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THE UNITED NATIONS TREATY BODY SYSTEM AND SOUTH ASIA;

PROMOTING GREATER COLLABORATION AND ACTIVISM

LAW & SOCIETY TRUST

CONTENTS

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Editor's Note.....

The Legal Research and Advocacy Unit of the Law and Society Trust (LST) is currently co-ordinating a regional initiative aimed at enhancing the capacity of South Asian NGOs to use the UN human rights treaty monitoring regime in a sustained and effective way. South Asia is the only region without a regional mechanism for human rights. In these circumstances, the UN Treaty monitoring bodies play an especially important part in the protection and promotion of human rights in our region. Their strategy of scrutinising governments' human rights records, enabling a dialogue with its officials and criticism of its acts and policies - effected through review of the reports submitted by States to the UN Human Rights Treaty Bodies - provide an important countervailing influence on States.

In addition, Treaty Bodies issue periodic comments, which explain and clarify the normative content of the different rights, and expanding the notions contained in Treaties, thereby ensuring that human rights do not remain static. Further, most Treaty Bodies provide a mechanism for the consideration of individual complaints regarding violations of rights covered by the Treaty. While several South Asians serve on Treaty Bodies and several act as Special Rapportuer of the UN Human Rights Commission, Special Representatives of the UN Secretary General and Special Advisors to key UN institutions such as High Commissioner for Refugees and High Commissioner for Human Rights, there still remains an under utilisation of the mechanisms provided via the Treaty Bodies, by South Asian activists.

This is partially due to the fact that working with the Treaty Bodies requires detailed knowledge of the extent of the rights covered, the powers of each committee and the means of accessing them (either via direct communication or shadow reports and special communiqués). The programme was designed to generate a South Asian network that will be able to provide mutual support among NGOs to monitor and participate in the process of reporting by SAARC states to the UN treaty bodies.

In the year 2004, the focus of this programme was changed from having an exclusive training focus to include an actual practical activity where the partners would also collaborate towards the drafting of a shadow report with regard to a treaty of particular importance to that country.

In accordance with this changed focus, LST worked with five regional partners in South Asia, namely Shirkat Gah (Pakistan), Commonwealth Human Rights Initiative (North India), Human Rights Centre of the National Law School University in

Bangalore (South India), Ain O Salish Kendro (Bangladesh) and Informal Service Sector (INSEC), Nepal.

The regional partners chose particular treaties that they identified as being particularly important to their country, (including the International Covenant on Civil and Political Rights (ICCPR), Convention Against Torture (CAT), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and conducted national level activities around each treaty body during August-October 2004 and December-January 2004/ 2005. Sri Lanka chose as its focus, the International Covenant on Civil and Political Rights with special emphasis on life and liberty rights. A wrap-up regional meeting was hosted by LST from 1-3 April in Sri Lanka where the reports were discussed and shared.

Insofar as Sri Lanka was concerned, it was relevant that on September 18, 2002, the Government had presented the 4th and 5th Periodic Reports to the UN-HRC during the October- November 2003 sessions of the United Nations Human Rights Committee (UN-HRC) in Geneva in terms of Article 40, ICCPR. The previous State report had been submitted to the UN-HRC as far back as 1994 despite being required to submit the reports within a four-year interval.

After due consideration of Sri Lanka's combined reports, the UN-HRC, on October 31 and November 3 2003, adopted several Concluding Observations. On the positive side, *inter alia*, the UN-HRC appreciated Sri Lanka's ratification of the optional protocol to the International Covenant on Civil and Political Rights (ICCPR) in October 1997, the entering into a ceasefire agreement by the Government with the LTTE and the establishing of the National Human Rights Commission.

Regrettably however, the UN-HRC observed that while containing detailed information on domestic legislation and relevant national case law, Sri Lanka's report failed to provide full information on the measures taken to implement the Committee's Concluding Observations on the country's previous report. Hence Sri Lanka was requested to submit its next report in 2007 indicating specifically the measures taken to give effect to the Concluding Observations.

Most importantly, in the light of persistent reports of gross violations of human rights by State officials, and the perceptible lack of effective mechanisms within the country to prevent such violations, the UN-HRC in accordance with rule 70

paragraph 5, urged the state party to provide information within one year on four pressing issues as contained in paragraphs 8, 9, 10, and 18 of the Committee's recommendations. This was, by all accounts, an unprecedented direction by the UN-HRC and testified to the gravity with which it viewed Sri Lanka's continuing inability to conform to obligations imposed by the ICCPR.

This monitoring exercise was embarked upon by the LST to ascertain as to what measure of improvement had been evidenced in the safeguarding of the life and liberty rights of all those subjected to Sri Lanka's jurisdiction, consequent to the issuance of the Concluding Observations of the UN-HRC. It records with appreciation, the practical input of the Asian Human Rights Commission (AHRC) in Hong Kong and the Geneva based World Organisation Against Torture (OMCT) into this process. The report is based on case studies, archival research, newspaper reports and a wide range of interviews with persons and bodies intimately involved in the protection and monitoring of the rights of life and physical security of persons in this country.

The draft report, published in this Issue contemplates the Phenomenon of Torture and Disappearances in Sri Lanka in the following context;

The Context of the Past: Emergency Law and Its Abuses.

The Context of the Present: How the normal law and law enforcement processes continue to be in line with past abuses of rights and practices of torture

a) How can this problem be analysed?

b) What has the State/ Government been doing and where has it failed?

Discussion of the draft report first took place during the National Workshop of the LST South Asia Treaty Bodies Programme held in August 2004. Thirty activists, legal practitioners and victims of abuses engaged in interactive sessions in relation to issues pertinent to the report and perspectives from the discussions are included in the draft monitoring report. The sessions were preceded by general analysis of international law norms and the UN systems by senior academics

and legal practitioners who had themselves, served in various capacities in mechanisms comprising part of the international monitoring regime.*

While the government follow-up report in the context of the UN-HRC Concluding Observation, is yet to be made public, despite the deadline of October-November 2004 being passed, the LST Review publishes the draft monitoring report with the objective of stimulating discussions in this regard. It is to be expected that further changes to the draft report would be made once the government follow up report is submitted to the UN-HRC.

The Review also publishes as an adjunct to this report, a draft Public Complaints Procedure for the National Police Commission in terms of Article 155G(2) of the Constitution.

It is hoped that the exercise will draw together a wider coalition of committed individuals who will work together to protect the rights of the victims in Sri Lanka, including not only legal practitioners, academics and activists working out of Colombo but also rural based activists who interact with state officers on a daily basis and most importantly, the victims for whom the phenomenon of torture and the prevalent impunity of custodial officers is no mere abstract notion but instead, most often, defines the frighteningly insecure manner in which they and their loved ones live their lives.

Kishali Pinto-Jayawardena

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* including senior attorney and former member, UN Sub-Commission on Minorities, RKW Goonesekere, former member, CEDAW Committee, Professor Savitri Goonesekere, former Special Rapporteur on Violence Against Women, Radhika Coomaraswamy and former alternate member, UN Sub-Commission on Minorities, Dr Deepika Udagama

A CONTINUING DILEMMA; THE PREVALENCE OF STATE SPONSORED VIOLENCE IN SRI LANKA

A Draft Monitoring Report by the Law & Society Trust in collaboration with the Asian Human Rights Commission (AHRC) and the World Organization Against Torture (OMCT), for submission to the UN Human Rights Committee Consequent to the Concluding Observations issued by the Committee following consideration of Sri Lanka's 4th and 5th Periodic Reports under the International Covenant on Civil and Political Rights in October-November 2003*

Introduction – the Persistence of the Phenomenon of Torture

Sri Lanka acceded to the ICCPR in 1980 and to the Optional Protocol to the ICCPR in October 1997. Sri Lanka also acceded to the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment / Punishment in 1994 and consequently adopted enabling legislation under the Convention (viz. The Convention Against Torture and other Inhuman and Degrading Punishment Act No 22 of 1994, hereafter the Torture Act). These treaties are only two of the plethora of international treaties that the Sri Lankan State has seen fit to submit to in recent years. Successive governments have also maintained close cooperation with the Special Rapporteurs of the United Nations and many representatives from the UN have visited the country, given significant conflicts in both the South and North-East of the country throughout the past several decades.[1]

While these developments are encouraging, ratifying international human rights treaties and enacting domestic enabling legislation do not *per se* guarantee the protection and promotion of the basic rights contained in the covenants in the absence of appropriate mechanisms of implementation.

Moreover, developing countries such as Sri Lanka often ratify international human rights treaties as a result of international pressure with the result that a real and pronounced commitment towards protecting human rights of its citizens becomes absent in the actual implementation of the obligations inherent in these treaties. Insofar as this country is concerned, the ratification of international treaties has failed to detract from the stark reality of flagrant human rights violations and the breakdown of the rule of law within the country.

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* This Report emerges from one year of action based research. Shyamali Puvimanasinghe conducted all interviews relevant to the report with the help of Juanita Arulanandam. The North-East segment of the report was updated thereafter by Laila Nasry. Overall guidance was provided by Head, Legal Advocacy and Research Unit of the LST, Kishali Pinto-Jayawardena and Executive Director, Asian Human Rights Commission, Basil Fernando.

[1] Some of these special representatives include representatives from the Committee Against Torture in 1992 and 1999, Displaced Persons in 1990, Extra Judicial Executions in 1997, Gender and Armed Conflict - 1999."

In paragraph 9 of its Concluding Observations made in November, 2003, the UN Human Rights Committee expressed concern about the persistent reports of torture and cruel inhuman or degrading treatment / punishment of detainees by law enforcement officials and members of the armed forces. The Committee recommended that the state party *"adopt legislative and other measures to prevent such violations... and ensure effective enforcement of the legislation."*

Since the Committee's recommendations, little appear to have changed as far as ground realities are concerned in Sri Lanka though government agencies tasked with the investigation and prosecution of torture have reacted more swiftly than is normal in regard to particular cases of egregious violations such as the cold blooded killing of Gerald Perera, a torture victim who was shot on 21 November in broad daylight and died thereafter in hospital, days before he was due to give evidence in a High Court trial instituted by the Attorney General's Department under the Torture Act. This however was manifestly an exception to the rule.

While in early 2003, the Supreme Court observed in one case that "the number of credible complaints of torture and cruel, inhuman and degrading treatment (showed) no decline"[2], it would be fair to conclude that this trend showed no sign of decline as the year progressed to the following year and thereafter.

Cases of torture during 2003 for example included 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 by-stander 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.[3] 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.'[4]

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[2]per Justice M.D.H. Fernando in ***Sanjeewa*** vs. ***Suraweera, O.I.C. Wattala and Others***, S.C. (FR) No. 328/2002, S.C. Minutes of 4th April, 2003.

[3] ***Konesalingam*** vs. ***Major Muthalif and Others***, S.C. (FR) No. 555/2001, S.C. Minutes of 10th February, 2003.
Shanmugarajah vs. ***Dilruk, S.I., Vavuniya***, S.C. (FR) No. 47/2002, S.C. Minutes of 10th February, 2003
Adhikary and Adhikary vs. ***Amerasinghe and Others***, S.C. (FR) No. 251/2002, S.C. Minutes of 14th February, 2003
Ekanayake vs. ***Weerawasam***, S.C. (FR) No. 34/2002, S.C. Minutes of 17th March, 2003
Sujeewa Arjuna Senasinghe vs. ***Karunatilleke and Others***, S.C. (FR) No. 431/2000, S.C. Minutes of 17th March, 2003.
Sriyani Silva vs. ***O.I.C. Paiyagala***, S.C. (FR) No. 471/2000, S.C. Minutes of 8th August, 2003.

[4] Observation made by Dr. Jayantha de Almeida Guneratne, P.C. speaking on 'Recent Jurisprudence concerning Rights Violations, at the National Workshop of the LST South Asian Treaty Bodies Programme, August 2004, Sri Lanka

Efforts to check these violations on the part of State bodies meanwhile remained adhoc and reactive rather than systematic, pro-active and effective. Although there exists an Inter Ministerial Working Group (IMWG) on Human Rights set up by the Ministry of Foreign Affairs to consider implementation and recommendations made by the Treaty Bodies, torture continues to be committed in an almost unabated manner by State officials at police stations and elsewhere across the country.

A Brief Background Note on the Context and Reality of Protecting Torture Victims

In theory, there is a process in place to hear urgent appeals by victims of torture, once the Police Department, the Attorney General's Department and the relevant authorities receive these urgent appeals. These entities are, in turn, obliged to submit a report to the Inter Ministerial Working Group (IMWG) on Human Rights issues that has been constituted by the Foreign Ministry. Officers of the said departments usually meet about once or twice a month and at such meetings, they are obliged to inform the IMWG of the action they have taken regarding the urgent appeals. The IMWG is co-chaired by the Ministers of Foreign Affairs and Defence. Senior officials from the police, the armed forces and other law & order agencies also participate[5]

In the past, the extraordinary security situation was cited as the reason - and the excuse - for the violation of basic human rights of persons within the country. Emergency laws gave extraordinary powers of arrest and detention to state officers and often facilitated acts of torture. These laws are no longer in force with both regimes under the Public Security Ordinance and the Prevention of Terrorism Act having lapsed with the cessation of active hostilities, (excepting the re-imposition of emergency law in a limited context following the devastating tsunami that impacted on coastal areas in Sri Lanka in December 26, 2004. Yet, safeguards provided by the ordinary law are often bypassed and what we see is a deeply troubling transference of an 'impunity mindset' earlier claimed by the police and the forces in respect of crimes against the State, now applied to the maintenance of ordinary law and order.

Even subsequent to the signing of the Ceasefire Agreement (CFA) in 2002, police officers continue to resort to torture of the most brutal and sadistic nature imaginable.[6] An important feature of the vast majority of cases of police brutality in Sri Lanka currently practiced is that they do not involve serious crimes. Rather, people are subjected to inhuman treatment and / or punishment in regard to frivolous crimes such as petty theft or trading and/or distilling illicit liquor.

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[5] Vide observations made by Mr. Sumedha Ekenayake, representative of the Ministry of Foreign Affairs at the National Workshop of the LST South Asian Treaty Bodies Programme, August 2004

[6] See details of 31 cases of torture and killings committed against 46 persons by Sri Lankan police at http://www.article2.org/mainfile.php/0301/120/ published by The Asian Legal Resource Centre. (visited on 06/07/2004)

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 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 view to fabricating evidence against them[7].

Also, 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 wield considerable power and authority and where victims lack the political or economic clout to fight back the injustice committed upon them and their families. Thus, the current state of affairs, prevalent in Sri Lanka while amounting to a severe breakdown of the rule of law by the custodians of the law, goes a long way to negate the argument advanced by some that human rights violations occur only during a period when the country is faced with a threat to its sovereignty.

Further the notion that torture is inflicted to carry bout investigations has been relegated to a mere myth given recent studies that indicate that more than 80% of the cases filed are not by criminals but rather by innocent people such as children and by-passers who had been tortured for no reason.[8] However the commission of such heinous acts by the law enforcement officials may well be the by-product of a gradual brutalisation and militarisation of the police and armed forces of the country since the early 1970s when they were used for riot control purposes and later for control of civil conflicts.

Inasmuch as the Sri Lanka Army is in issue, it must be noted that it has established a system of preventive mechanisms to curb Human Rights violations such as the screening of personnel prior to enlistment, educating officers on Human Rights and Humanitarian Law, monitoring cells, improving communication in the Tamil language, assistance for investigations and stringent action and suspension/dismissal from service.[9] However, at the height of the war, due to the necessity for mass

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[7] *"I was told during my period of torture that if I didn't give a statement the way they wanted me to that they would kill me They wanted me to give a false statement so that they could arrest many others"* - Mr. K.Thiranagama, Attorney-at-Law, a victim of torture later turned activist speaking of his personal experience of being tortured by the Police at the National Workshop of the LST South Asian Treaty Bodies Programme, August 2004, Sri Lanka

[8] "See reports of the Asian Human Rights Commission at http://www.ahrchk.net/ua/mainfile.php/2003/ Vide also the observation that "the perpetrators of torture are often logical, highly placed officials...most often in an advantageous and superior position," Mr. K. Thiranagama, attorney-at-law, and Executive Director of Lawyers for Human Rights and Development, speaking of his personal experiences as a victim of torture later turned activist, at the National Workshop of the LST South Asian Treaty Bodies Programme, August 2004

[9] Vide remarks made by Brigadier Mohanthi Peiris speaking at the National Workshop of the LST South Asian Treaty Bodies programme, August 2004.

scale recruitment of cadre, the screening of personnel by obtaining police and NIB reports was done away with. With the cessation of hostilities prevalent today, the process of screening has been reactivated.

In this background, human rights education programmes for army officers assume a particular importance. Rights education was introduced into army training programmes in 1991 and an accelerated programme began in 1997. The importance and need of such an education programme cannot be over-emphasized in the light of the complex situations that may arise in times of active conflict where military officers face singular dilemmas. Whilst they need to perform a certain mission, look after their unit, ensure that their unit performs efficiently and in a timely manner, they must also maintain order and ensure that the soldiers acting under their command do not overstep the line where rights of citizens are concerned. HR education provides them with an insight that the ends should be balanced with the means used to achieve military goals.

The doctrine of command responsibility is already embodied in the Army Disciplinary Regulations with several sections of the of the Army Regulations Act stating that military leaders must act speedily but only according to standing operational procedures and their actions must be legitimate to the extent that they tally with the short term goals of the mission as well as with the long term goals of the nation. Soldiers are informed that it is their duty only to obey *lawful* orders and not *any* orders. The extent to which these instructions are obeyed at a practical level is, of course, another matter altogether.

Where Sri Lanka's policing system is concerned, this is in a state of serious crisis as pointed out by several government appointed commissions themselves. It is more a system of military style social control than a sophisticated crime investigation institution. It would indeed not be very far from the truth to say that the majority of the present police resemble paramilitary units instead of a professional police force *per se*.

One reason for the emergence of militaristic style policing is that, due to the pressures of a two decade long conflict between the Government and the LTTE, persons were recruited to the police force in large numbers with little attention given to their qualifications or suitability. Thereafter these new recruits were afforded around three months of training, mostly in the handling of arms, before being posted to the North and East of the country. Most of its cadre received little or no training in criminal investigative methods. Hence, the only method of solving crime that they were familiar with, was to use extreme forms of torture in the hope of obtaining information from the suspects. The admission of confessions under the Prevention of Terrorism Act (PTA) made the use of these methods even easier

Accordingly, the prevalent policing system is one that relies on untrained human resources at the bottom of the system to carry out most of the arduous tasks of investigations. Even the methods of

recording statements is positively primitive with observations being made by the Supreme Court to the effect that that tampering with the official record has become a habit.[10]

Cause for Optimism – Where the Victims Speak Out

Whereas, a few years ago, victims of torture were reluctant to complain about the injustices committed against them, this fear is gradually declining with many victims as well as their families willing to come forward and publicise their grievances. The question is whether the various state organs that are in charge of safeguarding citizens' rights can measure up to the expectations of the people.

Several common features of police brutality as practiced in Sri Lanka and revealed by victims' complaints in the period 2003 – 2004 could be listed as follows:

- The proliferating illicit liquor business in the country is one that is often beneficial to police officers, as such business can only be carried out by paying bribes to the police. Therefore, when the sellers of liquor give up their business, some police officers lose their source of extra- income and many are the instances in which former illicit liquor sellers, who subsequently gave up their business, were severely punished by police officers.

- Sometimes the police are themselves actively involved in this lucrative business and induce people to distil liquor on their behalf and under their protection. They are then angered when the distillers decide to give up their illegal activities and take revenge by torturing and fabricating cases against them.

- Affluent and/or powerful individuals of an area may pay large sums of money to the police to arrest and torture people who have personally offended them, or whom they suspect of committing a petty offence but without an iota of evidence.

- Often unresolved crimes at a police station lead to strong public protest and put pressure on the police to find the culprits. There is a tendency then to arrest innocent persons and torture a confession from them. Thereafter charges are filed on fabricated evidence, leading to public applause and even promotions.

- Torture is committed by drunken policemen on totally innocent people for no other apparent reason other than to derive sadistic pleasure. The only 'offence' committed by the victims seems to be

[10] Vide Kemasiri Kumara Caldera's case (S.C (F.R.) Application No. 343/99), SCM 6/11/2001.

that they were in the wrong place (e.g. on the road) at the wrong time (e.g. when sadistic policemen were passing). After subjecting persons to severe torture, the perpetrator-policemen may obstruct victims who sustain life threatening injuries, from receiving medical treatment at the hospital because they are afraid that the medical report would be used as unfavourable evidence against them in court.

- The police may attempt to hide their crime by fabricating medical reports in cooperation with medical professionals including District Medical Officers (DMO) and Judicial Medical Officers (JMO). [11] In fact, sometimes these medical officers have been found to fill in the necessary medical forms without even speaking or examining the victims. Further, often cases of torture are examined under inadequate facilities by untrained doctors, as there is a scarcity for forensic specialists, leading to faulty reports.

- Doctors in Sri Lanka are not trained properly for the kind of injuries inflicted by way of torture. Although the UN Convention Against Torture and other cruel inhuman or degrading treatment or punishment and the Torture Act No. 22 of 1994 states that civil and medical personnel should be educated on torture, such education programmes are sporadic and have been admitted into medical school curricula only comparatively recently.

- When a person is initially admitted to hospital, the admitting doctor is only concerned with healing the person's injuries. So his report is rather general (and not necessarily of value in the investigation of torture). Victims are often unaware that it is the JMO's report that is of paramount importance and often sought recourse in by court.[12]

- When victims and their family members attempt to complain to the police hierarchy (e.g. the ASP), these officers try to hush up cases by refusing to receive complaints and instead offering small amounts of money in an attempt to settle the cases.

- After torturing and releasing the victims, the perpetrators also closely monitor the activities of victims and their families. They often pay them unexpected visits to ascertain whether victims are obtaining medical treatment, have made complaints or resorted to legal action.

- In fact, many are the victims and their spouses, parents and young children who have had to flee their homes, villages and livelihoods for fear of being killed by irked police personnel who have been unsuccessful in coercing the victims to withdraw their complaints/ cases against them.

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[11] *"There is a lack of independence on the part of doctors as they themselves are subject to external pressure from the police and Army. Most often such pressure is exerted on those who have taken up abode under their security and scrutiny"*-Professor Ravindra Fernando addressing the National Workshop of the LST South Asian Treaty Bodies Programme, August 004, on 'Duties/Responsibilities of the Medical Profession'.

[12] *Ibid*

- Religious leaders and public officials (e.g. grama sevakas) are frequently used as intermediaries to harass victims into withdrawing their complaints against the police.

- False allegations are made and cases filed (often under laws where bail is difficult to obtain e.g. the Offensive Weapons Act) using fabricated evidence to further intimidate the victims and their families as well as to discredit their complaints of torture. For example KP Tissa Kumara alleged that he was induced to withdraw the complaint of torture against the alleged perpetrator, in return for having the cases against him withdrawn. Other cases similar to his are legion[13].

D.G. Premathilaka complained that he was illegally detained and tortured by officers attached to the Katugastota police station on January 8 and 9, 2004. Reportedly, he was severely assaulted on the street, then taken to the police station and further assaulted. He was subsequently hospitalised. He complained of a severe headache, inability to move his neck and had wounds on his legs and arms. He claimed that he was arrested and tortured because he refused to continue to trade in illicit liquor.

Then again, Mr. Tennakoon Mudiyanselage Gunesekera, 39, complained that he had been severely assaulted with wooden bats by six drunken policemen attached to the Mahiyanganaya police station on December 31, 2004. The policemen had come looking for a policeman's bicycle parked near the hotel where the victim worked as a waiter. When they could not find a bicycle, they had severely assaulted him. When he fell to the ground, they had trampled him. As a result, he developed difficulties in breathing, and his ribs were determined as being damaged/broken.

In another example, Jayasekara Vithanage Saman Priyankara, 32 stated that on January 5, 2004 he was illegally detained and severely tortured by the policemen attached to the Matale police Station, where boiling water was poured down his right leg from the hip downwards, severely burning him. The perpetrator who was a sub inspector of police had claimed that he was going to make sure that the victim would not be able to have a normal sex life anymore. Afterwards he was given some ointment to apply on his wounds but was warned not to report the incident to anyone and not to receive any treatment at the hospital.

Micheal Anthony Fernando complained that several prison guards had tortured him while he was in the custody of the prison authorities after being sentenced to a term of one year's imprisonment for contempt of court by the Supreme Court. Currently, he has filed an individual communication before the UN-HRC in terms of the Protocol to the ICCPR, challenging the validity of the order of the Supreme Court as having no basis in law and as a violation of his rights under the ICCPR and

[13] for index of cases reported following the Concluding Observations of the UN-HRC in late 2003, see list of 'Urgent Appeals' for 2003 & 2004 compiled by the Asian Human Right Commission at http://www.ahrchk.net/ua/mainfile.php/2003/ and http://www.ahrchk.net/ua/mainfile.php/2004/ (visited on 12/07/2004)

asserting further that the torture that he was subjected to also amounts to a violation of his rights. Consideration of the communication is pending before the Committee.

In a similarly problematic instance, Koraleliyanage Palitha Tissa Kumara, was arrested on February 3 2004 and kept at the Welipenna police station until the 6th. During this time he alleges that he was brutally tortured by one S.I. Silva, who assaulted the victim all over the body with a cricket post (wicket), particularly on the neck, back, ears, head, hands, buttocks, ankles and knees. His right hand wrist too was severely injured when he was handcuffed to the iron rails of the police cell and jerked up and down many times. One of the most extraordinarily cruel acts during the torture was to get a tuberculosis patient, who was also in police custody at the time, to spit into the mouth of Mr. Tissa Kumara. He was then told that he would die within two months of the same disease.

But perhaps the heinous of all these cases was that of Gerald Mervyn Perera, 42, who was tortured by the Wattala Police under mistaken identity (as one of the accused persons in a triple murder), resulting in two weeks in a state of coma. Subsequent to his recovery, he filed a fundamental rights application before the Supreme Court and was awarded record high compensation amounting to Rs. 800,000 of which Rs. 650, 000 was payable by the State, Rs, 150, 000 by the police officer in question and an additional Rs. 854,871 .13 as medical expenses. The Attorney General later filed an indictment in the High Court under the Torture Act against the perpetrators, Inspector Sena Suraweera and eight other officers of the Wattala Police. Pressure was wielded on Gerald by a Pradeshiya Sabha member acting on the instigation of some of these police officers who had been sited as respondents to agree to an out of court settlement and to drop all charges. Such attempts were resisted by him. Some days before the date of the trial, at which Gerald was to testify, he was murdered.

Several extra judicial killings that occurred at the hands of law enforcement officers in Sri Lanka were also reported in 2004. Details of some are as follows:

- Dissanayake Mudiayanselage Suranga Sampath was killed on January 11 2004 at 2.30 am by a bullet fired by an officer of the Gampola police. This had occurred when a clash had taken place between two groups of young people returning from a musical show. Due to this clash, a large number of spectators were assaulted by the police, while some of them were detained, and later mercilessly beaten. When the police found it difficult to disperse the crowd awaiting the release of the detainees, the officers rushed back to the police station, returned with firearms and fired at the crowd. A few moments later Mr. Sampath fell on the ground struck by a bullet.

- Dehiwatte Gedera Jayathilaka, 45, was arrested by the officers from the Yatawatte Police Security Barrier (under the Mahawela police) on March 9 2004 at around 1.00pm. The police accused Jayathilaka of possessing illicit liquor and took him to the Mahawela Police Station. That evening, Jayathilaka's son was informed by the police to come to the police station and bail out his father,

which he did. On the way home, the victim said he was brutally assaulted by the police officers and complained of severe pain on his whole body due to torture. On the following morning the victim's body was found lying in front of his neighbour's house.

- Muthuthanthrige Chamal Ranjith Cooray 30, was arrested on the suspicion of theft on April 17, 2004 by two civilians who handed him over to the Modara (Moratuwa) police post. At the post, Ranjith Cooray was severely tortured and handed over to the Moratuwa police, where once again he was seriously assaulted. The next day, the victim was produced before a Magistrate and remanded at the Welikada prison. There too, the victim was subjected to torture at the hands of the prison officers. On the 19th, Cooray was released on bail. After he came back home, his relatives found that he was in critical condition and rushed him to the Panadura Government Hospital, but he died before he reached the hospital.

- Senarath Hettiarchchilage Abeysinghe, 39, was employed as a Reserve Police Constable at the Trincomalee Police Station. He worked in the police mess. On May 17 2004, Mr. Abeysinghe was found dead in his bed as if he had died in his sleep. At the inquest held on May 18, his wife expressed doubts about her husband's death, as there was no clear cause for the death. That is, some had said his death was due to natural causes, while others said he had died from consuming excess alcohol. Several days after his death, the wife discovered that her husband had been a victim of police torture, he had been admitted to hospital with injuries and that while in hospital he had complained of the torture to the HRC, Trincomalee. Recently the Magistrate ordered that his body be exhumed for further investigations.

The Inefficacy and Inefficiency of Investigations into Violations of Rights

The UN-HRC recommends that Sri Lanka "*should ensure ... that allegations of crimes committed by State security forces especially allegations of torture... are investigated promptly and effectively with a view to prosecuting perpetrators*".

In fact, as far back as 2000, two members of the Committee against Torture, inquiring into the systematic practice of torture in the country, had also recommended that Sri Lanka *"initiate prompt and independent investigations of every instance of alleged torture*".[14] The government in its reply affirmed that it is committed to "conduct prompt, impartial and comprehensive criminal investigations and domestic inquiries into all complaints and information received, relating to alleged perpetration of torture by public officials." In reality however, the mechanisms currently in place in Sri Lanka to investigate crimes of torture -- or the lack thereof -- do not facilitate such lofty ambitions of the State.

[14] See the Second and Third Periodic Report of Sri Lanka submitted to the Committee against Torture, p. 9.

(i) The Police Force

One of the most serious problems faced by the police force in Sri Lanka, which is also one of the main reasons for resorting to torture, is the lack of investigative skills of police officers. The absence of adequate machinery to investigate gross human rights violations is very much linked to the failure to develop proper investigating machinery to investigate crimes in general.

The police department itself has pointed to the need to introduce forensic training for its staff. But in the absence of better training skills, torture remains the main mode of criminal investigation. Thus, conducting inquiries into the perpetration of torture itself remains a serious institutional problem.

At present there is no special/independent unit in the police department that entertains complaints into allegations of police torture, and which is empowered to initiate investigations immediately thereafter. Instead, aggrieved parties and their family members are compelled to 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.

As already stated, victims allege that sometimes the high-ranking officers of the police refuse to entertain such complaints and /or harass victims and their families into accepting small amounts of money in settlement of these cases. However if and when these complaints are entertained, and recorded, the legal division upon receipt thereof, refers the complaint and any other ancillary information to the IGP, who in turn refers it to the Special Investigations Unit (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. Either way, the procedure currently in place in the police, for commencing investigations into allegations of torture is grossly time-consuming and inefficient. A special police unit empowered to entertain complaints and immediately commence investigations is urgently required, as recognised by the police hierarchy. But to date, no steps have been taken to set up such a Unit.

Earlier, torture cases were investigated into by the CID, but due to it being inundated with 'more important cases' as well as allegations of torture existing against several CID officers, the main unit in the police handling torture cases is currently, the SIU. However the SIU does not only investigate cases of torture; Instead, it also conducts investigations into other complaints against police officers e.g. fraud.

The cadre of the SIU as well as its allocated office space is totally insufficient, considering the workload entrusted to the SIU. There are about 80 officers including 3 ASPs attached to the SIU, which is housed in 2-3 cubicles at the New Secretariat Building at Police Headquarters. When a case is referred to the SIU, a team of about 3 policemen is required to visit the area in which the alleged offence occurred and begin their investigation. According to current procedure, it is imperative that at least the initial complaint is recorded by an ASP. But as there are only 3 ASPs attached to the Unit, there is a considerable delay before proper investigations begin. **Annex 1** depicts the current status of cases investigated by the SIU for the years 2002, 2003 and 2004. Of the 21 complaints received in 2004, investigations have not been completed as of May of that year and most likely not completed to date, since there are many complaints received in 2003 that are still pending investigations.

Another problem faced by the SIU is that its officers are not permanently attached to the Unit. Thus, these officers may be transferred at any moment to a police station anywhere in the country. A police officer presently attached to the SIU, and who conducts an investigation against a colleague at police station "X", may very well find himself subsequently transferred to "X" to work along side with the said officer. This may result in the SIU officer being ostracized at his new post and may even endanger his life and job at the hands of angry and vengeful colleagues.

Hence not having a permanent team of officers attached to the SIU is a distinct disadvantage that may impede upon the efficiency and diligence in which the SIU carries out investigations. The fact that alleged torture perpetrators continue to be employed in their same posts, while exacerbating the aforesaid problem, also obstructs investigations, as they are free to interfere with the evidence and witnesses of the case against them.

Also, according to the Criminal Procedure Code, the police department is the only organ entrusted with criminal investigative powers. In 1998, the Committee Against Torture recommended that Sri Lanka " *initiate.... independent investigations...of alleged torture*". However, when allegedly offending police personnel are investigated by fellow policemen, the resulting investigations cannot reasonably be expected to be 'independent'. The head of the legal division of the police, in an interview with us, was of the opinion that nonetheless, the head of the SIU is a very independent officer who closely supervises his subordinates, who are also independent officers. Be that as it may, the very fact that police officers investigate their colleagues has troubling implications where the gaining of public confidence in the propriety and efficiency of the investigations is concerned. A separate body, independent of police interference, to conduct investigations into allegations against policeman is an imperative requirement which has not yet received due consideration by the State.

(ii) The National Police Commission (NPC)

The Committee Against Torture in it concluding observations in 1998 urged the State, "*While continuing to remedy, through compensation, the consequences of torture, give due importance to prompt criminal prosecutions and disciplinary proceedings against culprits*".[15] The Government in its report to CAT, admits, that the objective of conducting domestic inquiries is to consider the adoption of necessary disciplinary action and the identification of suitable action for future prevention of torture. However, the lack of an unambiguous state policy with regard to disciplinary action against errant state officers and the woeful inadequacy of existing mechanisms for implementing such action, remains a most serious problem.

This lacunae has not been filled by the constitutionally created National Police Commission (NPC) even though public expectations were high in this regard. The National Police Commission (NPC) was appointed at the end of 2002 and was met with a warm public response. It was created by the 17th Amendment to the Constitution, which aims to depoliticise important national institutions by appointing commissions with constitutional powers over appointments, promotions, dismissals and disciplinary control of employees. The NPC enjoys all such powers, except in relation to the Inspector General of Police.

Article 155G2 of the Constitution, (brought in by the 17th Amendment), provides in mandatory terms that the NPC "*shall* 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]". But to date, the NPC does not have such a public complaints procedure.[16] Initially in 2002 and 2003, the complaints received by the NPC were referred to the IGP who had the authority to accept and act on them due to the fact that the disciplinary power of police personnel from the rank of Inspector downwards was delegated by the NPC to the IGP.

The Inspector General of Police in turn referred the cases to his subordinate officers, or to a special investigation unit. As this involved police officers investigating other police officers, the procedure lacked credibility. Also, 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 and hence most complainants were rightly fearful and distrustful of these inquiries. The NPC admits that till July 2003, the police handled their investigations. Hence its functions were appropriately described by its critics as being similar to that of a 'post box'; that is, it merely entertains complaints and refers them to the police for investigation.

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[15] Recommendation No: 255(c). See also Observation No. 250 --" The Committee regrets that there were few, if any, prosecutions or disciplinary proceedings despite continuous Supreme Court warnings and awards of damages to torture victims."

[16] See discussion later on in this segment of the Report.

On its part, the NPC justified the delegation of its disciplinary powers to the IGP on the basis that it was intended to check day-to-day indiscipline of police officers and to enable the smooth functioning of the police force. It was also maintained that at the time that the delegation was made, it was not realised by the NPC that instances of torture were widespread. The second justification for allowing the IGP to handle disciplinary matters was that the NPC is in charge of promotions etc., not the day-to-day running of the police. The IGP was allowed to retain powers with respect to lower ranking police personnel because it was considered necessary for administering his department. [17]

However, it is clear that this delegation of disciplinary power has been unsuccessful, in that the IGP has failed to take any action against offenders -- even in cases of torture -- although according to the Chairman, NPC, most of the offending officers are of lower ranks. Thus, whenever violations by lower ranking officers are brought to its notice, the NPC informs the IGP to take disciplinary action against the alleged offenders and notify the NPC of the measures that have been taken. However, it seems that the IGP rarely replies (or complies).

The IGP does not seem to be in a position to give details of specific instances in which disciplinary action has been taken against any offending police officer. And in the absence of a concrete policy regarding disciplinary action within the police, it may be reasonably inferred that if any action has been taken, it has been done on a purely *ad hoc* basis. There is also provision within the police to hold disciplinary inquiries against police officers, which admittedly takes several years to complete. However to date, very few disciplinary inquiries have been completed, and the outcome of these departmental inquiries are not known (**see Annex 2**).

Then again, contrarily to the views of the NPC, it is the opinion of the police hierarchy that majority of the offences are committed by higher-ranking officers, in regard to whom disciplinary powers has been retained by the NPC. Hence according to the police, it is the NPC that is responsible for the failure to take any disciplinary action. In fact the NPC was unable to cite even one instance of disciplinary action having been taken against a police officer responsible for torture, representing a serious dereliction of duty on the part of the NPC.

From the above, it is seen that there is a common reluctance to take disciplinary action against offending officers, with both the NPC and the police passing this responsibility to each other. That is, the NPC states that the majority of offenders are lower ranking officers, while the police insists that they are of the rank of Inspector (or higher). Furthermore, there seems to be no common policy among

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[17] *The 17th Amendment was to depoliticise the police force, enabling police officials to 'stand tall' without political interference, for often politicians manipulated the police for their own personal ends,"* Mr. Ranjith Abeysuriya, P.C./Chairman, NPC speaking at the National Workshop of the LST South Asian Treaty Bodies programme. *"Its main objectives are to create an independent and efficient police service and to set up the machinery to entertain public complaints, investigate them and provide redress."*

the different organs assigned to deal with the problem of police torture, giving rise to a total sense of impunity among the rank and file of the police force.

Constitutionally, however, the NPC is *bound* to conduct investigations into allegations of misconduct itself -- as a facet of disciplinary control. Its use of police officers to perform investigations shows that the NPC is not adequately aware of its constitutional duties and/or ill equipped to carry out its constitutional responsibilities. The recent statement by the Chairman of the NPC to the effect that the NPC does not have the power to conduct investigations in regard to offences or acts of misconduct of officers below the rank of Inspector of Police is very worrying.[18] In fact, the constitutional mandate of the NPC for disciplinary control excludes only the IGP. What this statement implies is that although the NPC has received large numbers of complaints, particularly regarding torture, mostly against officers below the rank of inspector, the NPC has not taken any action on these manners due to prevailing misconceptions about its own mandate.

Article 155G(3) of the Constitution explicitly states that "The Commission shall provide for and determine *all matters* regarding police officers...[italics added]" Therefore, it is not possible to maintain that the day-to-day running of the police is outside the purview of the Commission. The power of disciplinary control, among others, is vested *solely* in the Commission by Article 155G(1), and is ordinarily to be exercised by it, in consultation with the IGP, unless *specifically* delegated, by *publication in the Gazette,* to a Committee under Article 155H or the IGP under Article 155J. The provision for the delegation of disciplinary power to the IGP itself conclusively indicates that he or she does not, in the absence of such delegation, possess such power. This shows that both the factual and legal justification of the delegation of power is flawed.

Due to strong criticism made of the NPC in this regard by activists who pointed out that if the NPC delegated its powers to the IGP, the substantive purpose of the 17th Amendment would be defeated,

the NPC decided in mid 2004[19] that it would recall the delegation of its powers and assume substantive disciplinary control as mandated by the 17th Amendment over the police officers of all ranks, excepting the IGP.

The NPC has appointed police commission area coordinators, mostly from retired police personnel in selected districts, i.e. in Colombo, Gampaha, Kandy Matale, Kurunegala, Puttalam,

[18] See the *Daily Mirror* dated 21/07/2004 at p 11.

[19] The recalling of the delegated powers was first announced by Chairman, NPC Mr Ranjith Abeysuriya, P.C. at the National Workshop of the LST South Asian Treaty Bodies Programme, August, 2004. Mr Abeysuriya explained that most of the NPC's work since its official inauguration in November 2002 has been devoted to matters relating to promotions, particularly the filling of about 4000 vacancies in important posts which remained vacant due to inaction under the earlier system of administration. He explained that it was thought that resolving this problem of vacancies was a priority in order to get the system to function properly; however, the NPC is aware that dealing with the public complaints is of a matter of paramount importance.

Amparai/Kalmunai. A overall coordinator has also been appointed at the NPC head office. Practically, though the NPC has appointed district/area co-ordinators to look into public complaints, it is yet uncertain whether the NPC conducts its own investigations, or whether it refers them to the police. However the precise functions of these area co-ordinators are not known. Furthermore, it is doubtful as to whether one area coordinator could single handedly manage to entertain and investigate into all the cases of that particular area and most likely still refers investigations to the police.

It is clear that the Commission needs to be better acquainted with the scope of its powers and responsibilities. The lack of resources in this regard is equally problematic[20] but the generation of funds to support a vigorous and active NPC, given its constitutional character, which is unique in South Asia and perhaps in the entire world, is not a far fetched objective if the institutional will is present and clearly articulated.

Still no Public Complaints Procedure

In its concluding observations after considering the periodic report of Sri Lanka the Human Rights Committee stated that, "*The National Police Commission public complaints procedure should be implemented as soon as possible*"

It is axiomatic that an effective public complaints procedure requires clear written steps and practical measures for it to take effect. Article 155G(2) of the Constitution is very clear in its import. It does not merely state that public or individual complaints may be inquired into. If so, then the NPC may be justified in doing what they are doing now; that is appointing district co-ordinators to look into complaints. However, what it requires is not ad hoc consideration of complaints where the complainant is left to the mercy of an individual NPC officer but the mandatory establishing of meticulous procedures regarding the manner of lodging the complaint, the persons who can complain, the way it is recorded and archived and the way in which it is inquired and investigated.[21]

Article 155(G)(2) allows inquiry into public complaints, as well as complaints of an aggrieved person in respect of an individual officer or the service in general. Thus, a persons or groups of person can

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[20] *Ibid. "Taking back disciplinary powers from the IGP is insufficient. We need an Army of personnel to conduct investigations and disciplinary proceeding and in lieu of this, we advertised for investigators about 3 months back and received about 100 applications. We have already processed about 60 of them but had to put that matter aside to attend to the promotion matter."*

[21] Observation made by Kishali Pinto-Jayawardena at the National Workshop of the LST South Asian Treaty Bodies Programme, August 2004 on the Role of the National Police Commission in Sri Lanka. It was further pointed out that these procedures would hold accountable both the police officer concerned and officers of the NPC so that both act in strict compliance with their constitutional and statutory duties. This important in a context where officers of monitoring bodies themselves have been accused of colluding with the very perpetrators of terror in this country. Acts of collusion include settling with victims of the most gruesome torture for small sums of money and in extreme cases, collaborating with the police to cover up the incidents.

appeal to the NPC, rather than only the victim. The death/torture and/or cruel, inhuman or degrading treatment and/or injury to a member of the public in police care / custody are obvious examples where such interventions could be made. The NPC should enumerate and publicise a non-exhaustive list of such instances. Indeed, 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.

Guidelines should be put into place directing the registering, documenting and archiving of complaints so that uniform procedures are followed at all NPC district offices of which records should ideally be kept at the head office. Thereafter, at the very least, there should be quick responses to the complaints in terms of not only documentation but also ensuring of medical attention and victim protection.

Finally, the NPC has a duty to recommend appropriate action in law against police officers found culpable, in line with the vesting of the disciplinary control and dismissal of police officers, (other than the IGP) in it under Article 155(G)(1) of the 17th Amendment.

The lack of a complaints procedure has not precluded 'hundreds' of public complaints being received by the NPC by district co-ordinators appointed for this purpose. However not adopting such a procedure is clearly in dereliction of its mandatory constitutional duties. [22]

It is claimed that the NPC still does not have adequate resources. While the government has a duty to provide such resources, the proper functioning of an effective complaint mechanism is a separate matter. Proper investigations are obstructed by widespread impunity, which has deep roots in the country's history since the early 1970s, when draconian powers were given to law enforcement officers on the pretext of curbing dissident elements. The police force in Sri Lanka has been engaged in mass enforced disappearances, torture and extrajudicial killings. To date, it is this lifting of disciplinary procedures making impunity operative that remains the single biggest problem for policing in Sri Lanka.

To deal with this problem, the NPC will have to create strong disciplinary procedures and enforce it. At the moment, hundreds of 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 are still serving in their positions. In several recent cases, the Supreme Court has ordered the

[22] Chairman, NPC affirmed in August 2004 that the public complaints procedure under Article 155 G (2) of the Constitution of Sri Lanka, introduced under the 17th Amendment, will be implemented as soon as possible and apologised for the delay in initiating this procedure, which the NPC has acknowledged as one of its primary tasks. A draft Public Complaints Procedure was compiled on the initiative of the Asian Human Rights Commission (AHRC) and submitted to the NPC in 2004. It is however yet under consideration.

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 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.

The NPC needs to inculcate in the police force a serious understanding of the gravity of offences such as torture, extrajudicial killing and enforced disappearance. A clear disciplinary code should be included in any training programme for police. If such steps are taken, NPC may initiate a dramatic—albeit difficult—process towards change within the police force, forcing it to decisively abandon past practices. Without an effectively operating complaints procedure however, this is not possible.

(iii) The NHRC

One of the central functions of the National Human Rights Commission (NHRC) under Act, No 21 of 1996 (hereinafter NHRC Act), is to investigate human rights violations. The powers of the NHRC in this regard is limited to mediation or conciliation and is not comparable to the far wider powers of the Supreme Court in determining a fundamental rights violation.

The UN-HRC, in its Concluding Observations, 2003 recommended that "*the capacity of the National Human Rights Commission to investigate and prosecute alleged human rights violations should be strengthened.*"

This was not a new recommendation made by a UN monitoring body. For example, recommendation No. 255(e) of the two-member Committee against Torture, which visited Sri Lanka in May 1999 to inquire into the practice of torture in the country, was to "Strengthen the Human Rights Commission (NHRC) and other mechanisms dealing with torture prevention and investigation and provide them with all the means that are necessary to ensure their impartiality and effectiveness."[23]

In the third periodic report submitted by it to the Committee against Torture, the Government's response to the latter recommendation was that according to the National Strategic Plan of Action (2003-2006) of the Human Rights Commission, "one of the major activities envisaged in the next three years is the development of a specific program to combat torture through effective monitoring and follow up."[24] However despite its adoption of a specific policy on torture, certain shortcomings in the organisation and functioning of the NHRC continue to impair its effectiveness.

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[23] Second and Third Periodic Report of Sri Lanka submitted to the Committee against Torture, p. 24.
[24] *Ibid.* at p 25.

In the past, the failure of the NHRC to develop proper procedures for the conduct of investigations into cases of torture had resulted in NHRC district co-ordinators settling torture cases for minimal amounts of money with the consequence that the NHRC was subjected to severe criticism in this regard.

Responding to these concerns, a policy decision was taken was the NHRC not to mediate/conciliate complaints regarding Article 11, (freedom from torture)[25]. This policy has been put into place by the NHRC despite opinions being expressed by some that where complaints are bound to fail in the Supreme Court, settlement should be agreed to if parties are agreeable or where they themselves wish to settle instead of being embroiled in long drawn out litigation. The fundamental deficiency in this sort of thinking is that it ignores the element of coercion which is most always present when a dispute arises between custodial officers and victims of rights abuses which also informs the practice adopted in the Supreme Court of not allowing petitioners to withdraw their cases on the basis of a purported settlement where torture is in issue. It is therefore to the good that the NHRC has initiated this policy of non-settlement of torture complaints. The functioning of the recently set up special unit to deal with complaints of torture is yet in its early stages and cannot be commented upon in this instance.

Given that offences such as torture, which carry a serious punishment require professional criminal investigations, the capacity of the NHRC to conduct detailed investigations of a criminal nature remains very limited - if it exists at all. The NHRC receives around *400*-700 cases a month, with only a cadre of four legal officers and seven investigating officers and an insufficient allocation of funds from the treasury. In the absence of government assistance, the NHRC is trying to raise donor funds, but this in itself should not detract from the constitutional duty of the government to provide it with adequate resources.

One of the problems identified in respect of the investigative functions of the NHRC was that even in cases where the NHRC investigates an allegation of torture and sends the matter to the Attorney General, the Attorney General "again relies on police investigations." This duplicates and prolongs the investigative process and gives credence to the criticism that serious and thorough investigations are not undertaken by the NHRC.

It has been suggested that the NHRC be empowered to approach courts directly as is done in India. The Indian HRC for example, can approach the Supreme Court or High Court on its own after the conclusion of its inquiry, at its option under Section 18 of the Indian Act. Though Section 15(3) (b) of the NHRC Act states that, in selected cases where *interalia,* conciliation or mediation has not been successful, the NHRC may refer the matter "to any court having jurisdiction to hear and determine

[25] Vide observations made by Mr. N Selvakkumaran, member of the Human Rights Commission, speaking on the Role of the HRC, at the National Workshop of the LST South Asian Treaty Bodies Programme in August, 2004

such matter in accordance with such rules of court as may be prescribed therefore.., the necessary rules need to be yet prescribed by the Supreme Court. It is imperative that this is done if the NHRC is not to be scoffed at for its lack of substantive power in cases where individuals or bodies cited before the NHRC fail to pay heed to its directions.

Section 3 of the NHRC Act could also be amended to stipulate the inclusion of retired judges of the higher judiciary to be part of the composition of the NHRC, as is the case in India. Though this stipulation may not automatically guarantee a rights friendly NHRC, its inclusion may work well in general.

The NHRC should also develop closer links in the processes of torture investigations and prosecution, handled by the SIU and AG's Department respectively as well as, for that matter, the NPC. Preliminary investigations conducted by the HRC can greatly help in instituting criminal inquiries into gross human rights abuses such as torture. All three units should develop a working relationship regarding prosecution of torture cases in particular. This process can be aided by the NPC which can monitor all investigations and prosecutions of cases of torture and other grave abuses of violations of human rights. Greater co-ordination and mutual assistance between these state agencies and/or rights monitoring bodies continues to be essential.

This approach would require considerable openness on the part of the AG's Department to create special machinery for investigation and prosecuting of torture. On the other hand it would require the capacity on the part of the NPC to collaborate in such an effort and on the other to skilfully monitor the process therefore ensuring the proper functioning of such a system. This approach would help to avoid the duplication of inquiries while at the same time, keeping open an avenue to ensure accountability and transparency into the inquiries into complaints regarding torture and other abuses of human rights.

At present, the Commission does not monitor the operation of the Attorney General's Department, which is responsible for the investigation and prosecution of alleged torturers as it is thought that it would be improper for the Commission to do so. However, Section 9(h) of the HRC Act of 1996 provides that "to advise and assist the government in formulating legislation and administrative directives and procedures, in furtherance of, the promotion and protection of fundamental rights" is one of the Commission's functions. The effective fulfilment of this function would appear to require that the Commission monitor the process by which perpetrators of torture are currently being prosecuted, so as to enable it to identify the flaws in this process, and advise the government accordingly. Since Section 10(h) of the NHRC Act allows the Commission to "do all such... things as are necessary or conducive to the discharge of its functions", it could arguably be maintained that such monitoring is within its powers.

The NHRC appears reluctant to make recommendations to the Government, as part of its annual report on its activities. It is the view of the NHRC that such a "wish-list" would "probably not be taken seriously", and that instead, recommendations would be made "as and when issues come up." However, the issues regarding torture in Sri Lanka are already well documented, and given that the Commission is specifically mandated "to make recommendations to the Government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards", its reluctance to make specific recommendations in that regard is regrettable. Though part of its new strategic plan, the NHRC has not used radio and television media sufficiently to spread awareness on issues pertaining to torture prevention.

Since the provision of assistance to victims of torture has not been mentioned as one of the functions of the Commission under the NHRC Act, such work is not considered as part of its mandate. This points to a flaw in the Act, in that it appears to contain an *exhaustive* list of the Commission's functions and precludes it from taking a lead role on fundamental issues pertaining to torture prevention efforts. Perhaps a provision like S. 12 (j) of the Protection of Human Rights Act of India (hereinafter Indian Act), which provides that the Indian Human Rights Commission shall have "such other functions as it may consider necessary for the protection of human rights" should be appended to the list of functions in the Sri Lankan Act, to avoid restricting the HRC's scope of activity.

As pointed out previously, the HRC does not undertake independent prosecutions of human rights violations, nor does it have a strong investigation unit. Its main role is in mediation and reconciliation. However, given that one of the chief obstacles to the elimination of torture in Sri Lanka is the prevalence of impunity among police officers, an amendment of the HRC Act to provide the Commission with investigative and prosecutorial powers might be beneficial. The Indian HRC, although it too lacks independent prosecutorial capacity, is an example of a Commission with broad investigative powers. Sections 13-19 of the Indian Act contain detailed provisions on the powers of inquiry and investigation of the Commission, which are made equivalent to those of a civil court. Similar provisions can be made in the Sri Lankan HRC Act.

Currently, the NHRC can only investigate cases involving the alleged violation of *fundamental rights*, as guaranteed in the Constitution. However, since the fundamental rights in their present form may be inadequate for the protection of *human rights*, as recognized in international conventions, the NHRC should be allowed to make inquires into even those cases where there is no legal claim possible, if, in its opinion, they involve a violation of an internationally recognized right.

In such cases, although the courts could not be approached, the HRC could nevertheless exercise its mediatory and conciliatory powers, and could also recommend to the Government the award of compensation to the injured person. Other faults in the functioning of the HRC are its failure to keep

complainants informed of the progress of their cases, and the fact that case files are sometimes missing from the HRC's Head Office.

The Need for Swift Disciplinary Action Against Errant Police Officers and an effective Witness Protection system.

In one of the most grievous violations of rights in recent years, (referred to earlier in this report), the 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, the judges 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 condemnation (if not also of approval and authorization)." [26]

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 that had been instituted by the Attorney General's Department against some of those very same police officers under the Torture Act.

Section 2 of the Act makes torture, or the attempt to commit, or the aiding and abetting in committing, or conspiring to commit torture, an offence. A person found guilty after trial by the High Court is

[26] Justice Mark Fernando, with Edussuriya, J. and Wigneswaran, J. agreeing, in ***Sanjeewa vs Suraweera, OIC, Wattala police station and others***, S.C. (F.R.) 328/2002, SCM 4/4/2003

punishable with imprisonment for a term not less than seven years and not exceeding ten years and a fine not less than Rs. 10,000 and not exceeding Rs. 50,000.

Despite this Act, due to the lack of immediate disciplinary action against errant police officers and the total absence of a witness protection, victims are threatened, terrorised or even killed as evidenced most particularly by the fate that befell Gerald Perera. There are many instances in which, even after the indictment against alleged torture perpetrators are filed in the High Court by the Attorney General, victims forward affidavits to withdraw their complaints. Notwithstanding, on occasion, the AG proceeds to prosecute the accused police officers, which in turn may seriously endanger the lives of the victims and their family members.

When alleged perpetrators of torture and other serious crimes are allowed to continue in their same posts and even considered for promotions[27] they become a distinct threat to the safety of complainants and members of their families, while making a mockery of the entire system of justice. They are also in a position to destroy vital evidence with the Supreme Court itself remarking that it is common for the police to fabricate evidence and alter documents.[28]

Furthermore, the investigation and prosecution of torture cases in Sri Lanka should also follow the same procedure as applies to other crimes, where, when a *prima facie* case is established, the accused is arrested and immediately produced before a magistrate. However, this procedure is not followed in torture cases under Act No. 22 of 1994 and it seems that police officers charged with crimes are indeed treated differently from other alleged criminals. Even when indictment is forwarded and the accused police officers are produced before the Magistrate's court, they are almost immediately released on bail mainly because the police do not object to bail being granted. Thereafter, with cases pending before them, the accused continue to occupy their posts.

In their defence, the senior police officers point to several obstacles that they affirm, lead to their failure to take adequate disciplinary measures against officers who perpetrate torture. Firstly it is said that the provisions of the Establishment Code apply with respect to the suspension or interdiction of officers of the State. According to these provisions, an officer can only be interdicted or have his

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[27] See The Sunday Times dated 11/07/2004. Vide also SSC Shavindra Fernando, commenting on complaints by activists at the National Workshop of the LST Treaty Bodies Programme, that though indictments are issued against particular police officers, there is a lapse in time between issuance and the serving of the indictment resulting in interdicted officers still serving in their posts.
'In one case when the accused appeared before the HC in No. 1 uniform, the HC judge inquired into why he was in uniform and whether he was still in service. He replied that he was still in service and it was then that (I think) the HC judge informed the police that a PO against whom a trial was proceeding was still in service.'

He went on to state that if the NPC requests, a copy of the indictment could be sent to the NPC as well. Responding, NPC Chairman Ranjith Abeysuriya stated that the Commission would request from the Attorney General that this procedure be followed in future in not only torture cases but in all cases where indictment is served against police officers.

[28] supra Kemasiri Kumara Caldera's case, fn 10 above

salary suspended for reasons of corruption or fraud. In other instances, they are entitled to their salaries after 3 months of such an order. Thus, there is reluctance on the part of the IGP to suspend / interdict police officers while continuing to pay their salaries.

Secondly it is argued that if police personnel against whom allegations of torture exist are interdicted, suspended or denied promotions, they petition the Supreme Court and obtain relief including compensation, for violation of Article 12 of the Constitution (guaranteeing equality and equal protection before the law). Such an order of the apex court could thus nullify the disciplinary action taken by the IGP. 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. [29]

In these circumstances, there is an urgent need for the development of an effective witness protection scheme for victims of police abuses. Such a scheme must seek to ensure that victims of torture be treated with the utmost respect, in a manner that safeguards their safety and relief. Their stories and experiences must be heard and recorded accurately, extending even to instances where artists are called upon to draw their (victim's) experiences[30].

In recognition of this dire need, the Human Rights Committee stated in its concluding observations dated November 2003 that, "*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*".

This need was also recognised by the Attorney General of Sri Lanka, Mr. K.C. Kamlasabayson PC, who made the following observation in an address of December 2, 2003:

> "Another important feature that requires consideration is the need for an efficient witness protection scheme that would ensure that witnesses are not intimidated and threatened. No doubt this would involve heavy expenses for the State and amendments to the

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[29] Vide comments by DIG Thangavelu, head, Legal Division of the Sri Lanka Police, speaking at the National Workshop of the LST South Asia Treaty Bodies Programme that;
'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.

More effect should be made in regarding torture cases, to hold senior officers responsible -- because over the last few decades we have lost the concept of responsibilities of senior officers.'

[30] Comments made by Chitral Perera on 'Grassroots activism; helping the victims and the importance of victim protection at the National Workshop of the LST South Asia Treaty Bodies Programme, August 2004, Sri Lanka

law. I will only pose a simple question. Is it more important in a civilised 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?"[31]

The absence of a witness protection scheme seriously affects criminal justice. In Sri Lanka, many complainants have been murdered on their way to court, and while going about their daily lives. Because victims are frequently and seriously threatened, many fear to pursue their complaints. Others too are afraid to come forward as witnesses. The following cases illustrate the gravity of the problem.[32]

- Kurundukarage 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.

- The villagers of Baddegama -- were allegedly brutally attacked by the 200 drunken policemen from the Gokarella police and their supporters on December 31 2003. After the incident was reported to the NPC and NHRC as well as highlighted in various newspapers, the police threatened the villagers to withdraw the complaints and have stop the bus service to the village.

- Chamila Bandara 17, complained that he 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 NHRC.

- Lalith Rajapakse, complained that he 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

[31] Remarks made during the 13th Kanchana Abhayapala Memorial Lecture as reported by Basil Fernando in *The Right to Speak Loudly*, Asian Legal Resource Centre, 2004.
[32] See also The Daily Mirror dated 10/04/2004 at p.11.

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. He has since complained further to the NPC and the NHRC. 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 victim was acquitted of the fabricated charges against him.

- Dawundage Pushpakumara 14, complained that he 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 alleged 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 alleged that he was also threatened to withdraw his fundamental rights application in the Supreme Court, and his complaint to the Prosecution of Torture Perpetrators Unit.

- K Palitha Tissa Kumara complained of being assaulted up to 80 times with a cricket pole (wicket). He stated that a tuberculosis patient was instigated by a police officer to spit into his mouth whilst in the illegal custody of the Welipenna police and claimed that his fingerprints were forcibly placed on a hand grenade, after which he was charged under the Offensive Weapons Act and remanded. He complained that he continued to receive threats from intermediaries, acting on behalf of the torture perpetrators whilst in remand and later, and is currently in hiding together with his wife and 2 young children.

- Saman Priyankara complained of having boiling water poured on his thigh whilst in the illegal custody of the Matale police. Ever since he has made several complaints against his alleged torturers. In early July he was once again arrested and tortured by the Matale police. The alleged reason for the second act of torture which caused serious injuries to one of Saman Pryankara's ears was that he had refused to accept a settlement on his complaint of the throwing of boiling hot water on his thigh. It is alleged that the second act of torture took place after many attempts to pressure to him to withdraw his complaint failed.

Though the UN-HRC required the government of Sri Lanka to report on this matter within one year of its recommendations, to date, there does not seem to be any significant progress to rectify this serious defect in criminal justice procedures in Sri Lanka.

Re-visiting Challenges in Prosecutorial Strategies

(i) Criminal Investigations and Prosecutions

The Committee regrets that "*the majority of prosecutions initiated against police officers on charges of torture have been inconclusive ... despite a number of acknowledged instances of ...torture and that only very few.... have been found guilty and punished*".

In 1998, in its concluding observation the Committee Against Torture also observed "The fact that for years in the past police officers appeared to be immune from prosecution" and accordingly recommended Sri Lanka "to establish an effective mechanism for the criminal prosecution of public officials committing acts of torture". CAT also recommended the state "To establish an effective mechanism for the criminal prosecution of public officials committing acts of torture."

As stated before, Sri Lanka acceded to the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment in 1994 and consequently adopted enabling legislation the same year viz. by Act No. 22 of 1994. However, though domestic legislation criminalising acts of torture has been in existence for almost a decade, to date there has only been two convictions under the Act, both of which came about in the last one and a half years. On the positive side, these two convictions under the Prevention of Torture Act indicates that contrary to opinion sometimes held by legal professionals, judges are willing to convict accused despite the mandatory minimum sentence imposed by legislation.

The following are details of cases indicted by the Attorney General (AG) under Act No. 22 of 1994 for the years of 2001- 2004. Unfortunately the AG was unable to afford information re the current status of each of these cases.[33]

Year	Number of Cases	Number of Accused
2001	4	Exact No N/A
2002	2	2
2003	25	55
2004 (till June)	5	12

Furthermore, according to the Attorney General's Department, while a few cases indicted under the CAT Act have resulted in acquittals, the vast majority of cases are still pending before the High Courts. In fact though some indictments have been sent to the relevant High Courts almost 2 years ago, they have yet to be served on the accused. The reason given for this was the severe backlog of

[33] Condensed from information afforded by the Attorney General's Department during personal interviews with its officers in the year 2004.

cases in many high courts in Sri Lanka, with the next date of certain criminal trials 'going down' well into next year.

In the past the Attorney General's Department, which indicts for the offence of torture, was accused of delay in dispatching indictments to the perpetrators. Such a delay was due to most torture cases reported being from the North and the East and the on going conflict posing an impediment to expeditious proceedings. At times, while evidence pertaining to a torture case is available, the identity of the accused cannot be determined.

However in recent times (2001 onwards) most of the torture cases reported were from the South. In many of these cases, it has been easier to ascertain the identity of the perpetrator and carry out prosecutions, leading to an increase in the number of indictments filed by the Attorney General's Department.

Although to date, a number of cases are still pending before the High Court, convictions in such cases have seen the mandatory imposition of the seven years imprisonment as was evidenced recently. Nevertheless, it must also be noted that there have been very few acquittals against the Torture Act (only around five). The main reason for acquittals is the culture of exaggeration prevalent in Sri Lanka. In court, it is of absolute importance that the victim's evidence be credible and compatible with the medical evidence.

However in the face of such exaggeration the victim's credibility is destroyed in cross-examination resulting in good cases, where there has been torture, ending up in acquittal due to exaggeration[34].

The Government Report to the UN-HRC in paragraph 175 states that "...a special unit named the Prosecution of Torture Perpetrators Unit (PTP Unit) was established in the Attorney General's Department to function symbiotically with the CID in the prosecution of torturers" The report goes on to state that the unit is headed by a Deputy Solicitor General and consists of seven state counsel. However, a closer scrutiny of the structure of the Attorney General's Department reveals that there is no separate Unit dealing with torture cases, physically in existence in the department. Instead, the

[34] Vide remarks made by Senior State Counsel, Shavindra Fernando, at the National Workshop of the LST South Asian Treaty Bodies Programme, August 2004. He went on to state that 'Under normal guidelines that are followed by the Attorney General's Department, we have three factors that are taken into consideration when deciding to issue an indictment:

1. Is there sufficient credible evidence relating to the charge of torture?
2. Is there a 50 % chance of securing a conviction?
3. Is it in the public interest to prosecute the case? (not applicable to cases of torture)

Though torture is a heinous crime that has to be punished, the accused too are entitled to due process of the law. This is a human right. For a successful conviction in a torture case, the identity of the perpetrators and the evidence of the witnesses must be credible and the medical evidence should correspond with the facts.'

'PTPU' is only an administrative convenience (or international convenience) with neither specially assigned staff nor separate premises. 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 4 - 5 State Counsels, who also handle other criminal cases.

In addition, paragraph 178 states that "the PTP Unit monitors the progress and advises on the conduct of investigations of the CID pertaining to allegations of torture. The CID is duty bound to report the progress of investigations on the perpetration of torture to the PTP Unit, in order that this information may be periodically recorded in a computerised database maintained by this Unit." Even in its report to the Committee Against Torture in 2004, it is stated that " that the Prosecution of Torture Perpetrators Unit (PTPU) at the AG's Department monitors the conduct of all investigations in to allegations of torture."

As aforementioned, the main unit in the police service in charge of investigating allegations of torture is the SIU, which is operates directly under the IGP. Of course the IGP in his discretion may direct a case to be investigated by the CID or another special unit. Nonetheless, currently all allegations of torture against police personnel are investigated by fellow policemen. Even when an allegation is brought to the attention of the AG's department or the HRC, these too are referred to the SIU (via the IGP) for investigation.

It was observed during our work that contrary to what is stated to the Government Report, the AG does not seem to monitor investigations conducted by the SIU. Neither is the progress of an investigation reported to the AG. In fact, the department appears to 'lose track' of the investigation until it is completed and the file is returned to the department. Of course upon receiving a case file from the SIU, the state counsel in charge of the case may request the SIU to conduct further investigations, record statements or obtain ancillary documents. But considering the massive workload assigned to each state counsel, it is very unlikely that any of them can personally monitor the investigations conducted by the SIU. Thus if the principal task of the PTP unit is to ensure the successful conviction of perpetrators of torture, its dubious existence indicates that the system in place is clearly *not working*.

It must however be stated that insofar as the killers of Gerald Perera, (the torture victim who was killed days before he was due to testify in the High Court trial), are concerned, the IGP ordered the CID to investigate the killing subsequent to a public uproar over the outrage resulting in those responsible being arrested in mid February 2005. It is pertinent that upon arrest, the assassin had confessed to the police that he had been ordered to shoot Gerald Perera on the orders of the police sub-inspector who had been found responsible by the Supreme Court of torturing Perera. Though the investigation and arrest of the alleged perpetrators took place within a remarkably short time, their

trial is expected to take its normal course in courts, resulting in fears that it would be a considerable number of years before justice is served to the family members of the murdered torture victim.

(ii) Delays before Courts

Recommendation No: 255(d) of the Committee against Torture urges the Government to "*Take the necessary measures to ensure that justice is not delayed, especially in the cases of trials of people accused of torture*".

However it seems that the Government has failed to recognise the necessary measures that are essential for the efficient dispensation of justice in Sri Lanka for instance, the lack of proper and adequate infrastructure.[35] In this regard, the attention of the government and all relevant authorities needs to be drawn to the unnecessary suffering caused to people including extra-days spent in remand despite court orders to release them. This problem is due to lack of facilities of communication from and to the court when a person is ordered to be released or when a court requires additional information to be filed, where a petition requesting for bail is filed in court. Providing fax machines to all the courts in Sri Lanka could solve this problem with the magistrate courts, district courts and high courts all benefiting from the facility. It is unfortunate that the courts still do not have such a equipment when even small businesses and many private individuals are using such facilities.

The primitive communication systems still prevailing indicates the careless disregard for administration of justice and civil liberties of the people. While people are kept in remand unjustly they go to higher courts to obtain orders for release. Though courts may grant relief, the benefits from such orders take further time. While every one suffers from this delay, those who suffer most are the poor and illiterate. Added to the technical aspect of delays, some unscrupulous persons also take advantage of the situation and demand bribes for performing official duties. It is also not rare for case file / documents to mysteriously disappear when bribes are not forthcoming.

In addition, the time period within which indictments are served and the cases are taken up is extremely long. Even after a criminal trial begins, a lenient attitude is maintained by some judges towards lawyers who move for dates and postpone cases. This is a distinct disadvantage for prosecutions of torture as it gives the accused more time to intimidate witnesses and victims, and affects the memory and resolve of witnesses/victims. This may very well be one reason as to why, of the thirty six indictments forwarded by the AG since 2002, the overwhelming majority is still pending in court.

[35] See http://www.ahrchk.net/ua/mainfile.php/2004/716/ (visited on 10/07/2004)

Another pertinent impediment to efficient dispensation of justice was recently highlighted in a letter by the Bar Association of Wattala to the IGP.[36] In this letter the lawyers alleged that police officers of the Wattala police are interfering with the work of the lawyers to the extent that they are unable to conduct their professional duties towards their clients in the proper manner. The lawyers had complained that the police have virtually taken control of the presentation of court cases and the defense in this Magistrate's court.

The following allegations *inter alia*, were made against the said police in the letter:

- Some defendants were told that they could not get bail if they did not contact those lawyers selected by the police;
- In some other cases, police officers contacted a lawyer for the defendants and asked the accused to simply pay the lawyer;
- When the police failed to make a defendant choose a lawyer of their choice, they tried to mislead the defendant by claiming that it was not necessary for a lawyer to appear for him or her in the case;

This phenomenon of the police selecting lawyers means that many innocent persons will lose their chance to seek redress.[37] Torture victims and their families often complain that they are unable to retain lawyers working in a particular area to appear for them against errant policemen. It is alleged that either the lawyers themselves face intimidation and / or threat from the police or else they are wary of losing their criminal clientele if they antagonize the police. [38]

Amendment of the Constitution in keeping with the Concluding Observations of the UN-HRC

In paragraph 8 of its Concluding Observations, the UN-HRC indicates its concern that Article 15 of the Constitution permits restrictions on the exercise of the fundamental rights set out in Chapter III (other than those set out in Articles 10, 11, 13(3) and 13(4) which go beyond what is permissible under the provisions of the Covenant, and in particular under Article 4(1) of the Covenant. It is further concerned that article 15 of the Constitution permits derogation from Article 15 of the Covenant, which is non-derogable, by making it possible to impose restrictions on the freedom from retroactive punishment (Article 13(6) of the Constitution). Therefore the State party is recommended to bring the provisions of Chapter III of the Constitution into conformity with Articles 4 and 15 of the Covenant.

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[36] See http://www.ahrchk.net/ua/mainfile.php/2004/723/ (visited on 12/07/2004)

[37] Statement made by Basil Fernando, Executive Director of AHRC at the National Workshop of the LST South Asian Treaty Bodies Programme, August 2004, Sri Lanka

[38] Similar sentiments were expressed by K. Thiranagama, at the National Workshop of the LST South Asian Treaty Bodies Programme, August 2004, adding that in a recent case the Supreme Court ruled that irrespective of a lawyer informing court of injuries inflicted by torture, it is the duty of the Magistrate to observe the person who is produced before him or her, for evidence of the fact. However, the Magistrates' today seldom comply.

Article 4(1) of the Covenant states that restrictions are possible in times of emergency only to the extent strictly required by the exigencies of the situation, which derogation shall not be discriminatory and offend other obligations of State parties under international law. The only justification offered by the State here is that judicial interpretation by the Supreme Court has brought in the necessary element of international normative standards into Article 15. However, this is not sufficient. There is a need for explicit amendment of the Constitution in this regard. The Committee has also objected to the fact that Article 15(1) makes it possible to impose restrictions on Article 13(6) that refers to the freedom from retroactive punishment. However to date there has been no attempt to amend the domestic laws to keep in line with the provisions of ICCPR. There is also currently no draft before the Law Commission envisaging such changes.

In paragraph 9, the Committee states "...the restrictive definition of torture in the 1994 CAT Act continues to raise problems in the light of Article 7 of the Covenant..." Also, Recommendation No: 254 of the Committee Against Torture (CAT) in May 1998[39] urged "the State party to review Convention against Torture Act 22/94 and other relevant laws in order to ensure complete compliance with the Convention, in particular in respect of: (A) the definition of torture; (B) acts that amount to torture; and (C) extradition, return and expulsion" (Also see observation No. 252).

The Alternative Report to the UN Human Rights Committee presented by the Asian Legal Resource Centre (ALRC) and the World Organisation Against Torture (OMCT) in September 2003 (re-iterating observations made by Amnesty International in 1999[40]), highlighted significant differences between the provisions of Act No. 22 of 1994 and the UN Convention Against Torture in respect of each of the above three concerns. However, no perceptible initiative has been taken by the State party to bring domestic anti-torture legislation in conformity with the international treaties. Here again, there is no law reform initiative pending before the Law Commission.

The UN Convention against Torture defines "torture" as "any act by which severe pain or suffering... is intentionally inflicted on a person *for such purposes as*...[italics added]. In subsection (1) of section 2 of the Torture Act, however, the causing of "suffering is not explicitly made part of the definition of "torture", and the purposes for which torture is inflicted are listed in an exclusive (rather than inclusive) way by use of the wording "for any of the following purpose[s]. Thus, torture for other purposes, such as sadism alone, is not defined as a crime under this Act.

Also, subsection (3) of section 2 of the Torture Act stipulated that "the subjection of any person on the order of a competent court to any form of punishment recognised by written law shall be deemed not to constitute an "offence" under the Act. This means that courts can impose cruel, inhuman or

[39] http://www.unhchr.ch/tbs/doc.nsf/0/4a09cbe1c56a96b38025660f004bf3a7?Opendocument

[40] AI Index: ASA 37/010/1999, 1 June 1999

degrading punishments under the Penal Code and the Children and Yong Persons Ordinance 1939. The latter provides that courts can impose whipping on male children as an additional punishment for certain offences.

Dealing with Enforced or Involuntary Disappearances

In paragraph 10 of its Concluding Observations, the Committee expresses its concern about the large number of enforced or involuntary disappearances of persons during the time of the armed conflict and particularly about the State party's inability to identify or inaction in identifying those responsible and to bring them to justice. This together with the reluctance of victims to file or pursue complaints creates an environment that is conducive to a culture of impunity. " *The state party is urged to implement fully the right to life and physical integrity of all persons and give effect to the relevant recommendations made by the UN working group on Enforced or Involuntary Disappearances...*"

At present, instances of forced disappearances in Sri Lanka are investigated by the Disappearances Investigation Unit (DIU), a special unit within the Criminal Investigation Department (CID) of the police force. Members of the police and security forces implicated in disappearances are investigated by the DIU. This is in contravention of international norms, particularly Article 13 of the United Nations Declaration on the Protection of All Persons from Enforced Disappearances (Declaration), which provides that:

> "Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and *independent* State authority and to have that complaint promptly, thoroughly and impartially investigated *by that authority* [italics added]."[41]

The Missing Persons' Unit (MPU) is a separate unit within the Attorney General's department, which is headed by a Deputy Solicitor General. The head of the MPU is of the opinion that the officers of the DIU are competent and unbiased (see Note 1). However, even if that were to be the case, the mandate of the Declaration is for an *independent* investigative body. The establishment of such an independent body to investigate cases of disappearance was also one of the recommendations made in 1999, by the Working Group on Enforced or Involuntary Disappearances (Working Group), to the Government of Sri Lanka[42]. However, this recommendation has not yet been acted upon.

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[41] A. 13, United Nations Declaration on the Protection of All Persons from Enforced Disappearances, at http://www1.umn.edu/humanrts/instree/h4dpaped.htm (visited on 11/6/2004).

[42] Recommendations of the Working Group on Enforced or Involuntary Disappearances to the Government of Sri Lanka (December 1999), E/CN.4/2000/64/Add.1.

In this regard, the conferring of investigative powers on the Sri Lankan Human Rights Commission, along the lines of the powers possessed by the Human Rights Commission in India, is a conceptually attractive solution. This is a conceptually attractive solution for the reason that, as Article 1 of the Declaration recognises, forced disappearances amount to "a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field." The hearing of complaints in respect of forced disappearances, and their investigation, ought therefore to be within the purview of the Human Rights Commission.

The MPU in the Attorney General's Department has a poor record of successful prosecutions in cases of forced disappearance, despite the fact that tens of thousands of such cases are thought to have occurred in the past. Since 1998, it has secured convictions in only 9 cases of disappearance, according to the data made available by the MPU (**see Annex 3**). It is argued that one of the reasons for this poor record is that witnesses in these cases often shift their stance, and make successive, inconsistent statements, particularly in the identification of the perpetrator.

However, this may well be due to the intimidation of witnesses especially in the light of the absence of any form of witness protection programme. Since Article 13 (3) of the Declaration requires that steps be taken "to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal", a witness protection programme is essential.

Although the enactment of an amnesty law, or other provision which exempts perpetrators from criminal proceedings is not permissible under Article 18(1) of the Declaration, Article 4(2) of the Declaration does provide that "Mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance." The provision of mitigating circumstances, within the conditions specified in the Declaration, might enable a more practical process whereby the "culture of the disappeared" is displaced to a greater extent than what is currently prevalent.

Perpetrators of forced disappearance are currently prosecuted for the crime of abduction. This is unsatisfactory, because Article 4(1) of the Declaration requires that "All acts of enforced disappearance shall be offences under criminal law *punishable by appropriate penalties which shall take into account their extreme seriousness* [italics added.]" It follows that a specific prohibition of forced disappearance, as a distinct type of crime, along with a provision for a sentence commensurate with its severity, must be put in place.

The Government has reported that a Central Police Registry, for those detained under the Prevention of Terrorism Act and the Emergency Regulations, has been set up, and a twenty four hour telephone hotline made available for the public to make inquiries regarding detention of persons. However, although a step in the right direction, this is inadequate on two counts. Firstly, Article 10(3) of the Declaration requires that a register of "all persons deprived of their liberty" be maintained, both at the place of detention and centrally, and not just of those arrested under specific legal provisions. Secondly, as Article 10(2) of the Declaration makes clear, information about the detained person must be submitted *suo motu* by the detaining authorities to the family members of the detained person, not only on their request.

One of the recommendations of the Working Group was that freedom from enforced disappearance be included as a fundamental right in the Constitution. A declaration to this effect has not yet been made by the Supreme Court though the right to life has been recognised in the case of certain constitutionally protected rights to liberty and freedom from torture. Thus, in one seminal decision, the Court, interpreting Article 13(4) of the Constitution which provides that "no person shall be punished with death or imprisonment except by an order of a competent Court" held that, "Article 13(4), by necessary implication, recognizes that a person has a right to life – at least in the sense of mere existence, as distinct from the quality of life – which he can be deprived of only under a Court order." In this same case, the Court expanded *locus standi* to file fundamental rights applications to allow the wife of a deceased detainee to file an application as his representative.[43] It is only a small step from this judicial advance to recognise freedom from forced disappearances as a fundamental right. Regardless, its enshrining as a specific right in the Constitutions remains necessary for greater certainty given judicial vagaries that may arise on occasion.

Finally, the relief measures in place for the victims of disappearances are unsatisfactory. The Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons recommended the payment of fair and adequate compensation to dependants of disappeared persons, and institution of employment schemes and vocational training for affected families.[44] Similar recommendations made by the Working Group, which also recommended that the higher rates of compensation payable to families of civil servants be abolished, have not yet been acted upon.

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[43] ***Sriyani Silva vs. OIC, Payagala Police Station and Others*** S.C. (F.R.) Application, per Justice M.D.H. Fernando (Yapa, J. and de Silva J. agreeing at page 8. Also see ***Welwage Rani Fernando vs. OIC Minor Offences Seeduwa Police Station*** S.C. (F.R.) 700/2002, SCM 26/7/2004, per judgement of (Dr) Shirani Bandaranayake J.

[44] Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons, at http://www.ahrchk.net/hrsolid/mainfile.php/1998vol08no12/1853/ (visited on 11/6/2004).

North-East Perspectives

The Northern and Eastern areas of Sri Lanka have been ravaged for over a decade by a long drawn out war between the Liberation Tigers of Tamil Eelam (LTTE) Rebels and the Security Forces, that has left in its wake, grave human rights violations and a serious threat to the rule of law. Quite apart from the errant acts of the law enforcement authorities, that has led to large scale disappearances, torture and extra-judicial killings, extraordinary security laws enacted with a view to protect national security and the territorial sovereignty of the State have been a contributory factor towards the breakdown of the system and much of the ensuing abuse.

State obligations under international law and corresponding domestic laws

As stated earlier in this report Sri Lanka has ratified the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) with many of the rights enumerated therein being incorporated within the domestic legislative framework[45] Importantly particular rights innumerated in these international treaties predominate even in a state of national emergency and cannot and should not be derogated from.

Sri Lanka has also ratified the International Covenant on Economic Social and Cultural rights, locally undertaking such obligations as part of the Directive Principles of State Policy in the Constitution[46] Such a guarantee is important in the context that violation of civil and political rights such as freedom from torture, arbitrary arrest in turn violates the right to family life, right to education and adequate standard of living.

Further the Constitution[47] of Sri Lanka empowers the Court of Appeal to grant and issue writs of habeas corpus to hear cases involving, *inter alia* the body of a person improperly detained in public or private custody, and to discharge or remand any person so brought up thereby ensuring a legal process that deals with disappearances.

Draconian laws in violation of human rights obligations

In many countries at war, governments forsake international human rights norms under the guise of national security and Sri Lanka is no exception. Although the normal legal system prevalent in the country contains safeguards to prevent disappearances, torture and extra-judicial executions, the

[45] Article 11 of the Constitution- Freedom from Torture, cruel inhuman and degrading treatment and punishment, Article 13 (1) and (2) of the Constitution- Right to freedom from arbitrary arrest and detention and to a fair trial
[46] Article 27 of the Constitution
[47] Article 141 of the Constitution

continuous years of emergency rule and the laws enacted thereby have seriously undermined such protections.

Emergency Regulations

Section 2 of the Public Security Ordinance (hereafter PSO) provides that

> Where, in view of the existence or imminence of a state of emergency, the President is ***of the opinion*** (italics added), that it is expedient so to do in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community, the President may by Proclamation declare that Part II of the PSO shall come into operation. The President's opinion cannot be called into question in any court

The PSO provides further that once Part II of the PSO is in operation as aforesaid, the President is empowered to make such regulations as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion or for the maintenance of supplies and services essential to the life of the community.

These emergency regulations (ERs) prevail over other law (PSO/ Section 7) and cannot be called in question in any court (PSO/Section 8) but could be revoked by resolution of Parliament (PSO/Section 5 (3)).

Under the provisions of Section 5 of the Public Security Ordinance (PSO) No. 26 of 1947 (as amended), the President has the power to declare Emergency Regulations, which automatically have the force of law subject to the monthly ratification by Parliament. These regulations give the government – acting through the Secretary to the Ministry of Defence or other public authorities – vast powers for the search, arrest, and detention of citizens without charge or trial, in addition to authorising many other restrictions on basic civil and political rights.

Historically, such regulations have specified different forms of 'permissible' detention, each with different procedures and lengths of detention. These provisions were broadly drafted and granted sweeping powers to army officers, detracting from the obligations undertaken by the State to protect a citizen's human rights and fundamental freedoms at all times.

Classically, one set of regulations would allow for "preventive detention," authorising the Secretary to the Ministry of Defence to detain individuals for up to a year, "with a view to preventing any person from acting in a manner prejudicial to national security or public order."

Another set of regulations would allow for the arrest and detention for purposes of investigation of anyone involved or suspected of involvement in violating other Emergency Regulations. Such "investigative detention" allowed individuals to be held for as long as nine months without charge.

Yet another set of regulations would stipulate the terms of "detention for rehabilitation," which would be applicable to anyone already detained under emergency regulations or under the terms of Section 9 of the Prevention of Terrorism Act (1979).

These regulations promulgated under a state of emergency directly contravened Article 9 of the International Covenant in Civil and Political Rights (ICCPR)[48] which enumerates *inter alia* that all people arrested shall be promptly notified of any charges against them and that anyone arrested or detained on a criminal charge shall be promptly brought before a judge and shall be entitled to a trial within a reasonable time or to release.

Despite judicial activism in this regard, emergency regulations became commonly used during the past several decades when the country was more often than not, ruled under emergency law, to circumvent the normal legislative processes merely for reasons of expediency. Abusive regulations were broadly categorized in the following manner:

a) those regulations that are not properly within the purview of the law making powers of the executive because of an inadequate nexus with public security concerns (ie: regulations that pertain to matters such as the adoption of children, the salt industry and banking), or are over broad;

b) those regulations which fall within emergency powers but are clearly violative of fundamental rights such as those regulations that do away with inquests in respect of deaths occurring while in custody or on account of the action of a member of the armed forces or the police;

c) those regulations that continue to be in force though the circumstances that first warranted their imposition are no longer valid.

A succinct analysis of such emergency regulations during the period June 1989 to May 1992 is set out in a study released in 1993 by the Center for the Study of Human Rights of the University of Colombo (CSHR) in association with the Nadesan Centre. The study specifically recommended that;

a) emergency powers should not be used under any circumstances to circumvent the normal legislative process merely for reasons of expediency;

[48] Amnesty International, "Sri Lanka New Emergency Regulations- Erosion of human rights protection," July 2000(ASA 37/19/00) p. 13

b) those regulations which have been promulgated outside the powers given by the Public Security Ordinance and also those, while presumably falling within emergency powers are nonetheless of no relevance due to change of circumstances, be rescinded;

c) those regulations which are too broadly framed (such as that which gives powers of arrest to any person authorised by the President) or which are disproportionately harsh on account of not containing sufficient safeguards for basic rights (such as indefinite or prolonged detention with no or inadequate judicial supervision) be revised; and

d) that wide publicity be given to emergency regulations when they are promulgated, ie; by publishing them in the newspapers so that the public are aware of the contents; that a preamble in each regulation should explain the reason for its promulgation and that an official compilation of emergency regulations be prepared with an index of amendments thereto, with periodic updates.

The last concern had become particularly important in the 1990's. As emergency regulations can be amended, revoked or added to at the behest of the President of the Republic, bypassing the normal legislative process, a large number of emergency regulations had come into being, sometimes without the public being aware of such regulations with the gazettes in which they are published not readily available. Civil society organizations had pointed out the difficulty in keeping track of all the emergency regulations that come into force at different times.

Judicial interpretation of the power to arrest and detain under emergency has however significantly restricted the ambit of these powers in the interests of the liberty of the subject. Thus, the Sri Lankan Supreme Court has asserted its power to strike down an ER on the basis that it conferred unguided and unfettered discretion to the police to grant or refuse permission to distribute pamphlets and posters.[49]

Judicial reasoning proceeded on the basis that while Article 15 (7) gives 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 is counterbalanced by Article 155 (2) of the Constitution which places 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 speech prohibited and the ground on which it is prohibited. (i.e. any of the restrictions enumerated in Articles 15(2) &(7)) Any indirect or farfetched connection between the two would

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[49] ***Joseph Perera Vs The Attorney General*** (1992 1 Sri LR 199, 230) see also particularly out of a number of cases in this regard, ***Karunatilleka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others*** *[1999 Sri.L.R. 157].*

make the regulation invalid. Moreover, though the Court would give due weight to the opinion of the President whether a particular regulation was necessary or not, it could claim to itself the power to question the necessity of the regulation and whether the required proximity exists.

In more recent times, the Supreme Court has advanced so far as to question even a Presidential Proclamation regarding a question to be submitted to the people at a referendum[50] on the basis that the question must satisfy necessary legal requirements; otherwise action taken even by the police in the belief that the proclamation conferred upon them powers that they were authorised to exercise, could be unlawful.

In this case, a police assault on a lawyer when some opposition parties were conducting protest marches against the prorogation of Parliament at that time was ruled to be *mala fide* amounting to unjustified, unreasonable and excessive actions in the context of the police pleading that they had acted on orders of the IGP under Section 45 of the Referendum Act which prohibited the holding and taking part in any procession at any time from the date of the publication of the Proclamation to the date on which the result is declared, other than on May Day. No sections of the Police Ordinance, under which the police have ordinary powers with regard to unlawful processions or in the interests of public order or in order to prevent an apprehended breach of the peace, were cited.

The court stated that the prohibition on processions imposed by Section 45 of the Referendum Act applied only where there had been a valid Proclamation under Section 2 which, in this instance, was not the case, as the proposal for submission to the people by referendum, was not a question satisfying legal requirements? Section 2 (2) (a) of the Referendum Act stipulated that the question should be capable of being answered by a 'yes' or a 'no.' Thus, in the unequivocal opinion of the court, such a question should convey clear, intelligible and meaningful information of future government action.

These attributes were not satisfied in the 2001 formulation of the question. The answer 'no' could have been given by, at least three categories of persons while the answer 'yes' was even more ambiguous and could have been given by several different groups of persons agreed only upon the need for a new Constitution but holding wholly divergent views as to what that Constitution should provide. An extensive elaboration of this reasoning is contained in the judgement of the court.

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[50] ***Sujeewa Aruna Senasinghe vs Senior Superintendant of Police, Nugegoda and three others***, SCM 17.3.2003, judgement of M.D.H. Fernando J. (with Gunesekera J. and Wigneswaran J. agreeing). In answering the question as to whether the court lacked jurisdiction to determine whether the Proclamation was valid and/or whether the Referendum Proposal had been duly formulated, because those were 'political questions' in the positive, the court affirmed the accepted principle that all powers and discretions conferred upon public authorities are to be used reasonably, in good faith and upon lawful and relevant grounds of public interest. 'These are therefore not unfettered, absolute or unreviewable and the legality or propriety of their exercise must be judged by reference to the purposes for which they were conferred.'

This judgement of the Supreme Court is a pointer to the manner in which a Presidential Proclamation under the Referendum Act may not be sacrosanct. However, insofar as a Presidential Proclamation under the Public Security Ordinance is concerned in bringing into being a state of emergency, not only Section 2 of the PSO prohibits such a proclamation being questioned in any court of law (which ouster may be overcome in a like manner as the courts overcame the ouster in Section 8 of the PSO relating to regulations made in terms of the PSO), but also a constitutional ouster clause is predominant as set out in Article 154 J (2) of the Constitution

It is salutary therefore that Section 3 of the PSO be repealed and Article 154 J (2) of the 1978 Constitution amended in order to permit judicial review of Presidential Proclamations declaring a state of emergency on the grounds of necessity and/or expediency and/or proportionality and further 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. For greater coherence, it may be advisable that Section 8 of the PSO which stipulates a now academic ouster clause in respect of judicial review of emergency regulations is also repealed.

Prevention of Terrorism Act

In 1979, while a state of emergency was in force in the country, Parliament passed the Prevention of Terrorism (Temporary Provisions) Act (hereinafter referred to as the PTA) in order to cope with burgeoning political cum ethnic violence in the North. Section 29 of the PTA confined the operation of the Act for a period of three years from the date of its commencement however this provision was repealed in 1982.

The PTA contains a number of harsh provisions that are indefensible from a human rights point of view. It is retroactive in nature since it defines "unlawful activity" as including action taken or committed before the date of coming into operation of the Act, which would, if committed after the date of passing of the Act be an offence under the Act.

It provides a broad and loose definition of "terrorist acts" to include ordinary cases of murder, robbery, and theft etc. The purpose of this law was to curtail terrorist activities, but the broad definitions contained in the Act led to the violation of the fundamental rights of ethnic Tamils living in the North and East. Thousands were held under *incommunicado* detention under the PTA without any charge or trial.

One of the many examples in this regard is the case of Mr S.S. Lingarathnam who was arrested under the PTA in July 1992 in Trincomalee. No reasons were given for his arrest. He suffered extreme torture and a confession was extracted from him. He was produced before a magistrate in July 1995

and a case was filed in the High Court only in October 1996. Since then, the case has been postponed 63 times by April 2003.[51]

Further in relation to the phenomenon of disappearances it is important to note two recent decisions of the United Nations Human Rights Committee in relation to cases brought by Sri Lankan citizens in terms of the Optional Protocol to the ICCPR, alleging a violation of Covenant rights[52]

In the first instance, deliberating on a complaint filed by a father from Trincomalee, whose son 'disappeared' in army custody in 1990, the Committee found a violation of the rights to liberty and security and freedom from torture not only of the son but also of his parents who, the Committee opined, had suffered 'anguish and stress" by the continuing uncertainty concerning his fate and whereabouts.

The State was directed to expedite current criminal proceedings against individuals implicated in the disappearance, to ensure the prompt trial of all persons responsible for the abduction and to provide the victims with an effective remedy including a thorough and effective investigation into his disappearance and fate, his immediate release if he is still alive, adequate information resulting from its investigation and adequate compensation for the violations suffered by him and his family.

In delivering its views, the Committee reasoned that, for the purposes of establishing State responsibility, it is irrelevant that the officer to whom a particular disappearance of an individual is attributed, acted outside the law or that superior officers were unaware of his or her actions.

In this context, the definition of enforced disappearances contained in the Rome Stature of the International Criminal Court (Article 7) was used to good measure. Here, "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

The Committee concluded accordingly that where the violation of Covenant rights is carried out by a soldier or other official who uses his or her position of authority to execute a wrongful act, the violation is imputable to the State, even where the soldier or the other official is acting beyond his authority.

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[51] See Daily News, February 4th 2004

[52] See the Jegetheeswaran Sarma Case (Communication No 950/2000 (Sri Lanka, 31/07/2003) CCPR/C/78/D/950/2000 and the Sinharasa case (CCPR/C/81/D/1033/2001), 21st July 2004, eighty-first session of the UNHRC in Geneva)

In doing so, the jurists followed previous decisions to this same effect by other regional tribunals, including the Inter-American Court of Human Rights in the *Velasquez Rodriguez* Case and decisions of the European Court of Human Rights.

These cases affirmed that even where an official is acting *ultra vires*, the State will find itself in a position of responsibility if it provided the means or facilities to accomplish the act. Even more boldly, it was asserted by the Human Rights Committee in this instance that even if, and this is not known in this case, the officials acted in direct contravention of the orders given to them, the State may still be responsible.

The second Communication of Views is important for the unequivocal direction that it gives the State to amend sections of the Prevention of Terrorism Act No 48 of 1979 (as amended) that are incompatible with the guarantees of fair trial under the Covenant. Particularly, Section 16(2) of the PTA is brought under inquiry for its imposing the burden regarding the proving of the voluntary nature of a confession made to an ASP, on an accused detained under the special provisions law.

In this case the aggrieved, Sinharasa had been detained on 16 July, 1993 pursuant to an order by the Minister of Defence under section 9(1) of the PTA which provides for detention without charge up to a period of eighteen months (renewable by order every three months), if the Minister of Defence "has reason to believe or suspect that any person is connected with or concerned in any unlawful activity". The detention order was not served on him and he was not informed of the reasons for his detention.

Thereafter, he was kept in detention up to August 1993, where he was first brought before a Magistrate, and then remanded back into police custody. No bail was given in terms of Section 15(2) of the PTA. Neither did the Magistrate review the detention order, in terms of Section 10, which states that a detention order under Section 9 of the PTA is final and shall not be called in question before any court.

On 11 December 1993, he was produced before an ASP (who had previously interrogated him in the capacity of a police constable) and asked to sign a statement, which had been translated and typed in Sinhalese by another police officer who also acted as an interpreter during this time. When Sinharasa had refused to sign, as he could not understand it, he alleged that the ASP then forcibly put his thumbprint on the typed statement. He did not have legal representation.

Sinharasa's claim was that he was forced to sign a confession and subsequently had to prove that it was extracted under duress and was not voluntary in terms of Section 16(2), which imposed the burden on him. He pleaded that this was impossible for him to do given that he was compelled to sign the confession only in the presence of the police officers concerned by whom he had been tortured.

The judicial medical report produced at his trial in the High Court confirmed that he displayed scars on his back and a serious injury, in the form of a corneal scar on his left eye, which resulted in permanent impairment of vision. The report also stated that "injuries to the lower part of the left back of the chest and eye were caused by a blunt weapon while that to the mid back of the chest was probably due to application of sharp force".

At a *voir dire* hearing in the High Court, the Court concluded that the confession was admissible, pursuant to section 16(1) of the PTA, which renders admissible any statement made before a police officer not below the rank of an ASP, provided that it is voluntary. The confession was admitted despite the Court noting that there were "injury scars presently visible on the [author's] body" and acknowledging that these were sequels of injuries "inflicted before or after this incident."

A further factor taken against him was that he had failed to complain to anyone at any time about the beatings, including the Magistrate. Sinharasa was convicted and sentenced to fifty years imprisonment in 1995 for under section 23(a) of the State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 with the Public Security (Amendment) Act No. 28 of 1988, of having conspired by unlawful means to overthrow the lawfully constituted Government of Sri Lanka, and (read together with the provisions of the PTA) of having attacked four army camps with a view to achieving the said objective.

The conviction was based solely on the alleged confession. His appeal to the Court of Appeal was dismissed though his sentence was reduced. Thereafter, in January 2000, the Supreme Court also refused special leave to appeal. It was from this refusal that Sinharasa appealed to the Geneva based Committee

The primary question was as to whether his rights under Article 14, paragraph 3 (g) of the Covenant had been violated by his being forced to sign a confession and subsequently to prove its voluntary nature. The Committee answered this question in the positive. In so doing, it pointed out that its jurisprudence had laid down the principle that no one shall "be compelled to testify against himself or confess guilt" which must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt. It was considered implicit in this principle that the prosecution prove that the confession was made without duress.

> "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."

It was in this context that the Committee found that the State had violated Article 14, paragraphs 2, and 3(g), read together with Article 2, paragraph 3, and 7 of the Covenant. The State was put under an obligation to provide Sinharasa with an effective and appropriate remedy, including release or retrial and compensation.

Human Rights Abuses

During past decades of continuous emergency rule, the spate of violence and abuse inflicted by the law enforcement authorities on individuals in the South as well as the North-East using emergency law for this purpose was mainly due to the failure to impose legal safeguards to withstand the corrosive effects of the emergency regulations and the PTA. The failure on the part of the government to stop exponential progression of cases of disappearances, torture and extra judicial killing stands as a grave indictment on the human rights track record of Sri Lanka.

When in 1996 a 17-year-old student, Krishanthy Kumaraswamy, "disappeared" after she was raped and murdered by several members of the armed forces on duty at the Chemmani checkpoint and the subsequent killing of her family and friends, who went in search of her, starkly illustrated the severity of disappearances and extra-judicial killings in Jaffna.

By 1998, the court sentenced six soldiers and one reserve police officer to death and for the first time members of the armed forces and the police were given maximum sentences for the grave human rights violations. In making his final judgment at the Trial at Bar held in the High Court, Colombo, Justice Gamini Abeyratne stated:

> "In view of the strong evidence . . . deterrent punishment had to be imposed. The court cannot ignore the barbaric and brutal assault made on a schoolgirl . . . [T]he accused held responsible positions in the Armed Forces and Police, but they attacked this young girl like a pack of savage animals."
>
> HIGH COURT CASE NO 8778/97, HIGH COURT, COLOMBO, BENCH OF THREE JUDGES

During the sentencing phase of the *Kumarasamy* case, another case of massive rights violations emerged when former Lance Corporal Somaratne Rajapakse, one of the convicted soldiers, revealed knowledge of mass graves at Chemmani containing bodies of up to 400 persons killed by security forces in 1996. Five others substantiated claims of mass graves in the Chemmani area, where they alleged to have buried between 120 and 140 bodies on superior orders.

In 1999, almost a year after Rajapakse made his revelations, exhumations started, in the presence of international observers and forensic experts, yielding 15 skeletons. After further forensic analysis, the experts presented the evidence in December 1999 to the Jaffna Magistrate, demonstrating that ten of the remains showed signs of trauma and assault, which resulted in death. By the end of 2001, a total of 13 of the original 15 bodies were still to be identified.

Lance Corporal Rajapakse, along with others convicted in the Kumarasamy case, implicated 20 security personnel for the killings. Yet by March 2001, authorities arrested only five suspects and issued another arrest order for a suspect who had fled. By June, authorities released on bail one suspect not charged with murder.

Disappearances continued in 2000 to 2001 in the course of military operations in the north and east, albeit on a smaller scale than in previous years. In December 2000, eight Tamil civilians went missing in December 2000 in Mirusuvil after arrest and torture by the Sri Lankan Army. Two soldiers identified as perpetrators admitted to the killings, while authorities later arrested one commissioned officer and six other soldiers. By the end of 2001, the government ordered an official inquiry and withheld the salaries of the soldiers. The case in this regard is still pending and according to the National Human Rights Commission's Jaffna officer, Ruwan Chandrasekera, the main witness in the case has feared for his safety in Colombo and had requested transfer of the case to Jaffna. The case was transferred to Anuradhapura Magistrate's Court and has not yet come to trial.

Currently the North and East is experiencing a respite in the war with a cessation of hostilities that has prevalent force since February 21, 2002 through Norwegian facilitators. Though the peace process is moving at a snail pace, it could be stated that the time is ripe for the government to effectively address the problem of human rights violations and ensure accountability.

Recommendations for Ending the Disappearances Cycle

In creating a model process to combat disappearances, the three strategies of prevention, investigation, and countering impunity must be strengthened. The first phrase of prevention will deal with the training of armed forces and the provision of legal safeguards to ensure documented arrest and detention. The second phrase of investigation will provide un-politicized commissions and investigations by police to provide greater evidence in support of cases of disappearance. The third phrase will implement an effective system to combat the climate of impunity, to allow greater accountability for actions undertaken by security forces, and to provide justice through standardized trials in cases of disappearance.

A. Prevention Procedures

The first step in such a model process involves the prevention of disappearances and other violations of human rights. Eradicating disappearances is a matter of political will, a duty, which the Sri Lankan government has in maintaining public order. Some key areas of prevention include effective training of security forces, safeguards on arrest and detention etc. in this regard the human rights based educational programme carried out by the Sri Lankan Army, previously referred to in this report is a step in the right direction.

The Sri Lankan government must provide comprehensive training to security forces in human rights and humanitarian norms in order to ensure non-abuse. Greater supervision of troop activities by those adequately trained in human rights norms will also encourage the armed forces to be more attentive to their human rights obligations under international law.

Security forces should also be trained to understand that they have a right to disobey or refuse to participate in activities that violate norms of human rights and a duty to report such breaches in conduct.

In addition the government must ensure stern implementation of established legal processes for example the notification of the HRC of arrests and detentions so that arbitrary arrests and detention maybe prevented. Penalties already guaranteed under the HRC's mandate, ranging in severity from fines and/or imprisonment for not more than one year after trial, must be enforced and possibly elevated for those soldiers and officers who disregard this essential rule. Further places of detention should be regularly inspected by the HRC and other human rights monitors to ensure that disappearances and incidents of torture are not concealed.

B. Investigative Procedures

In order to prevent and combat disappearances, torture and extra judicial killings there must be an effective investigation carried out into all such cases.

Investigating bodies must be impartial, have necessary powers and resources, be staffed by professionally competent personnel, and be protected from intimidation.

The Disappearance Investigative Unit (DIU) of the Police Department should not be the sole authority responsible for providing crucial evidence to initiate charges against human rights offenders, some of whom are within the department's own ranks. An independent body possessing investigatory powers to look into cases of disappearance, torture and extra judicial killing must be established. At the minimum, the DIU should be fully staffed and funded by the government to carry out their

investigations and provide evidence to the AG's Department in a competent and effective manner in order to carry out the prosecution.

C. Confronting Impunity

Legal and constitutional changes in Sri Lanka should be initiated to provide greater accountability for disappearances. The act of enforced disappearance should be made a separate offence under Sri Lankan criminal law, "punishable by appropriate penalties as stipulated in Article 4 of the United Nations Declaration on the Protection of All Persons from Enforced Disappearances."

This will classify the phenomenon as a crime under law and allow for more efficient and greater numbers of prosecutions as opposed to the handful of prosecutions currently carried out under the offence of abduction.

The prohibition against enforced disappearance should be elevated to the status of a fundamental right in the Sri Lankan Constitution, allowing a petition to the Supreme Court. Such a move would allow for more efficient prosecutions, as proof of death will no longer be an impediment to initiating charges against the perpetrators, and further serve to strengthen the recent decisions of the Supreme Court, holding that the right to life of citizens have been impliedly guaranteed under the Constitution.

The Prevention of Terrorism Act (PTA) and the Emergency Regulations (ER), should either be abolished or modified to render them consistent with international human rights norms. Crucially, the provisions of the PTA should be revised to follow normal Sri Lankan criminal procedure by allowing an arrested suspect to be brought before a judicial officer within 24 hours, thus reducing the likelihood of abuse by arresting authorities.The law should be further amended to ensure that confessions are not admitted, irrespective of the rank of the police officer to whom they are made.

The government also must ensure an increase in prosecutions and convictions of offenders. Prior efforts to ensure steady prosecutions have failed, with low numbers of convictions and even promotions of suspected perpetrators, despite expanded criminal investigations by the DIU and the AG. The government must hasten efforts to bring suspects to justice by empowering the Missing Persons Commissions Unit of the AG's office or another independent body to indict suspected perpetrators. More thorough and less politicised investigations by the DIU of the Police Department and the establishment of permanent commissions will provide solid evidence by which prosecutions may begin and convictions may be sought.

Overall, the judicial process must be prompt, impartial, effective, fair, and open. Sri Lanka must comply with Article 18 of the Declaration on the Protection of All Persons from Enforced and Involuntary Disappearance and must not pass any amnesty law or similar provision to exempt

perpetrators from criminal proceedings or sanctions. In disappearance cases, statutes of limitations should not apply, the defence of superior orders should not be a permissible defence, and the full scope of liability for prosecution and universal jurisdiction should apply. Sri Lanka must take full responsibility for past and present disappearance cases in an effort to provide justice and accountability for those who lost their lives through senseless acts of ethnically motivated violence.

Conclusion

The above report attempts to examine human rights violations occurring in Sri Lanka in general as well as having regard to the peculiar situation that prevails in the North-East of the country. It tries to illustrate the unabated practices of torture that are evidenced and the fatal flaws that continue to exist in domestic mechanisms of investigations, disciplinary inquiries, prosecution and the judicial system since the Concluding Observations were delivered by the UNHRC in October-November 2003.

Vitally, it highlights the lack of a coordinated effort between the different organs set up by the State to deal with State sponsored violence. Until there is a firm resolve by the State and it organs to rectify these deficiencies and uphold the accountability of offenders, it is our submission that the State cannot be said to have made a serious attempt to comply with the recommendations made by the Human Right Committee in terms of the obligations imposed upon Sri Lanka under international law by the ICCPR.

Summary of Recommendations

We suggest the following with regards to the Committee's recommendations as contained in **paragraphs 8, 9, 10, and 18** and in which the State party was urged to provide information within one year in accordance with rule 70 paragraph 5 of the UN-HRC's rules of procedure.

(i) Paragraph 8 -- Constitutional changes to Article 15 of the Constitution

The only method in which the constitutional amendments suggested by the Human Rights Committee could be achieved in the present political setting and with regard to the Parliamentary majorities needed, is by way of a consensus between all parties -- similar to the process by which the 17th Amendment was passed.

Arguably, mutual agreement among the different political parties along the lines suggested by the Human Rights Committee may be possible despite a very different political climate prevailing now as opposed to 3rd October, 2001 when the 17th Amendment was enacted into law. However, in the minimum, the government should, (with a view to complying with the recommendations of the UN Human Rights Committee), draft the necessary legislation and seek the consensus of all parties to

enact the required legislation. We further recommend that civil society organisations keenly focus on this issue, lobby the government and other political parties towards this end as well as monitoring progress.

Furthermore, in the undertakings given by the Sri Lankan government in 1995 to the Human Rights Committee recorded in the Concluding Observations of the HRC under 'positive aspects' the State agreed to amend the fundamental rights provisions in the Constitution to facilitate the following. (a) To expand the time limit of one month for filing petitions re human rights violations before the Court and (b) to create the possibility for interested organisations to have *locus standi* to file applications on behalf on affected parties. This undertaking should be honoured by necessary amendments to the Constitution. These amendments should not be postponed until the overall constitutional reforms as debated for a number of years are being achieved.

(ii) Paragraph 9 -- Regarding Prevention of Torture and Other Gross Abuses of Human Rights

The central concern with regards to the above, is the lack of a competent and credible investigating machinery for the investigation into complaints of such violations. The establishment of such a mechanism is urgently required if the Sri Lankan government is to comply with the HRC recommendations. Ideally, an **Independent Prosecutor's Office** should be established with a mandate to conduct independent investigations. As explained above, the Special Investigation Unit (SIU) investigation procedure in to cases of torture -- with little supervision of the Attorney General's (AG) Department -- is inadequate and subject to serious defects. Also, the National Human Rights Commission (NHRC) procedure in no way comes near to a proper criminal investigation system for the investigation of such violations.

As an alternative to the above, we suggest that the present SIU system be strengthened by making it an investigating unit that solely inquires into complaints of torture and other gross abuses of human rights on a permanent basis. This implies that members of this unit during the time of their service to the SIU should not be assigned with any other task other than the investigations regarding torture and other abuses of human rights.

Also, the work of the SIU should be directly controlled and supervised by the officers of the AG's Department specially assigned for this purpose. During the time that they hold the position of supervision over the said SIU, such state counsel should have no other assignments. The government should also increase the cadre of the AG's department, if so required. This process should be thoroughly monitored and supported by the Human Rights Commission, and the NHRC should assign competent persons for that task. The Human Rights Commission should be in a position at any given

time to account for each single investigation under the CAT Act or any other violation of human rights amounting to a crime and investigated by the SIU and prosecuted by the AG's Department.

For this purpose, the AG and the NHRC should work together to develop guidelines for such cooperation between the AG's Department and the NHRC. These guidelines must be made available to the public so that the public can be aware of the manner in which such complaints are investigated and prosecuted.

The NHRC should thoroughly review its inquiries and investigations unit within the shortest time possible. Within at least a period of three months the NHRC should arrive at a clearly laid out policy and guidelines for the achievement of such a policy. Such statement should also be made available to the public. The NHRC should avoid duplication of inquiries and instead adopt an approach of critical cooperation in which the interests of justice and the promotion of human rights would be the primary consideration.

It has been suggested that the NHRC Act be amended to empower the NHRC to approach courts directly as is done in India. In the minimum, rules need to be made by the Supreme Court in order to enable the NHRC to 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 therefor....," in terms of Section 15(3) (b) of the NHRC Act.

An alternate course of action for the NHRC would be to develop closer links in the area of torture investigations and prosecution, handled by the SIU and AG's department respectively. Preliminary investigations conducted by the NHRC can greatly help in instituting criminal inquiries into gross human rights abuses such as torture. All three unites should develop a working relationship regarding prosecution of torture cases in particular. This process can be aided by the NPC which can monitor all investigations and prosecutions of cases of torture and other grave abuses of violations of human rights.

This approach would require a considerable openness on the part of the AG's department to create special machinery for investigation and prosecuting of torture. On the other hand it would require the capacity on the part of the NPC to collaborate in such an effort and on the other to skilfully monitor the process therefore ensuring the proper functioning of such a system. This approach would help to avoid the duplication of inquiries while at the same time, maintaining an avenue to ensure accountability and transparency into the inquiries to complaints regarding torture and other abuses of human rights.

The National Police Commission (NPC) should, as soon as possible, make a policy statement clarifying its role regarding disciplinary control of all police officers except the Inspector General of

Police (IGP). The recent statement to the effect that the disciplinary control of the ranks below that of Inspector of Police does not come under the purview of the NPC has created considerable confusion and doubt about the efficacy of the NPC in disciplinary control.

Under no circumstances should the role of disciplinary control be delegated to the IGP. Instead the NPC should develop a procedure of its own to speedily deal with complaints of torture and other violations of the police affecting public confidence in the institution of policing. The NPC should clearly lay down the types of misconduct or abuse of rights it will inquire into and what punishments would follow if complaints of breaches of such conduct were proved. All possibilities of assigning blame on these matters should be closed, by the NPC clearly undertaking the entire responsibilities on this matter.

As for the resources needed, the NPC should work out its requirements and place them before the government. The public including the civil society organisations and the media should assist the NPC to come to a clear understanding of its constitutional mandate and to assure that the government will provide all resources required by the NPC. The National Human Rights Commission should supervise the development and the execution of the disciplinary control function by the NPC.

A very high degree of professionalism is required from the staff of both the NHRC and the NPC to ensure the aforementioned. All possibilities of political interference in the appointment of staff to the NPC should be strictly guarded against, with a removal procedure for acts of serious misconduct clearly laid down and enforced. Particularly the allegation of corruption and cooperation of staff with perpetrators of alleged acts of torture and other gross abuses of human rights should be speedily inquired into and acted upon. The excuse of the rights of employees should not be used for condoning serious acts of misconduct, which obstruct the performance of the mandate of the said commissions.

In particular the NHRC and the NPC should strictly supervise the work of their area offices and area coordinators. This is because the loss of confidence at area levels could seriously undermine the effectiveness of these commissions. On the other hand the efficient functioning of the commissions at area level would greatly enhance the capacity of the public to have their complaints made and investigated with less hazard.

Witness Protection -- The absence of a witness protection scheme may be identified as the single-most obstacle to the protection of human rights with regard to torture and other gross abuses of human rights. This also affects the control of crime in general. We recommend that the Attorney General and the police department develop a strategy and scheme for the effective protection of witnesses. This could be developed by an expert group who could draw up a scheme within a short period of time with a statement of the resource allocations required. If the AG and the police department follow

a common strategy re witness protection, it is very likely that the state and the public would support such a move.

At present, while the AG has publicly acknowledged the lack of such a strategy and scheme, no initiative has been taken to create such a witness protection scheme. Therefore the recommendations of the UN-HRC in this regard has not even been properly studied -- let alone implemented. And until a proper strategy and scheme is in place, implementation of the UN-HRC's recommendations would not be possible. Given the importance that a coherent witness protection scheme bears to the preservation of human rights, the NHRC too should make its recommendations for the implementation of the human rights committees recommendations on this matter and monitor this issue until its realisation. Furthermore, the NHRC could include witness protection into its recently adopted policy of zero tolerance of torture.

Finally, the NHRC can hold public consultations and thereby provide to the government, the AG and the police department the best possible options for the speedy implementation of an effective witness protection programme. The NHRC can form a group of experts working on a voluntary basis to study this issue and monitor the progress until such a scheme is realised.

(iii) Paragraph 10 -- Regarding Disappearances

As obtaining redress for disappearances has defied all attempts at a solution, we recommend that the UN-HRC address the State's failure to implement the recommendations of the UN Working Groups of Forced Disappearances and the Committees own recommendations. Sufficient time has elapsed and mere repetition of recommendations regardless of any serious attempt at implementation only facilitates the slighting of such international obligations. We further recommend that the UN Working Group on Forced Disappearances review this matter once again and take necessary steps towards redressing tens of thousands of families who have waited for such redress for many long years, in the South, North and East of the country.

Legislative measures should be taken to make disappearances a crime in Sri Lanka as suggested by the UN Working Group on Forced Disappearances in 1998. This legislation can also be passed by way of a consensus arrived at between the government and the opposition. No initiative to draft such legislation has taken place. The NHRC, together with the Law Commission of Sri Lanka could draft and pursue such a law. As already stated, enforced disappearances should also be constitutionally prohibited.

The removal of legal impediments for killings after arrest is an essential element in the disappearances that have taken place in Sri Lanka. Such removal of the legal impediments has had an enormous impact on the law enforcement agencies of the State and has remained the major cause for a very

serious breakdown in the rule of law in the country. This breakdown in the rule of law and the weakening of the law enforcement agencies has remained a most serious obstacle against crime control in general and the protection of human rights in particular. This overall collapse of the rule of law needs to be addressed urgently if further catastrophic consequences to the entire legal system are to be avoided. Today fear of harm to the bodily integrity of persons, fear of assassination, fear of being a victim of crime and enormous insecurity has spread throughout the country. There is consensus among the people, including the media, the government and the opposition that the situation is extremely serious. However, there is no attempt to seriously study a remedial strategy and plan of action for this matter.

We therefore recommend that the UN-HRC when reviewing the implementation of their recommendations in accordance with rule 70, paragraph 5 of the Committee's Rules of Procedure, should specifically address the situation of the overall breakdown of the rule of law in the country including specific concerns affecting the independence of the institution of the judiciary. We also note that the NHRC in articulating its three-year plan has acknowledged the issue of rule of law as the central issue around which its other strategies have revolved.

Given this acknowledgement, the NHRC should initiate a public discussion under the procedure of public hearing so that there can be a greater consensus build to access the problems relating to this area on an urgent basis. We also recommend that the focus of the local and international agencies on human rights should be on the link between the rule of law and human rights if their interventions for the improvement of human rights in the country are to be of any value.

Special Note

Information obtained from interviews conducted with the following persons has been included in the above monitoring report. However, upon the request of some of those who have been interviewed, we have refrained from personally quoting them.

1. The Head, Special Investigations Unit of the Police Department on 18th May 2004
2. The Head, Legal Range of the Police Department on 18th May 2004.
3. The Chairman, National Police Commission on 11th May 2004
4. The Chairperson of the National Human Rights Commission on 6th April 2004.
5. A Director of the National Human Rights Commission on 26th April 2004.
6. A Senior State Counsel, Attorney General's Department on 21st April 2004
7. Head of the Missing Persons' Unit at the Attorney General's Department on 31st March 2004
8. State counsel at the Attorney General's Department on 22nd March 2004
9. State counsel attached to the Missing Persons' Unit at the Attorney General's Department on 25th March 2004
10. Commander and Chief Legal Officer of the Army

ANNEX 1

Current status of cases investigated by the SIU for the years 2002, 2003 and 2004

	Complains received	Investigation completed	Investigation pending
2002	95	83	12
2003	156	85	71
2004	21	-	21

ANNEX 2

Table containing details of disciplinary inquiries pending and completed by the police department for 2003

Year	Complaints received	Inquiries pending	Inquiries completed
2003	156	3	11

ANNEX 3

Data made available by the Missing Persons' Unit (1998 to present)

Case files have been sent to MPU by DIU	2147
Cases have been sent to the record room after completion of inquiry due to insufficient evidence	1384
Indictments in High Court (107 acquittals / 9 convictions)	353
Summary inquiries	2
Non-summary inquiries	43

GIVING EFFECT TO CONSTITUTIONALLY MANDATED PROCEDURES; A DRAFT PUBLIC COMPLAINTS PROCEDURE FOR THE NATIONAL POLICE COMMISSION IN TERMS OF ARTICLE 155G(2) OF THE 17TH AMENDMENT♠

Amendment 17, Article 155.G.2

" The Commission shall establish procedure to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purposes."

– Explanatory Note

The 17th Amendment to the Constitution of Sri Lanka, in so far as it provides in Article 155G(2) for the mechanism of complaints against the police, is a unique provision compared with any other legal procedures:

a. Other complaints procedures provide only for internal inquiries;
b. Under 155 (G) 1, disciplinary control of the police service belongs to the Commission. Thus control of all aspects of procedures for public complaints is the responsibility of the Commission

Creation of the procedures is a constitutional obligation that has yet to be realized. Although ASPS, DIGS and the like have, so far, had the duty of investigation of complaints, disciplinary procedures in the police thus far have been arbitrary and *ad hoc*. The following submission is a working template that seeks to fulfill the mandate of Amendment 17 Section 155.G.2.

With reference to the scope of the submissions , the procedure is not related to all aspects of police discipline, but rather confined to complaints by aggrieved parties and public complaints. Thus issues of disobedience to superiors and other internal matters are not part of this procedure, though in other jurisdictions these are taken together. This implies that our draft can exclude these aspects.

♠ Compiled in December 2003 by Dr J. de Almeida Guneratne P.C and Kishali Pinto-Jayawardena on request of – and in collaboration with - Basil Fernando, Executive Director, Asian Human Rights Commission, Hong Kong.

Preamble: Principles of the Article 155G(2) of the 17th Amendment

Whereas the 17th Amendment amending the Constitution of Sri Lanka was passed by the Parliament of Sri Lanka in order to bring about greater transparency and accountability in public institutions and in the process of governance, in order that citizens' rights be safeguarded, particularly in so far as restoring law and order and public confidence in the rule of law is concerned;

Whereas the Police Commission was created under the 17th Amendment as aforesaid, to engage in reform of the police service by functioning as an independent inquiry body into public complaints against the service as a whole as well as individual police officers;

Whereas the 17th Amendment, by virtue of Article 155G (2) imposes a specific duty on the Police Commission to establish procedures to entertain and investigate public complaints or complaints of aggrieved persons against an individual police officer or the police service and provide redress in accordance with law;

Whereas there is tremendous public concern about the police force in general and their capacity to enforce law and order in the context of a severe deterioration of discipline, inadequate training and common prevalence of practices of torture by police resulting in public confidence in an independent police service deteriorating to an extent that threatens the very foundations of law and order in Sri Lanka;

And given therefore, that an urgent need exists for the establishing of systematic and transparent procedures under Article 155G (2), in order that public complaints are entertained, investigated and redressed in the manner required by the Constitution;

These following Rules are established by the Police Commission under Article 155G (2) of the Constitution.

CHAPTER 1 – ENTERTAINMENT OF COMPLAINTS

1.1. Public Complaints and Complaints by Aggrieved Parties Against Offender(s) Regarding Specific Incidents

01. Any person, persons or body of persons, who are personally aggrieved or who may become aware of any action or inaction on the part of any police officer or officers leading to a violation of statutory and/or constitutional and/or public duties[1] imposed on such officer or officers or involving a violation of the rights of any person, may complain to the Commission in the manner hereinafter provided for;

[1] See definition of statutory and/or constitutional and/or public duties in part 2.2 of these Procedures

02. Such action/inaction or violation of statutory and/or constitutional duties and/or public duties by police officer/s in respect of which a (complaint may be lodged as aforesaid, includes particularly;

a) death of a person in police care or custody;

b) allegations of torture and/or cruel, inhuman or degrading treatment and/or injury to a member of the public in police care / custody and by any action of a police official;

c) road traffic incidents in which a police vehicle is involved;

d) shooting incidents in which a police officer discharges a firearm in the course of a police operation;

e) allegations of bribery or corruption involving police officers;

f) miscarriage of justice resulting from misconduct by a police officer;

This would include;

(i) refusal/ failure/postponement to record a statement sought to be made to the police;

(ii) undue delay in making available certified copies of c statements made to the police by any person on payment of the usual charges; Explanation;- a lapse of more than 48 hours shall be regarded as 'undue delay' unless the Officer-in-Charge of the relevant police station or any officer under delegation of authority by such Officer-in-Charge, gives in writing the reasons for any delay beyond the stipulated period which may be brought to the notice of the Commission which shall inquire into the said alleged cause for the delay.

(iii) Discouraging complainants or witnesses from making statements;

(iv) Use of abuse words, threats or intimidation on complainants or witnesses;

(v) Failure to maintain records- Erasing or otherwise altering records;

(vi) Making deliberate distortions in statements recorded;

(vii) Failure to read the statements over to the signatories before getting the signatures;

(viii) Exhibiting partiality towards members of political parties in the carrying out of official duties;

(ix) Making false reports and statements to court/deliberate fabrication of cases;

(x) Negligence in filing cases without evidence;

(xi) Failure and/or refusal on the part of any police officer to co-operate with any Attorney-at-Law looking after the interests of his or her client and/or any attempt to deny a person his or her unfettered right to obtain legal representation.

g) any alleged misconduct and/or breach of discipline on the part of a police officer or officers;

h) racist and /or discriminatory and/or sexist conduct by police officers or conduct which offends the constitutional guarantee of equality before the law;

i) arrestable offences allegedly committed by a police officer;

j) any dereliction of the mandatory duties imposed on police officers by virtue of Section 56 of the Police Ordinance;

k) any attempt to deny any individual the freedom of speech or freedom to engage in a lawful occupation, profession and business;

l) any attempt to coerce/intimidate/subvert a medical officer or any other public officer into submitting false documents or engage in dereliction of that officer's duties;

m) In relation to Arrests;

(i) Failures to make notes on each stage of the arrest;
(ii) Failure wear uniform or identification items as police officers;
(iii) Failure to use official transport with identification marks as a police vehicle;
(iv) Failure to inform the reasons for arrest

Provided that where a complaint is pending investigation by a police officer, the complainant will have a right of appeal to the NPC if reasons are provided for in writing by the complainant as to why investigations have been unsatisfactory and such reasons are accepted by the NPC or an officer delegated by the NPC.

1.2 Public Complaints and Complaints by Aggrieved Parties Against the Police Service

Individuals or organizations may submit complaints relating to general deficiencies or concerns of the police service.

These may relate to general issues of police "mis-management and abuse of power in the public sphere" pertaining to a particular locality or in general. For example prevalence of torture in a particular police station may be the subject of such a complaint. Similarly, misbehavior of police officers in a particular area or acts or omissions by police officers in a specific area, absence of some services generally expected from the police such as immediate police response to crimes in a locality and similar violations such as number of fabricated cases and delayed investigations and like issues of police "mis-management and abuse of power in the public sphere" pertaining to a particular area can come under this category.

Public inquiries undertaken by the NPC on its own initiative or by the request or order by the courts or at the request of the state with regard to the police service in general may come under this category.

1.3 The Submission and Entertainment of Complaints

1. Where the complaints are to be made:
   Complaints can be made at the head office and local offices of the NPC. [2]

2. The manner in which complaints could be made:
   Complaints could be made (a) through the post, (b) by fax, (c) by telephone, (d) in person, (e) by electronic mail.

3. What is necessary for a complaint:
   The complaint should be made in the manner that may be prescribed hereinafter by the NPC

1.4 Automatic Complaints System[3]

All Officers–in-Charge of police stations, ASPs and/or DIGs and/or SPs shall refer to the Commission, all cases specified in the following categories regardless of whether there has been a complaint or not;

(a) deaths in police care or custody;

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[2] Interestingly, in the UK-IPCC system, complaints are submitted to the Police which then is passed to the IPCC. It is only when there is a refusal to record a complaint that the complainants have a right to appeal to the IPCC against he refusal. In the Dec 2000 *Complaints Against the Police*(hence CAP) the reason for keeping the complaints recording procedure within the police authority is because "To do otherwise would complicate and lengthen what is a routine process which causes little friction except when there Is a refusal to record." However, this system might not be well suited for the Sri Lankan context.

[3] This method is in effect in the UK-IPCC.

(b) fatal road traffic incidents in which a police vehicle is involved;
(c) shooting incidents in which a police officer discharges a firearm in the course of a police operation;
(d) allegations of corruption involving police officers;
(e) miscarriages of justice resulting allegedly from misconduct by a police officer;
(f) allegations of racist or / and discriminatory and/or sexist conduct by police officers;
(g) an arrestable offence allegedly committed by a police officer; and
(h) allegations of torture and injury of a person in police custody or care and by any action of a police officer.

1.5 Pro-Active Role of the NPC

The NPC may undertake *suo motu* investigations into all or any of the instances set out in sub section 1.4 above.

1.6 The Registering and Documenting of Complaints

1. How to Register and Document a Complaint: There should be guidelines as to how the complaints are registered and documented.

a) if the complaint has been made orally, it should be reduced to writing and read to the complainant who would sign himself to attest the contents of the written complaint.
b) Written complaints received directly or by post or electronic means should be stamped by the receiving officer indicating the time and date it was received.
c) All complaints should be registered on a register of complaints with a unique number which will be the case number for further follow up. Complainant must be informed of the unique number for further follow up.
d) The copies of complaints should also be maintained on a computerized database in which the same unique numbering system should be followed and should also include proceeding tracking information indicating current status and responsible officer.
e) Care should be taken to maintain cross-referencing with regard to complaints recieved in order that similar complaints recieved with regard to police officer/s under sub-section 1.1, 1.2 and 1.4 can be cumulatively evaluated by the NPC at a given time and/or referred to by a member of the public upon authorisation given to that effect by the NPC
f) All steps towards the protection of records must be followed. The NPC should draft regulations relating to the protection of the documents of the NPC which

would allow aggrieved parties and/or members of the public access to completed case records upon permission given by the NPC.

2. How the Complaints will be Archived: The NPC should also issue guidelines as to how these complaints will be maintained and protected, either through protection of written records or use of electronic recording.

CHAPTER 2: Procedure Relating to the Investigation of Complaints and Disciplinary Inquiries Thereto.

2.1 Procedure Relating to Investigations Against Particular Police Officers under Section 1.1 and/or the Automatic Complaints Procedure under Section 1.4

STAGE ONE

a) immediate inquiries (Quick Response) to intervene and stop an ongoing violation against a person to ensure his/her protection and to record the initial statements and observation.

b) inquiries to determine whether there is a prima facia case to proceed with,

c) comprehensive fact finding inquiries to collect all the evidence relating to the complaint.

STAGE TWO

g) Recommendations made to appropriate prosecutorial authority for the purpose of instituting criminal action against the perpetrators;

h) Where findings of such investigation indicate a breach of statutory and/or constitutional and/or public duty on the part of any police officer, the provisions of sub-section 2.2 shall apply *mutatis mutandis*.

Clarification of STAGE ONE

a) *Immediate inquiries (Quick Response) to intervene on an ongoing violation against a person to ensure his or her protection and to record the initial statements and observation.*

Duties of the First Response Officer:

- On reception of the complaint, he will visit the premises where the alleged violation has taken place or continues to take place
- He will record the statements of the victims and the alleged perpetrators and make observations on the condition of the victim/s and record such observations.

- He will issue such instructions as required for the protection of the victim such as immediate medical attention when required, or reallocation of the victim to stop re-victimisation by the perpetrators, and recommend such other measures as to ensure protection of the victim, family and witnesses.

b) Inquiries to determine whether there is a prima facia case to proceed with,

Duties of a NPC authorized officer(s) -

An authorized officer or officers will go through the available evidence and will arrive at a determination as to whether there is a prima facia case to proceed with. Where the determination is not to proceed with further investigation, the reason for such determination should be recorded by the authorized officer. Any such recommendation must be conveyed to the complainant.

c) Comprehensive fact finding inquiries to collect all the evidence relating to the complaint.

An authorized Special Investigation Unit should conduct comprehensive investigations

Duties of Investigators

- recording all the statements of witnesses available;
- viewing / examining and copying necessary records;
- making photographs and causing forensic examination as required by the circumstances
- referring the case for an expert opinion as and when required;
- taking all other necessary steps to ensure that all the available evidence has been collected.
- At the end of the investigations, to review the evidence and make recommendations and submit the file for subsequent action by the NPC.

Clarification of STAGE TWO

Recommendations made to appropriate prosecutorial authority for the purpose of instituting criminal action against the perpetrators.

- Where the NPC is satisfied that evidence of a criminal offense or offences exist under the prevalent law, the NPC will refer the matter for investigation to the relevant authorities with the observation of the NPC that a prima facia case exists against the alleged perpetrators. A information note should be conveyed to the complainant.

- NPC should follow up such reference and obtain reports on the progress of such investigations and subsequent prosecutions;
- Such reports should be made available for public scrutiny at the offices of the NPC unless the said reports are excluded from public scrutiny on express orders of the NPC.

2.2. Procedure Relating to Complaints that Constitute Breach of Public and/or Statutory and/ or Constitutional Duties

Explanation; Breach of Public and/or Statutory and/or Constitutional Duties shall include actions of police officers prohibited in terms of sub-sections (f),(g), (i), (j), (k),(l) and (m) of Section (02) of Section 1.1 above and shall also include adverse findings against any police officer by the Supreme Court in the exercise of its fundamental rights jurisdiction under Article 126 of the Constitution and wilful refusal and/or failure of any police officer to comply with a request made by the NPC (or an officer delegated by the NPC) in pursuance of investigations carried out under these Rules read with the duties imposed upon such police officer under Section 3.1 of these Rules.

Upon a complaint being recieved to this effect or upon such breach being disclosed during investigations conducted under the preceding sub-section of these Rules, an officer of the NPC will record all the relevant statements and collect all evidence of acts of police officer/s that are categorized as breach of Public and/or Statutory and/or Constitutional Duties as defined above within two months of the said complaint being received or disclosed and will refer the report therein to a Committee of the NPC for inquiry;

- On the basis of the comprehensive investigation contemplated in the preceding sub-section, the NPC will conduct a disciplinary inquiry into whether disciplinary action should be taken against the alleged perpetrators, during which inquiry, the alleged perpetrators will be charge sheeted and interdicted from service;

- The inquiry will be conducted within two months of the preliminary report being submitted to the NPC and will be conducted by a three member panel of the NPC presided over by the Chairman or by a member of the NPC with authority delegated thereto by the Chairman of the NPC.

- The complainant and/or affected persons thereto will be notified by the NPC of the said inquiry. The alleged perpetrators will be given the right to defend themselves as required by law;

- After the inquiry, the Committee of the NPC shall make their findings in writing to the NPC.

- On the basis of such finding, the NPC will take appropriate disciplinary action as provided by law. Such decision must be conveyed in writing to the complainants, the perpetrators and the IGP;

- A right of appeal from such decision of the NPC will exist to the Administrative Appeals Tribunal established under Article 59 of the Constitution.

2.3 Procedure Relating to Investigation of Complaints Against the Police Service under Section 1.2

Procedure Relating to Complaints against the Police Service.

a) Upon the receipt of complaints against the police service, the NPC shall delegate the complaint to an officer of the Special Investigation Unit of the NPC for follow up action;

b) Such officer shall record all the statements of witnesses available, view/ examine and copy necessary records, make photographs and cause forensic examination as required by the circumstances, refer the case for an expert opinion as and when required, take all other necessary steps to ensure that all the available evidence has been collected;

i) At the end of the investigations, which shall not be longer than a period of three months, the officer shall submit the report to the NPC.

Provided that, if a written request is made to the NPC for an extension of this time period for explainable reasons, such extensions may be granted for one month at a time, provided that the entire timee period shall not extend for more than six months.

j) Upon the receipt of the report, a three member Committee of the NPC shall deliberate on the report and shall cause the same to be notified to the complainant. Written representations may be called for by the public under the hand of the Secetary to the NPC if such is considered to be necessary. Such views may be furnished in writing or the committee of the NPC may also make available time for oral representations;

k) Such deliberations shall be in public unless the NPC sets down in writing, the reasons why it should be held in camera;

l) The report of such sub-committee of the NPC shall be submitted to the NPC sitting as a body within three months of the complaint being made along with the findings and/or recommendations of the said committee and the NPC shall, within two months of the report being submitted, authorise the implementation of the same with suitable modifications;

m) The findings of the NPC shall, along with the investigative report, be filed in the offices of the NPC to enable public scrutiny unless reasons are given in writing by the NPC as to why the report and/or the findings cannot be made public.

CHAPTER 3: THE POWERS OF THE NPC, ITS PUBLIC ACCOUNTABILITY AND MATTERS INCIDENTAL THERETO

3.1. The Accessibility of Information for an Effective NPC to complete Investigations

For investigations to be thorough, the NPC will need open access to all relevant information.

In terms of the power given to the NPC under Article 155G(2) to investigate complaints against any police officer or the police service, all police officers are under

(a) a legal obligation to produce and/or give access to the NPC documents or other material as called for;
(b) allow members of the NPC to take away the actual or copies of the documents or other material, and
(c) allow entry to police premises;

Explanatory Note; Breach of these duties will result in disciplinary sanctions being visited on the errant police officer by the NPC acting under Section 2.2 of these Rules

1. NPC should have full access, when appropriate, to all necessary information from both the public and private sector.

2. Simultaneously the NPC should abide by the following guidelines when handling the information:

3. The NPC in their dealings with the complainant, should have the discretion to disclose information from the investigation of complaints subject only to harm test;

4. The NPC should have the freedom to use information received from reports and other documents from police forces, after excluding sensitive or demonstrably confidential material, to compile guidance, promotional and other material for the purpose of continuous improvement in the complaints procedure and in raising the publics awareness and understanding of the complaints procedure.

3.2 The NPC and its response to the Complainant(s)

Once the investigatory process mandated with regard to all complaints against a police officer is complete, the complainant(s) should be sent a full written account of the investigation to the complainant setting out the way the investigation had been conducted, a summary of the evidence, the conclusions, which include the proposed action to be taken against the officer concerned, reasons for those conclusions and any action taken to prevent a recurrence;

If necessary, a member of the NPC should meet the complainant or the family of the complainant, explain the results of the investigation and findings.

3.3. Duty of Fairness on the Part of NPC Officers and Prohibition on Collusion with the Police in any Form or Manner Whatsoever

All officers of the NPC shall be under a duty to act fairly in entertaining, acting upon or investigating complaints as mandated under Sections 1 and 2 of these Rules;

Any officer of the NPC found colluding with any police officer or officers in any form or manner whatsoever in the carrying out of their duties as contemplated by these Rules will be immediately suspended from work aand upon inquiry being held, will be forthwith dismissed from the service of the NPC.

3.4. The NPC and Public Accountability

The NPC should not only be unbiased, but must be perceived by the public to be unbiased. To ensure transparency and maintain the public confidence the NPC should present an annual report of its activities through means that will be accessible to the public.

NPC finances should generally be produced and available. The NPC should provide an opportunity to assess the public confidence of NPC, through public debates and surveys.

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