananda and others* [1999] 2 Sri LR 213, concerning a long-term Tamil resident of Colombo who was arrested and detained for failing to produce a document of registration at the relevant police station despite the fact that he did not need to produce such a document (because he had not come to Colombo from outside and he had his identity card with him at all times). The arrest was instead on the basis that as he was of Tamil ethnicity, and the identity card was thus said not to be sufficient to prove his identity *bona fides*. The arrest as well as detention was ruled to be unconstitutional by the Supreme Court. It was disclosed during the hearing, however, that when the suspect was taken to court, his identity card (which he had been compelled to surrender to the police) was found in the possession of a lawyer who had then demanded money from the suspect to appear for him.

³⁵ Above note 2, p 125.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*; see also above note 23.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

government is not bound to follow all international laws and standards".⁴¹ This rejection of the right to have access to a lawyer or to have a lawyer present during interrogations undermines Article 14(3)(d) of the Convention and represents a significant barrier to the prevention of torture and ill-treatment in Sri Lanka.

1.3 Right to inform family of arrest

There are no provisions in the Constitution or Code of Criminal Procedure on the requirement to inform family members of the arrest. As demonstrated in the example of Nandini Herath above, family members are often not informed of arrests and often denied access to the suspect.⁴²

1.4 Right to be assisted by an interpreter

The right to an interpreter is given equally scant attention under Sri Lankan law. Section 4(1)(d) of the International Covenant on Civil and Political Rights (ICCPR) Act 2007 states that an accused has the right to an interpreter "where such person cannot understand or speak the language in which the trial is conducted". However, this provision is not properly implemented or followed in the Sri Lankan justice system due to a severe lack of qualified interpreters.⁴³

1.5 Right to receive an independent medical examination

There is no constitutional provision enshrining the right to receive an independent medical examination. Suspects held under the PTA or ER, as well as other legislation, do not have an independent right to a medical examination. Article 122(1) of the CCP Act states that where an officer in charge of a police station considers it necessary for the investigation, he or she may order the examination of any person by a medical practitioner.⁴⁴ This is dependent entirely on the volition of the officer in charge. The suspect does not have the right himself or herself to request and receive medical assistance.

A Magistrate may also order a medical examination to be carried out by a Judicial Medical Officer if a suspect complains of ill-treatment or torture. The right of complaint, however, is rarely exercised by the suspect due to fear of retribution upon return to custody.⁴⁵

The Special Rapporteur on torture noted a significant failing in the current practice of medical examinations, namely that a victim who is taken for a medical examination before a Judicial Medical Officer is accompanied by the same police officer responsible for the alleged torture or ill-treatment.⁴⁶ As such, the medical examination can be neither independent nor reliable, and is often deliberately used by the police to discredit claims of torture or ill-treatment.

A study of torture claims raised by individuals held as suspects held under the PTA found that the majority of the medical examinations were undertaken purely for the purpose of

⁴¹ Ibid.

⁴² Above note 2, p.124.

⁴³ Ibid, p.139.

⁴⁴ Ibid, p.53.

⁴⁵ Ibid.

⁴⁶ Ibid, p.127; see also above note 32, para 38.

protecting authorities from future torture petitions. As noted in one study:⁴⁷

What happens in practice is that police along with the suspect 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.

It is also not uncommon for medical examinations to be delayed to deliberately obstruct or interfere with the gathering of evidence. In the case of Nandini Herath, mentioned above, she was consistently denied a medical examination. When she was finally referred to a Judicial Medical Officer, the report only noted two contusions and a fracture - injuries unrelated to the sexual assault.⁴⁸ It was only after seven months from the time of her sexual assault that she was allowed to obtain a proper medical examination, which then authoritatively concluded that her genital injuries were consistent with her allegations of torture.⁴⁹

2. Habeas Corpus

2.1 Right to habeas corpus

Pursuant to Article 141 of the Constitution, all persons are guaranteed the right to challenge the lawfulness of their detention through the writ of *habeas corpus*. Detainees may file a petition with the Court of Appeal for a writ of *habeas corpus* to bring before the court “the body of any person to be dealt with according to law” or “the body of any person illegally or improperly detained in public or private custody”. The Provincial High Court is also conferred jurisdiction to hear *habeas corpus* petitions under the High Court of the Provinces (Special Provisions) Act 1990. In practice, however, the ability to challenge effectively and expeditiously the lawfulness of detention through *habeas corpus* is severely limited. The process is mired in dysfunction, a lack of political will, delays and Court backlogs, a disregard for witness protection and a manifest lack of sensitivity or concern for victims.⁵⁰

In the first comprehensive analysis of the writ of *habeas corpus*, 880 orders and substantive judgments along with relevant pleadings were examined, charting the trajectory of *habeas corpus* jurisprudence from pre-independence to the modern era.⁵¹ The *habeas corpus* remedy has specific uses in respect of torture and ill-treatment. First, the *habeas corpus* remedy allows families of victims to locate the “disappeared”, providing an opportunity to seek the truth in the absence of a specific criminal offence or a reliable and effective Constitutional remedy. Second, the *habeas corpus* remedy has been used to uncover torture and ill-treatment in custody.⁵² Third, the remedy provides an avenue to seek damages and compensation for a person subject to unlawful arrest or enforced disappearance.⁵³

In this brief section, an overview of the problems with the *habeas corpus* process in the Appeal Court as well as the Provincial High Courts of the Northern and Eastern Provinces is presented.

⁴⁷ Ibid; see also V.S. Ganesalingam, in “Case study of custodial torture survivors,” *Beyond the Wall: Home for Human Rights Quarterly Journal on Human Rights and Views*, January-March 2005, Colombo, Sri Lanka, p.22.

⁴⁸ Above note 2, p.126; see also Kishali Pinto-Jayawardena and Lisa Kois, *Sri Lanka – the Right not to be Tortured: A Critical Analysis of the Judicial Response* (2008).

⁴⁹ Ibid.

⁵⁰ Above note 3, p.xxxii.

⁵¹ Ibid, p.xiii.

⁵² Ibid, pp.222-223.

⁵³ Exemplified in the *Leeda Violet case*, a case of enforced disappearance where exemplary costs were awarded to the victim’s family, cited at above note 3, p.223.

2.2 Obstacles to habeas corpus petitions in the Court of Appeal

The inefficacy of the *habeas corpus* remedy in Sri Lanka is systemic and systematic. In the *Habeas Corpus* study, 844 Appeal Court decisions were examined between 1994 (the year Sri Lanka acceded to the Convention) and 2002, revealing many of the problems and issues surrounding the process, including five key issues identified here.⁵⁴

First, it is not uncommon for the Court of Appeal to dismiss petitions on the basis of the word of counsel for the respondent (i.e. counsel for the State authorities), without any other corroborating evidence. Of the 844 *habeas corpus* petitions, 676 cases were dismissed.⁵⁵ Of these 676 cases, 390 petitions were dismissed on the word of counsel that the detainee had been indicted (without any other evidence presented to the Court).⁵⁶ A further 21 petitions were dismissed upon withdrawal by counsel on the basis of producing the detainee before a Magistrate or locating him or her in custody.⁵⁷ Again, the Court has commonly relied exclusively on the word of State counsel as to the facts of the case without any other corroborating documents or supporting evidence.⁵⁸

Second, the State policy of not investigating cases of “disappearances” dilutes the efficacy of this remedy because it means that judicial authorities are prevented from proceeding further in such cases. One illustrative example during the period under review is the enforced disappearance of journalist Prageeth Ekneligoda. Prageeth, a cartoonist and political analyst with a news website, *Lanka-e-News*, was abducted on his way home from work on 24 January 2010.⁵⁹ State authorities deny involvement in the abduction and claim to be investigating the case. Prageeth Ekneligoda’s wife filed a *habeas corpus* petition in a Colombo court in August 2010. There have been six hearings in the matter with no significant progress or resolution of the case.⁶⁰ On 22 August 2011, the Court of Appeal directed the Homagama Magistrate to expedite the matter; to conduct an inquiry as soon as possible and report on the findings to the Court of Appeal upon completion. The Court of Appeal has scheduled its next hearing in the *habeas corpus* petition for 12 January 2012.⁶¹

Third, the discretionary language of the Appellate Court’s jurisdiction in *habeas corpus* petitions allows the Court to dismiss applications on the ground of late filing. Applicants seeking a remedy or relief from the Court of Appeal are normally required to comply with time limits, or statutes of limitations, imposed for filing such claims.⁶² Failing to do so can result in a bar to granting relief. In the case of *habeas corpus* petitions, however, the situation is unique. Applications invoking the revisionary jurisdiction and the writ of *habeas corpus* jurisdiction of the Court of Appeal are not subject to any specific time limitation.⁶³ However, these jurisdictional bases are couched in language that indicates the discretionary nature of the remedies, allowing the Court to decline relief if the Court feels the applications are filed

⁵⁴ Above note 3, p.xx.

⁵⁵ Ibid, p.xxiii.

⁵⁶ Ibid, p.xxiii.

⁵⁷ Ibid, p.xxiii.

⁵⁸ The Court of Appeal did find in case reference HCA/157/94 that “state counsel’s mere *ipse dixit* that the detainee had been indicted” was not enough without any further authority to justify his continued detention. This case, however, was not followed in subsequent decisions – see *Habeas Corpus Study*, above note 3, p.xxiii.

⁵⁹ International Federation of Journalists, *IFJ Welcomes Progress in Prageeth Ekneligoda Case in Sri Lanka*, at: <http://asiapacific.ifj.org/en/articles/ifj-welcomes-progress-in-prageeth-ekneligoda-case-in-sri-lanka> (accessed on 12 October 2011).

⁶⁰ Ibid.

⁶¹ Chitra Weerathne, “Appeal Court orders Homagama Magistrate: Give Priority to Ekneligoda disappearance complaint” *The Island*, 23 August 2011, at: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=33103 (accessed on 13 October 2011).

⁶² Above note 3, pp.95-96.

⁶³ Ibid, pp.95-96.

belatedly or after long delays.⁶⁴ The Supreme Court in *Juwanis v Lathif Police Inspector, Special Task Force and Others* held that the writ of *habeas corpus* was “not discretionary, in that it is [a] right which issues *ex debito justitiae* when the applicant has satisfied the court that his detention was unlawful”.⁶⁵

It is not uncommon for families to first try to locate a victim through informal means. Family members will often file a *habeas corpus* petition only after all other avenues have been exhausted. While the courts may request that *habeas corpus* applications be filed as soon as possible or practicable, delays in the filing of such petitions should not act as a bar to relief.⁶⁶ There should be a clear enunciation of the legal principle that despite the appellate court’s *habeas corpus* jurisdiction being couched in discretionary language, any delay in instituting proceedings will not be treated as a bar to the grant of relief in cases where grave human rights violations have been alleged committed.⁶⁷

Fourth, there is no explicit statutory recognition of the principles of institutional or command responsibility to ensure that army officers or police officers in command of a particular army / police station are held responsible.⁶⁸

Fifth, the burden of proof to establish beyond a reasonable doubt that a victim has been arrested and taken into State custody is placed on the petitioner. Given the State’s denials of involvement in such cases this burden is nearly impossible to discharge. In *Kodippilige Seetha v Saravanathan*, the petitioner, the wife of a victim of an enforced disappearance, brought a *habeas corpus* petition before a Magistrate’s Court.⁶⁹ The State denied the allegations and presented an alibi to demonstrate that the victim was elsewhere at the time of arrest. The eyewitnesses supporting the petitioner’s claim then retracted their statements, meaning that the evidence for the petition turned solely on the testimony of the petitioner. The Magistrate dismissed the case and the petitioner appealed to the Court of Appeal, which held that the burden of proving an illegal arrest or enforced disappearance in a *habeas corpus* petition falls on the petitioner. This principle would only be reversed if the State conceded that the victim had been taken into custody.⁷⁰

While it is not uncommon to place the burden on the applicant, the standard of proof is generally a balance of probabilities. The Supreme Court radically departed from this general rule in the case of *Gampola Paddeniiyage Gedera Cecelia*, where it held that an ordinary citizen making a serious allegation against a State official, which if true would amount to a crime, would have to prove such allegation beyond a reasonable doubt.⁷¹ To impose such a high standard of proof on an applicant making a claim of a serious human rights violation creates a significant and normally insurmountable hurdle to *habeas corpus* petitions, and a denial of the right to an effective remedy.

2.3 Obstacles to *habeas corpus* in the Provincial High Court of the Northern Province in 2003–2004

Between February and December 1996, some 900 persons were arrested by the Sri Lankan army during an offensive operation to recapture the Jaffna Peninsula.⁷² Subsequent to these arrests, 37 *habeas corpus* petitions were filed in the Provincial Court of the Northern and Eastern Provinces.⁷³

⁶⁴ See above note 3, pp.95-96.

⁶⁵ [1988] 2 Sri LR 185; see also above note 3, p.96.

⁶⁶ Above note 3, p.96.

⁶⁷ Above note 3, p.228.

⁶⁸ *Ibid.*

⁶⁹ [1986] 2 Sri LR 228 at 234; see also *ibid* p.230.

⁷⁰ Above note 3, p.73.

⁷¹ *Ibid*, p.xxviii.

⁷² *Ibid*, p.194.

⁷³ *Ibid*, p.195.

The *Habeas Corpus Study* followed the trajectory of these 37 petitions in order to examine the obstacles that victims and their families face when attempting to access the *habeas corpus* remedy in the Provincial Courts. The whereabouts of the all of the victims remains unknown.⁷⁴ Some of the petitions are at the level of the Provincial High Court, while others are pending at the Court of Appeal after being transferred by the respondent State to the Appeal Court.⁷⁵ Others have been transferred to the High Court of Anuradhapura. Three principle issues are addressed concerning these petitions.

First, respondent Army Officers often continue to work or remain on-duty pending the determination of the *habeas corpus* petition.⁷⁶ This invariably leads to petitioners and their family members being threatened or intimidated by the respondent, sometimes resulting in the petition being withdrawn. In the absence of a Witness Protection Bill or any other measures to protect witnesses, this obstacle will continue hindering the process.

Second, there are extreme and unnecessary delays in the hearing and determination of petitions.⁷⁷ Ordinarily, after an application is filed with the High Court, it is referred to the overburdened and backlogged Magistrate's Court. It may be queried why this referral takes place given that the High Court has jurisdiction to determine the application.⁷⁸ *Habeas corpus* petitions are usually delayed for about three years before a preliminary inquiry is held. The *Habeas Corpus Study* noted that even Magistrates that the High Court of Jaffna complained that they should be determining applications in the first instance so as to prevent these delays.⁷⁹ As noted by one Magistrate from the Magistrate's Court of Chavakachcheri:⁸⁰

"[The] further stand of this court is that the High Court of Jaffna should have conducted the inquiries on the original application when the application was first made and should have come to a conclusion. For some reason the High Court without conducting the inquiries has transferred this case to a lower court. Even after the transfer no compensation or decision was given for the last three years."

The *Habeas Corpus Study* cites additional technical or procedural obstacles interfering with and hindering the functioning of the *habeas corpus* remedy: technical objections raised by respondents relating to the non-naming of officers identified as being responsible for the enforced disappearance of the person concerned in the application;⁸¹ frequent postponements or adjournments by the respondents' lawyers;⁸² and frequent applications made by the respondents requesting to transfer the cases to the Courts in Colombo based on the perceived security threat to the respondent army officers in the Northern and Eastern provinces.⁸³ Concerning the last issue, the transfer of cases to Colombo creates serious obstacles for petitioners. Many of the petitioners are unable to travel to Colombo due to increased security risk and financial cost, i.e. the cost of accommodation and legal fees for Colombo lawyers. As a result, transfers often result in cases being dismissed due to a failure by the petitioner to appear in court. This also occurs frequently with *habeas corpus* petitions before the Court of Appeal.⁸⁴

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid, p.197.

⁷⁷ Ibid, p.198.

⁷⁸ Discussed further at section 3.3 below.

⁷⁹ Above note 3, p.198.

⁸⁰ Observation made by the Magistrate's Court of Chavakachcheri in Case Illustration 1, Application 684/2003, filed 1 October 2003 by petitioner Ravindran Jayaranni in respect of Ponnar Ravindren, as cited at above note 3, p.198.

⁸¹ Above note 3, p.199.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid, pp.199-200.

2.4 Obstruction of habeas corpus petitions in the provincial courts

Examination of the 37 High Court petitions mentioned also reveals common defences and strategies adopted by State officers, including officers of the Attorney General's Department to deliberately frustrate the *habeas corpus* process. First, custodial officers generally deny having made the arrest. In one case, this position was insisted upon, notwithstanding a finding issued by the Human Rights Commission that the army had taken custody of the victim with no evidence of subsequent release.⁸⁵ A similar defence is to argue that all arrested persons had been handed over to police and as such were not in the custody of the Army.⁸⁶

Second, State law enforcement officers consistently claim that any formal documentation relating to the special military operations has been destroyed by terrorist groups and therefore cannot be submitted to the Court.

Third, as noted above, State law enforcement officers have been known to raise formal objections on the basis that the petitioner has incorrectly cited one of the respondents,⁸⁷ while refusing to engage with the information contained in the application and proceedings. In most cases, State officers refuse to participate in proceedings despite stern observations by the court.⁸⁸

3. Contemporary Issues Faced at the Provincial Level

A series of consultations held with the Provincial Bar Associations of Galle and Matara, Trincomalee, Mutur, Kanthale, Jaffna, Ampara, Vavuniya and Kandy during 2010 and early 2011 revealed further contemporary challenges faced at the provincial level.⁸⁹

3.1 Non-existing or lapsed detention orders

It is not uncommon for a detainee to be held under a detention order that has lapsed or where there is no detention order at all. In such circumstances, the Court must immediately release the detainee as there is no jurisdictional or legal basis to continue the detention. However, there are instances in Jaffna, Vavuniya and Trincomalee where respondent counsel for the Government prevail upon the Court to adjourn the matter so that a valid detention order may be produced. The Courts comply, ordering the State to produce a valid detention order by the next day, failing which the individual is to be released.⁹⁰ There is no legal basis justifying the Court to make such an order. In the absence of a valid detention order, or upon its expiration, a detainee must be released immediately.⁹¹

3.2 The need for a Special Division of the High Court

In the last months of the civil war, thousands of LTTE (Liberation Tigers of Tamil Eelam) combatants surrendered to the Government, primarily in Vavuniya but also in Jaffna and Trincomalee.⁹² Hundreds of *habeas corpus* petitions have been filed in respect of these individuals. Currently there are only 68 judges sitting and fifteen others commissioned to sit

⁸⁵ Ibid, pp. 207-208.

⁸⁶ Ibid, p.208.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid, p.212.

⁹⁰ Ibid, p.213.

⁹¹ Ibid.

⁹² Ibid, p.212.

as High Court Judges.⁹³ It has therefore been suggested that a Special Division of the High Court be created to expedite these petitions. Reasons given for not doing this include that there is no issue with the legality of the detentions, so that there is no corresponding need to expedite the petitions; and to create a Special Division would be complicated as it is not clear whether the PTA, the ER or the Code of Criminal Procedure would apply as the relevant legislation.⁹⁴ Notwithstanding these concerns, the individuals in question are Sri Lankan citizens and are entitled to enjoyment of their rights. At a minimum, the Judicial Services Commission should request the respective High Courts to deal with their cases as a matter of priority.⁹⁵

3.3 High Court jurisdiction to hear and determine habeas corpus petitions

As explained above, it is normal practice for the High Court to refer *habeas corpus* petitions to a Magistrate's Court for a preliminary inquiry, resulting in an inordinate delay.⁹⁶ A High Court is entitled to hear and determine a *habeas corpus* petition without having to refer the matter to the Magistrate's Court. There have been instances in the Vavuniya High Court, for example, of *habeas corpus* petitions being determined and heard in the High Court without prior referral to the Magistrate's Court.⁹⁷ If such a practice were widely adopted, it would significantly decrease delays and expedite *habeas corpus* petitions.⁹⁸

3.4 Duplication of indictments

State authorities have at times filed multiple indictments for the same individual in different courts. For example, there was an incident of a Kilinochi resident who was arrested and released, only to be indicted the very next day in Colombo.⁹⁹ The practice of filing multiple indictments in different Courts frustrates the *habeas corpus* process: Not only does it pose a significant challenge to counsel, it negates the *habeas corpus* remedy for the victim who, after being released, is immediately re-arrested and detained.¹⁰⁰

3.5 Rendering the writ of habeas corpus irrelevant or inapplicable

The Attorney General will often continue to hold on to a detention order signed by the President even after the filing of an indictment. By doing this, the Attorney General denies the detainee the right to bail that would normally be available to him or her when transferred to judicial custody. The continued application of the detention order renders the *habeas corpus* petition meaningless.¹⁰¹

⁹³ The exact number of High Court judges is not certain. As of 25 March 2009, the Judges Training Institute cited 55 High Court Judges serving in the country (above note 3, p.215); see also Sri Lanka Judges Training Institute website, at <http://sljti.org> (accessed 21 September 2011).

⁹⁴ Above note 3, p.216.

⁹⁵ Ibid, p.217.

⁹⁶ This rule comes from the proviso in the Constitution of the Democratic Socialist Republic of Sri Lanka, Article 141: "Provided that it shall be lawful for the Court of Appeal to require the body of such person to be brought before the most convenient Court of First Instance and to direct the judge of such court to inquire into and report upon the acts of the alleged imprisonment or detention...". Although Article 141 refers to the Court of Appeal, the provision applies *mutatis mutandis* to the High Court by virtue of the High Court of Provinces (Special Provisions) Act 1990; see also above note 3, p.217.

⁹⁷ Above note 3, p.217.

⁹⁸ Ibid.

⁹⁹ Ibid, p.218.

¹⁰⁰ Ibid.

¹⁰¹ Ibid, p.219.

3.6 Information on the status of proceedings in the Magistrate's Court

In practice, a Magistrate who conducts a preliminary inquiry will not release the writ of *habeas corpus* to the petitioners after the inquiry. As a result of this practice, petitioners are unaware of the status of their case, sometimes for years. For instance, several petitioners who had lost their sons and husbands in 2007 gave evidence before the Trincomalee Magistrate's Court, but still do not know what happened to their cases. It is recommended that the magisterial order be made available to the petitioner at the conclusion of the Magistrate Court's inquiry.¹⁰²

Article 3

List of Issues, paragraph 11:

11. With reference to paragraphs 33–35 of the State party's report, please provide information on how the Extradition Law of Sri Lanka covers the situation envisaged by article 3 of the Convention and ensures that no person is expelled, returned or extradited to another state where there are substantial grounds for believing that he or she would be subjected to torture. What is the procedure followed when a person invokes this right? Are individuals facing expulsion or return, or extradited, informed that they have a right to seek asylum and to appeal a deportation decision? If so, does such an appeal have suspensive effect?

The Convention against Torture Act is silent on the issue of *non-refoulement*. The Sri Lankan Government has cited a general policy not to extradite individuals where a threat of torture exists, as well as Extradition Law 1977, which incorporates restrictions on extradition where there is a possibility of facing punishment, detention or restriction based on race, nationality or political opinion. The Government has stated there have been no instances of persons seeking to refute an extradition order based on allegations of risks of torture if extradited.¹⁰³

Notwithstanding this, the Sri Lankan Government does not apply these principles to illegal immigrants and asylum-seekers, and fails to acknowledge that the principle of *non-refoulement* applies equally to them where they could face torture or ill-treatment upon being deported. As a result of this *lacuna*, Sri Lanka cannot rely exclusively on the Extradition Law to fulfil its obligations under Article 3 of the Convention.

Articles 12 and 13

List of Issues, paragraph 29:

29. Please provide the Committee with updated information on the status of the draft bill on Witness and Victims of Crime Protection, which was presented to the Sri Lankan Parliament in 2008. Please provide the number of requests for protection or complaints of intimidation or harassment received from witnesses and victims in cases of torture and ill-treatment during the reporting period. Please indicate how many requests for protection were honoured and how many complaints were subsequently investigated, and with what outcome.

A Witness and Victim Protection Bill was presented before Parliament in 2008, although this remains pending in the House, demonstrating the lack of legislative intent to enact this draft legislation.¹⁰⁴

¹⁰² Ibid, p.220.

¹⁰³ Above note 5, para 33.

¹⁰⁴ Above note 2, p.142.

As to its content, the Witness and Victim Protection Bill has many commendable aspects, offering protection to a wide group of persons with varying levels of participation in the criminal justice process. First, the entitlement to witness protection is conceived of widely and includes not only those facing “real harm” but also “possible harm”. Second, protection is offered to those intending to testify as well as those who actually do. Third, the definition of victim is drafted widely, covering 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 Convention.

Despite some positive aspects, the Bill contains some problematic provisions. Clause 7(5), which sets out a prohibition on revealing or disclosing the identity of victims, is qualified. First, 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”; second, a “good faith” caveat is inserted to cover cases where the disclosure was made in good faith or in compliance with other provisions or procedures established by law. Thus, if a directive issued by an authorised public official under any emergency regulation calls for the release of such information, no protections would apply. A further weakness is the lack of a Protection Division, independent from the Police Department with a team of competent investigators.

Article 14

List of Issues, paragraph 30:

30. Please indicate whether victims of torture have an enforceable right to fair and adequate compensation and the procedure for enforcing this right. Please provide statistical data on redress measures, including compensation and the means for rehabilitation, ordered by the courts and actually provided to the victims of torture, or their families, since 2006.

There is no specific reparation program for victims of torture in Sri Lanka. A right to compensation is available to victims pursuant to Article 126 of the Constitution. According to case law, the Supreme Court is empowered to order compensation in regard to:¹⁰⁵

“...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.”

Apart from compensation awarded for a violation of constitutional rights, there is no legislative mechanism within the Convention against Torture Act, or the penal law, for compensation or other forms of reparation for torture victims. Although the NHRC may recommend awards of compensation to be made to torture victims, such orders are not enforceable or binding against the perpetrators.

Compensation awarded through the Supreme Court has been grossly inconsistent, sometimes varying significantly according to the make-up of the particular bench issuing the compensation order.¹⁰⁶ In some cases, even when compensation is judicially ordered, it is not paid.

¹⁰⁵ Ibid, p.74; see also *De Silva v Chairman Ceylon Fertilizer Corporation* [1989] 2 Sri LR 393.

¹⁰⁶ Above note 2, p. 202.

Article 15

List of Issues, paragraph 34:

34. Please provide examples of cases in which individuals have alleged that State officials compelled persons to confess to a crime under torture, and inform the Committee of any measure taken to ensure that these statements were not admitted as evidence in court and that the burden of the proof rests with the prosecution to prove that such confessions were provided voluntarily. Please comment on reports that confessions obtained by coercive means, including torture, have been admitted as evidence in cases under the Prevention of Terrorism Act. Do magistrates order independent medical examinations of suspects ex officio?

Under the Evidence Ordinance Act 1895, confessions obtained through inducement, threat or promise must be excluded as evidence in judicial proceedings. Likewise, the privilege against self-incrimination is upheld and extended beyond judicial proceedings to include the entire course of the police investigation, even to the period preceding the framing of the charge and the indictment. The Courts have acknowledged the importance of preventing the conviction of an accused person based on statements made by himself or herself. However, the Convention against Torture Act does not explicitly prohibit or exclude the use of information as evidence obtained by torture. Moreover, the PTA allows all confessions obtained by police at or above the rank of Assistant Superintendent of Police (ASP) to be admissible, imposing a burden on the accused to prove that the confession was not voluntary. Article 16 of the PTA states:

- 16(1) Notwithstanding the provisions of any other law, where any person is charged with any offence under this Act, any statement made by such person at any time, whether –
- (a) it amounts to a confession or not;
 - (b) made orally or reduced to writing;
 - (c) such person was or was not in custody or presence of a police officer;
 - (d) made in the course of an investigation or not;
 - (e) it was or was not wholly or partly in answer to any question, against such person if such statement is not irrelevant under section 24 of the Evidence Ordinance: Provided, however, that no such statement shall be proved as against such person if such statement was made to a police officer below the rank of an Assistant Superintendent.
- (2) The burden of proving that any statement referred to in subsection (1) is irrelevant under section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant[...].

It has been observed by a senior human rights lawyer involved in cases of detainees under the PTA and ER that in 99 percent of cases filed under the PTA, the sole evidence relied upon is confessions obtained by an ASP or an officer above that rank.¹⁰⁷ Courts have also convicted individuals based on such evidence under the PTA and ER in spite of: (a) medical reports presented to the court supporting allegations of torture; (b) evidence that suspects had no legal counsel during interrogation; (c) evidence that suspects who needed an interpreter did not have one during the interrogation.¹⁰⁸

CONCLUSION

The ICJ is concerned with a range of issues resulting from problematic provisions of the PTA, the ER and the Convention against Torture Act. It also is concerned with a lack of legislation securing key fair trial rights, applying the principle of *non-refoulement* to all individuals within the State's jurisdiction, and recognising enforced disappearances as a discrete crime. The non-functional nature of the writ of *habeas corpus*, a key safeguard against abuses like torture and ill-treatment, is also particularly disturbing. The lack of a general

¹⁰⁷ Ibid, p.130.

¹⁰⁸ Ibid.

right to compensation for victims of torture demonstrates a lack of will on the part of the Government to ensure justice for victims.

RECOMMENDATIONS

Against the background of the information provided within this submission, and in the context of the thematic areas considered in this submission, the ICJ suggests that the Committee make the following recommendations to the Sri Lankan authorities:

Articles 1 and 4

1. Amend section 12 of the Convention against Torture Act to include the term "suffering" within the definition of torture;
2. Incorporate the offence of enforced disappearance within Sri Lankan law as a specific criminal offence, clearly distinguishable from related offences such as abduction and kidnapping, and be punishable by appropriately severe penalties. In that respect, the definition of enforced disappearance should fully incorporate the internationally agreed standard contained in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance;

Article 2

3. Apply the legal safeguards contained in Presidential Directives to all cases of detention, including those under the Emergency Regulations and the Prevention of Terrorism Act (PTA);
4. Enact legal safeguards to ensure that all persons arrested or detained are guaranteed the enjoyment of the right to access to legal counsel and to have legal counsel present during the interrogation and that those rights may be effectively exercised in practice;
5. Enact constitutional and legislative measures to guarantee the right to legal counsel and the right to an interpreter during the investigation, as well as the right of families to be informed of arrests;
6. Afford detainees a right to an independent medical examination, exercisable upon their own request. Police Officers should not accompany suspects to such a medical examination. Once a suspect has made a request for a medical examination, such examination should take place as soon as practicable;
7. Concerning the right of *habeas corpus*:
 - a) Despite the discretionary language used concerning the *habeas corpus* jurisdiction, ensure that any delay in instituting proceedings is not be treated as a bar to the grant of relief;
 - b) Statutorily incorporate the principle of institutional or command responsibility to ensure responsibility of army officers or police officers in command control of army camps or police stations at which the arrest of an individual takes place and who is then subject to enforced disappearance;
 - c) In *habeas corpus* petitions, impose on the petitioner a burden to establish his or her case by no higher standard than the balance of probabilities;
 - d) Where counsel for the State submits during *habeas corpus* proceedings information that the person who is the subject of the petition has been discharged and released, or indicted, or committed for rehabilitation, ensure

that such submissions are substantiated by material evidence placed before the court;

- e) Allow for awards of compensation to be made in respect of any person found to have been incarcerated without legal justification;
- f) When State officials who are respondents to *habeas corpus* petitions plead that the detainee has subsequently died after being detained, require that official records and evidence of the circumstances in which the detainee is said to have died be produced before the Court;
- g) Establish a Special Court, or alternative mechanism, to deal with the long list of pending *habeas corpus* petitions concerning persons disappeared during the last stages of the war between the Government and the Liberation Tigers of Tamil Eelam;
- h) Adopt and adhere to effective policy decisions in order to minimise delays in the hearing and determination of *habeas corpus* petitions;
- i) Ensure that adverse judicial findings in *habeas corpus* petitions are not confined in their remedial orders to orders for payment of compensation by the State, but also include disciplinary action against the State officials responsible;

Article 3

- 8. Enact a *non-refoulement* provision within the Convention against Torture Act that is conformity with obligations under article 3 of the Convention against Torture;

Articles 12 and 13

- 9. Enact a Victims and Witness Protection Law without delay, the provisions of which must conform with international standards;
- 10. Establish a dedicated Protection Division, or other mechanism independent from the Police Department, with a team of competent investigators;

Article 14

- 11. Formulate and effectively implement legislation and a comprehensive State policy on effective remedy and reparation, including compensation and rehabilitation, in conformity with international law and standards. Such a policy should be formulated following adequate public consultations;

Article 15

- 12. Amend the Convention against Torture Act to explicitly prohibit the admission of information as evidence obtained through torture or ill-treatment;
- 13. Amend Article 16 of the PTA to explicitly prohibit the admission of confessions obtained by torture or other ill-treatment.