

SRI LANKA

I. INTRODUCTION

1. THE LEGAL FRAMEWORK

1.1. The Constitution

Sri Lanka has a population of about 19 million people which is comprised of Sinhalese, Tamils, Muslims as well as Burgher, Malay and Vedda.

Sri Lanka, formerly called Ceylon, became independent from the United Kingdom on 4 February 1948. The current Constitution was adopted on 16 August 1978. It declares Sri Lanka to be a Democratic Socialist Republic in the form of a unitary state¹ divided into 9 provinces. The Constitution guarantees fundamental rights and freedoms, such as freedom from torture or cruel, inhuman or degrading treatment (Article 11); freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation (Article 13) as well as a number of other individual and collective rights and freedoms but not the right to life.² Under Article 4(d) of the Constitution, all the organs of the government are bound to respect, secure and advance the fundamental rights declared and recognized by the Constitution.

Judicial power is exercised by the Supreme Court, the Superior Court, the Court of Appeal, the High Court established for each region together with courts of first instance, tribunals or institutions.³ The courts of first instance are comprised of the Magistrates Court in criminal cases, and the District Courts in civil cases. The Supreme Court has limited power of reviewing the constitutionality of bills and Acts of Parliament according to Article 120 of the Constitution. Article 126 of the Constitution conveys the Supreme Court with sole and exclusive jurisdiction to hear and determine cases relating to the infringement of fundamental rights by State action. The independence and impartiality of the judiciary are guaranteed by Articles 107-117 of the Constitution.⁴

1.2. Incorporation and Status of International Law in Domestic Law

Sri Lanka has ratified the following relevant international human rights and humanitarian law treaties:

- Genocide Convention (12 October 1950)
- Geneva Conventions 1949 (28 February 1959)
- ICCPR (11 September 1980)

¹ Article 1(1) and 2) Constitution.

² This right has now been included in Article 8 of the 2000 Draft Constitution.

³ Article 105(1) Constitution.

⁴ Independence of the judiciary has been further strengthened by the 17th Amendment to the Constitution which vested the power of appointment of the Judges of the Superior Courts and the members of the Judicial Service Commission in a Constitutional Council appointed with the concurrence of all political parties represented in the Parliament. The 17th Amendment was adopted in September 2001.

- ICESCR (11 September 1980)
- CEDAW (5 October 1981)
- CERD (18 February 1982)
- CRC (12 July 1991)
- Convention against Torture (3 January 1994)
- Optional Protocol ICCPR (31 November 1997)

Customary international law and human rights treaties ratified by Sri Lanka have no status in national law. They cannot be directly invoked or enforced through the courts or by the administration in Sri Lanka. They must be transformed into domestic law before the courts or competent authorities can apply them. Even so, the Courts of Sri Lanka have referred to them in their judgements. Sri Lanka has enacted the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994 to give effect to the Torture Convention.

2. PRACTICE OF TORTURE: CONTEXT, OCCURRENCE, RESPONSES

2.1. The Practice of Torture

There have been several violent conflicts in Sri Lanka over the last thirty years. The most severe of these has been the armed confrontation in the Northeast of the country between government forces and paramilitary groups on one side and the LTTE (Liberation Tigers of Tamil Eelam) on the other. This armed conflict, which broke out in 1977, has continued almost unabated until late 2001 when the new Sri Lankan government under the leadership of Ranil Wickremasinghe, UNP, and the LTTE agreed upon a ceasefire.⁵ In the course of the conflict, both sides carried out serious human rights violations. Government forces have reportedly carried out extra-judicial killings, "disappearances" and torture on a wide scale.⁶ As it has come to light in numerous habeas corpus and fundamental rights applications, torture has frequently been used against Tamil detainees. Most of the cases filed against them depended solely on the confessions extracted under torture. Torture has been facilitated by a number of emergency laws, some of which have recently been lifted, which suspended safeguards and curtailed the rights of the people affected, i.e. mainly the Tamils living in the Northeast of Sri Lanka. Presently, in the context of attempts to find a peaceful settlement to end the military conflict, several constitutional reforms are being discussed which might lead to a substantial devolution of political power to the Tamil dominated areas.⁷

Torture has also been systematically applied during the JVP (Janatha Vimukthi Peranmuna, People's Liberation Front) uprisings. In the suppression of the 1971 JVP uprising, several thousand youth were extra-judicially killed and over 15,000 were held in long-term detention without trial. Most of those were subjected to torture. During the 2nd JVP uprising from 1987 to 1991, over 30,000 persons were disappeared or extra-judicially killed and over 18,000 persons were held in long-term detention without trial. The majority of those in custody had been subjected to torture. Army camps were set up throughout the country where detainees were held

⁵ The negotiations of both parties regarding a political settlement of the conflict are ongoing at the time of writing.

⁶ See, also on the historical background, Elisabeth Nissan, Sri Lanka: A Bitter Harvest, Minority Rights Group, London, 1996.

⁷ E.g. the Draft Constitution of 3 August 2000.

for years without trial. Several army camps and police stations earned notoriety as torture chambers. During this period the government sanctioned torture and the state agencies carried out torture with its connivance.⁸

While the number of allegations of torture in the Northeast has decreased since the ceasefire came into effect in 2001, torture appears to continue unabated in the rest of the country, judging by the cases reported in the press as well as by human rights organisations. In particular, there has been a significant rise of cases of rape in custody.⁹ There have also been twelve cases of people dying in suspicious circumstances in custody since late 2001 in the south of the country.

The perpetrators have employed a wide range of torture methods, the use of which has resulted in several deaths in the custody of the army, the police and prisons. Typical perpetrators of torture have been the Police and the members of security forces. Allegations of torture have mostly been directed against the Police Forces members which often appear to act collectively.¹⁰ In the Northeast, allegations of torture have been made mainly against the army, the navy and the Special Task Force (STF) of the Police. In this context, torture has been routinely committed following an arrest under the Emergency Regulations (ER) or the Prevention of Terrorism Act (PTA), often in unauthorised places of detention. Reportedly, Tamil groups fighting alongside government forces have also committed serious human rights violations, including torture.¹¹ Allegations of torture are rarely made against the Prison Administration though the prison officers use force to keep the prisoners under control.

During the periods of conflict specified above, victims of acts of torture were mostly political prisoners who were arrested and detained under Emergency Regulations and the Prevention of Terrorism Act. Despite the fact that all the persons arrested in connection with the ethnic struggle are persons belonging to the Tamil community, torture has not been exclusively directed against members of ethnic communities or political opponents of the regime.

As is evident from the records of the fundamental rights applications filed in the Supreme Court during the period 1990 – 2001, the vast majority of victims of torture are ordinary persons. Women have in some instances become victims of various forms of sexual harassment and abuse, including rape, in custody. Children have also been subjected to torture in several cases.

In the majority of cases, torture has been employed to extract statements and confessions. It has however also been used to intimidate political opponents, to gain sexual pleasure, to settle personal scores and as a form of punishment.¹²

⁸ Amnesty International, Sri Lanka, Extra-judicial Executions, "Disappearances" & Torture, 1987-1990, London 1990.

⁹ See Amnesty International, Sri Lanka: Rape in Custody, January 2002, AI Index: ASA 37/001/2002.

¹⁰ Which has been referred to as "Gang Behaviour", see on this Newman, Dwight, Patterns of Torture, Circumstances Facilitating Torture in Sri Lanka and Malaysia, in: Human Rights Solidarity, Vol.12, No.4, July 2002, at 16.

¹¹ See Amnesty International, Sri Lanka: Torture in Custody, June 1999, AI Index: ASA 37/10/99 and the issue of the journal Article 2, Vol.1, No.4, August 2002 of the Asian Human Rights Commission which contains several articles on the practice of torture in Sri Lanka.

¹² See *ibid.*

2.2. Domestic Responses

Over the last ten years, the Government has, taken the following steps in response to human rights violations and torture: ratification of the Torture Convention and subsequent enactment of a Torture Act; appointment of four Commissions of Inquiries into Involuntary and Enforced Disappearances; establishment of a Human Rights Commission empowered to investigate cases of human rights violations; establishment of special units responsible for prosecuting torture and "disappearances" in the Police and Attorney General's department, introduction of a human rights component to all of its training programmes for the Police and the Armed Forces. In 2001, the Inspector General of the Police issued an official circular to all officers in charge of Police Divisions and Specialised Divisions that stated that under no circumstances should torture be perpetrated or permitted.

While the Supreme Court has strongly condemned torture and the continuing impunity of torturers on several occasions,¹³ the lower courts have apparently shown less willingness to take a strong stance against torture.¹⁴

2.3. International Responses

As Sri Lanka only ratified the optional protocol to the ICCPR in 1997, and is not subject to the jurisdiction of any other human rights bodies or courts, it has been largely left to the various UN bodies charged with monitoring human rights to highlight human rights violations in Sri Lanka and recommend steps to be taken to improve the human rights situation.¹⁵ Throughout the 1990s, the UN Working Group on Enforced or Involuntary Disappearances urged Sri Lanka to take effective steps to bring down the extremely high number of "disappearances".¹⁶ In 1998, the Committee against Torture, in its observations on Sri Lanka's country report under the CAT, stated that it was "gravely concerned by information on serious violations of the Convention, particularly regarding torture linked with disappearances," "regrets that there were few, if any, prosecutions or disciplinary proceedings despite continuous Supreme Court warnings and awards of damages to torture victims,"... "noted the absence, until recently, of independent and effective investigations of scores of allegations of disappearances linked with torture," and urged Sri Lanka to take steps to combat impunity.¹⁷

Sri Lanka was also subject to a confidential inquiry of the Committee against Torture under Article 20 of CAT from April 1999 to May 2002. The Committee observed that

¹³ "The fact that police officers continue unlawful acts, including torture, despite regular judicial condemnation of such acts, shows that the authorities have permitted such acts by their failure to impose effective sanctions." – Kulatunge J, *Pelawattage vs. O.I.C. Wadduwa*, SC Appn. No. 433/93, SC Minutes, 31 August 1994; "The incidence of unlawful arrest and detention and torture by police officers has not declined, which situation is attributable to the failure on the part of the authorities to impose prompt, adequate and effective sanctions against offending officers. The Court views this situation with dismay and hopes that it will be remedied forthwith." – Kulatunge J, *Weragama vs. Indran and others*, SC Appns. 396-397/93, SC Minutes, 24/02/1995.

¹⁴ See *infra*.

¹⁵ Several cases relating to torture and "disappearances" are presently pending before the Human Rights Committee.

¹⁶ See Report on the visit to Sri Lanka by a member of the Working Group on Enforced or Involuntary Disappearances (25-29 October 1999), UN Doc. E/CN.4/2000/64/Add.1, 21 December 1999.

¹⁷ Concluding observations of the Committee against Torture: Sri Lanka, UN Doc.A/53/44, paras.243-257, 19 May 1998, paras.249 et seq.

torture is frequently resorted to by the police, the army and paramilitaries and stated that "even though the number of instances of torture is rather high, the majority of suspects are not tortured; some may be treated roughly."¹⁸ The Committee "welcomed the significant efforts undertaken by the Government of Sri Lanka to fight and prevent acts of torture" while noting that "Investigation by the Sri Lankan police of alleged instances of torture is not satisfactory, as it has been often inordinately delayed. Prosecution or disciplinary proceedings have until recently been rare."¹⁹

The large number of reported cases of "disappearances", torture and rape in custody have also been highlighted by the Working Group on Enforced or Involuntary Disappearances,²⁰ the UN Special Rapporteurs on torture²¹ and Violence against Women,²² all of whom have urged Sri Lanka to take adequate measures to eradicate such human rights violations, in particular by combating impunity.

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

Under Article 11 of the Constitution, freedom from torture is a fundamental right guaranteed by the Constitution: 'No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. According to Article 15, there shall be no derogation from the rights declared and recognised in Article 11 in times of public emergency.

Torture is a criminal offence under the Torture Act No.22 of 1994, Section 12 of which defines torture in line with Article 1 of the Torture Convention as follows:

"Torture, with its grammatical variations and cognate expressions, means any act which causes severe pain, whether physical or mental, to any other person, being an act which is-

(a) done for any of the following purposes:

(i) obtaining from such person or a third person any information or confession;

(ii) punishing such other person for any act which he or a third person has committed, or is suspected of having committed;

or

(iii) intimidating or coercing such other person or a third person; or

(b) done for any reason based on discrimination,

¹⁸ CAT report presented to General Assembly, to be published, para. 176, 177. See in this regard Amnesty International, Sri Lanka: Amnesty International urges the government to stop torture, AI-Index: ASA 37/017/2002, 1/11/2002. Of note, a number of human rights organisations, including Amnesty International, expressed concern at the findings of the Committee.

¹⁹ Ibid., paras. 195 and 179.

²⁰ Supra.

²¹ See Report of the Special Rapporteur on Torture, Sir Nigel Rodley, UN Doc. E/CN.4/2001/66/Add.1, 25 January 2001, paras. 956 et seq., who observed, para.1001, *inter alia*, that "It remains evident that more prosecutions and convictions will be required in order significantly to affect the problem of impunity."

²² See Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/2002/83/Add.1, 28 January 2002, paras. 117-139.

and being in every case, an act, which is, done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.”

The Supreme Court has in its jurisprudence interpreted torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by a public official acting in the discharge of his executive or administrative duties or under colour of office for such purposes as obtaining from the victim or a third person a confession or information, imposing a penalty on the victim... or coercing the victim or third person to do or refrain doing something...”²³

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. THE SUBSTANTIVE LAW

1.1 Criminal Offences and Punishment

Acts of torture, as well as participation, complicity, and incitement to torture or the attempt to torture are punishable under criminal law in Sri Lanka. Section 2 of the Torture Act states: “(1) Any person who tortures any other person shall be guilty of an offence under this Act; (2) Any person who- (a) attempts to commit; (b) aids and abets in committing; (c) conspires to commit, an offence under subsection (1), shall be guilty of an offence under this Act.”

The law does not recognise any specific defences against charges of torture. Section 3 of the Torture Act specifically denies the defence of exceptional circumstances: “For the avoidance of doubts it is hereby declared that the fact that any act constituting an offence under this Act was committed- (a) at a time when there was a state of war, threat of war, internal political instability or any public emergency; (b) on an order of a superior officer or a public authority, shall not be a defence to such offence.”

Torture is punishable by a mandatory minimum sentence of imprisonment of seven years with a maximum sentence of ten years. Such a sentence cannot be suspended. A perpetrator of torture is also liable to a fine of 10,000 to 50,000 rupees (\$100-500).²⁴

Under the Penal code, the only criminal law applicable to acts of torture before the Convention against Torture Act in 1994 came into force, a perpetrator of torture and other forms of ill-treatment can be charged with voluntarily causing hurt²⁵ to extort a

²³ Amarasinghe J in *De Silva, Mrs. M. K. vs. Chairman Ceylon Fertilizer Corporation*, (1989) 2 S. L. R. 393: “Torture implies that the suffering occasioned must be of a particular intensity or cruelty. In order that ill treatment may be regarded as inhuman or degrading it must be ‘severe’. There must be the attainment of a ‘minimum level of severity.’ There must be the crossing of the ‘threshold’ set by the prohibition. There must be an attainment of ‘the seriousness of treatment envisaged by the prohibition’ in order to sustain a case based on torture or inhuman or degrading treatment or punishment,” in: *Our Fundamental Rights of Personal Security and Physical Liberty* by Amarasinghe J, 1995, p. 29, quoted in several judgements with approval.

²⁴ S. 2 (4) Torture Act.

²⁵ Section 310 Penal Code defines causing hurt as: “Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.”

confession or to compel the restoration of property.²⁶ This offence carries a punishment of up to seven years imprisonment and a fine, and ten years imprisonment and a fine in cases of causing grievous hurt.²⁷ Voluntarily causing hurt is subject to a punishment of a term of imprisonment of up to one year and/or a fine²⁸ and voluntarily causing grievous hurt shall be punished with a maximum of seven years imprisonment and a fine.²⁹

Rape in custody and gang rape, both aggravated forms of rape, is subject to a punishment of a minimum of ten, and a maximum of twenty years imprisonment and a fine.³⁰ Culpable homicide and murder are crimes carrying heavy punishments, the latter being punishable with death.³¹

1.2. Disciplinary Sanctions

The rules applicable to disciplinary action against all public officials, including police, are contained in Chapters XLVII and XLVIII of Volume 2 of the Establishments Code. The disciplinary procedures applicable to the members of armed forces are contained in the respective Acts dealing with the three Forces. Disciplinary sanctions can also be imposed following a judgment of the Supreme Court.³²

Disciplinary sanctions, which can be applied in lieu of and in addition to criminal sanctions, may take the form of withholding salary increases or promotions for a few months or at most for a year. Public officials, including physicians in public service, may be barred or suspended from the public service or from certain other professions if they are convicted and sentenced to imprisonment.

2. THE PROCEDURAL LAW

2.1. Immunities

All public officials can be prosecuted for torture under the Torture Act. There are no amnesty laws or immunities which apply to the crime of torture. The provisions in the Emergency Regulations and the PTA which protect the officers who enforce emergency powers from criminal prosecution does not apply to perpetrators of torture.³³

²⁶ Section 321 Penal Code: "Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, ... shall be punished with imprisonment of either description for a term which may extend to seven years, and shall be liable to a fine."

²⁷ Section 322 Penal Code.

²⁸ Sections 312 and 314 Penal Code.

²⁹ Sections 313 and 316 Penal Code.

³⁰ Section 364 (2) Penal Code.

³¹ Sections 293-297 of the Penal Code. The death sentence has not been carried out in Sri Lanka since 1977.

³² See infra III, 3.3.

³³ See e.g. Emergency Regulations published in the Gazette Extraordinary No. 1.130/8 dated 03. 05. 2000. This provision is found in all Emergency Regulations promulgated at different times since 1983: "No action or other legal proceeding, whether civil or criminal, shall be instituted in any court of law in respect of any matter or thing done or purported to be done in good faith, under any provisions of any emergency regulation or of any order or direction made or given thereunder, except by, or with the written consent of, the Attorney General."

2.2. Statutes of Limitation

There is no express statute of limitations for the crime of torture but criminal prosecutions have a prescribed limit of twenty years with the exception of murder and treason.³⁴

2.3. Investigations into Torture

2.3.1. Criminal procedure

A torture survivor has the following avenues through which he/she may lodge a complaint concerning alleged acts of torture:

- Firstly, to the Supreme Court by letter addressed to the Chief Justice alleging violation of a fundamental right (Article 11 of the Constitution) or by way of a formal application (petition & affidavit supported by medical reports) by the victim or an attorney-at-law on his behalf within 30 days of such infringement. These applications are private prosecutions brought by victims or by lawyers on their behalf;
- Secondly, to the Police with the aim of seeking disciplinary action or criminal prosecution. If the torture has been inflicted by the local Police, the complaint can be made orally or in writing to a higher Police Authority in charge of the local Police in question;³⁵
- Thirdly, to the Attorney General's Department by way of a written complaint;³⁶
- Fourthly, a complaint can be filed with the National Human Rights Commission;³⁷ and
- Finally, a torture survivor or a relative of a torture victim may also file a criminal action against an alleged torturer for voluntarily causing hurt under the Penal Code provided the police have not filed an action themselves. Such proceedings can be instituted in a Magistrate's Court, by a complaint being made orally or in writing to a Magistrate stating that an offence has been committed over which the court has jurisdiction either to inquire into or try. Such complaint if in writing shall be drawn up by a pleader and signed by the complainant.³⁸ The victim has to obtain a certified copy of the initial complaint, which needs to be made to the police as well as a medical report

³⁴ Section 456 Criminal Procedure Code.

³⁵ This can be done in the following order: Assistant Superintendent of Police (ASP) → Superintendent of Police (SP) → Deputy Inspector General of Police (DIG) → the Police Headquarters See Criminal Procedure Code, Chapter XI, Ss. 109(1), (2), (5)(a), S. 125.

³⁶ There are no laws applicable as such. For the implementation of the Torture Act, a Perpetrators of Torture Prosecution Unit has specially been set up in the Attorney General's Department on the basis of an internal arrangement.

³⁷ See infra III, 2.3.2.

³⁸ S.136, 1a) Criminal Procedure Code.

from a government hospital that is normally not made available without a court order.³⁹

The Police are responsible for the investigation and the Attorney General's Department is responsible for the prosecution of an alleged torturer on the ground of committing torture as defined in the Torture Act.⁴⁰ The Criminal Investigations Department (CID) conducts all investigations into complaints of torture and the investigation is conducted on the directions of the Attorney General's Department. There is a Prosecution of Torture Perpetrators Unit in the Attorney General's Department which was set up in November 2000. It has taken steps to investigate and prosecute acts of torture committed since Sri Lanka's ratification of the Torture Convention.

There are no special procedures for investigating and prosecuting offences involving members of the state institutions that would normally conduct the investigation. But where there are allegations of torture against the officers of the CID, the investigation will be entrusted to a Special Investigation Unit at the Police Headquarters under a senior Deputy Inspector General of Police.⁴¹

On complaints of serious offences, opening an investigation is obligatory in cases where there is credible evidence of the commission of the offence, i.e. a prima facie case.⁴² The police may decide to discontinue an investigation on the basis of a lack of evidence to prove a case beyond all reasonable doubt.⁴³

The Attorney General has the power to review such a decision and give necessary directions to continue with the investigations.⁴⁴ The Courts may also review such a decision but there are no precedents to date. The HRC may also inquire into a complaint of not proceeding with investigations but it has no power to give directions to reopen the investigations.

When an allegation of torture is made, steps may be taken to arrest the alleged perpetrator of torture.⁴⁵ The person making the complaint has a right of access to a doctor and/or to have a medical report drawn up. When a suspect is produced in Court from Police custody, the person or his lawyer can request the Court to have him examined by a government medical practitioner and call for a medical report on the injuries and their causes.⁴⁶ An injured person can be treated in the prison hospital. The history given by the injured person is recorded by the medical practitioner. At the time of filing a fundamental rights application the victim can request the Court for an order directing a Judicial Medical Officer or a District Medical

³⁹ S. 122(1), (2), S. 124 and S.137 of the Criminal Procedure Code which are meant to assist the Police in conducting investigations. There are no similar provisions supporting private complaints in the Magistrate's Courts.

⁴⁰ Whether under the Torture Act or under the Penal Code for voluntarily causing hurt, the Police will not take steps to prosecute a torturer without a direction by the Attorney General. The Police have the power to institute action under the Penal Code for voluntarily causing hurt in the Magistrate's Court. Under the Torture Act only the Attorney General can indict a person in the High Court.

⁴¹ In 1997, there was also a Disappearance Investigations Unit established.

⁴² S. 109(5)(a) Criminal Procedure Code; Ss. 109(5)(b), 114, 115(1), and 116(1) Criminal Procedure Code.

⁴³ S.109 (5) (b) Criminal Procedure Code.

⁴⁴ Ss. 393 and 397 Criminal Procedure Code.

⁴⁵ Section 2 (5) Torture Act.

⁴⁶ See section 122 Criminal Procedure Code.

Officer (DMO) to examine the person and furnish a report. In case of suspicious deaths, an autopsy has to be carried out.

The decision of the Attorney General not to indict the alleged torturer is not subject to any expressly provided for independent or judicial review. The Courts may have the power to review the decisions of the Attorney General but there is no such precedent.

A victim of torture has the right of access to a doctor and can bring a private prosecution in certain cases, but not under the Torture Act, as outlined above. Beyond this, victims, their families and witnesses have no right to specific protection during the proceedings but can bring any threat or harassment to the attention of the Court, which can take steps to ensure their protection.

2.3.2. National human rights commission

A victim of torture or any interested party or an attorney-at-law on their behalf may complain to the HRC in writing alleging a violation of Article 11 of the Constitution within a reasonable time (there is no time limit).⁴⁷ Under Section 14 of the Human Rights Commission Act, the Commission has power to conduct investigations into complaints of violation of fundamental rights. Where an investigation discloses the infringement of a fundamental right, the Commission has the power to refer the matter for reconciliation or mediation.⁴⁸ Where the attempt at reconciliation or mediation is not successful, the Commission may recommend to the appropriate authorities that a prosecution or other proceedings be instituted against the violator; or make such recommendation to the appropriate authority with a view to preventing or remedying the violation.⁴⁹ A copy of the recommendation shall be sent to the aggrieved person, the head of the institution concerned and the Minister to whom the institution concerned has been assigned.⁵⁰ The Commission shall require any authority or persons to whom a recommendation is addressed to report to the Commission the action taken to give effect to such recommendation.⁵¹ Where any authority fails to report to the Commission, the Commission shall make a full report of the facts to the President who shall cause a copy of such report to be placed before Parliament.⁵² The Commission can only make recommendations and has no power to make orders.⁵³

2.4. Trials

Under the Torture Act, only the High Court has jurisdiction to try all persons indicted for torture.⁵⁴ A Magistrate's Court has power to try a person charged with voluntarily

⁴⁷ See Section 14 Human Rights Commission of Sri Lanka Act, No. 21 of 1996.

⁴⁸ Ibid., Sections 15 (2) and 16.

⁴⁹ Ibid., Section 15 (3).

⁵⁰ Ibid., Section 15 (6).

⁵¹ Ibid., Section 15 (7).

⁵² Ibid., Section 15 (8).

⁵³ See for the powers of the Commission, *ibid.*, Section 11.

⁵⁴ S.2, Torture Act.

causing hurt under the Penal Code.⁵⁵ A Court Martial may have the power to try military personnel charged with torture.⁵⁶

All trials relating to torture are conducted under the normal criminal procedure code of the country.⁵⁷ In torture cases on indictment, the State Counsel of the Attorney General's Department conducts the trial. This is based on the adversarial system. As torture is a criminal offence, a high degree of proof is required to prove the case beyond all reasonable doubt. If relevant and admissible, no evidence will be excluded or withheld on grounds of public security.

The law allows for the participation of the victim or (in the case of death of the victim his or her relatives) in a criminal trial as an aggrieved party.⁵⁸ A lawyer may appear to look after the interests of the aggrieved party. The aggrieved party cannot lead evidence or cross-examine witnesses at High Court trials, but can make submissions, with leave of the Court, on matters affecting them specifically.⁵⁹ The Court has discretionary sentencing power.⁶⁰ The punishment for voluntarily causing hurt may be a suspended sentence. Every convicted prisoner is entitled to remission of his/her sentence at the rate of three months for every year. A prisoner may also benefit from pardons and amnesties.

3. THE PRACTICE

3.1. Complaints

There have been numerous complaints relating to the commission of torture to the courts, police, Attorney General and the Human Rights Commission.⁶¹ As at 30 June 2002, the Torture Perpetrators Unit in the Attorney General's Department had selected for investigations, 94 cases out of the fundamental rights applications that were filed in the Supreme Court alleging torture during the period from January 1994 (the year in which Sri Lanka ratified the Torture Convention) to date. It also selected 20 cases mentioned in Amnesty International reports and 52 cases referred to by the UN Special Rapporteur on Torture for investigation. However, many torture survivors have refrained from making complaints, particularly against members of the army in the Northeast, because of a lack of access to the available mechanisms, out of fear of reprisals or because of the stigma attached to rape in custody cases.

⁵⁵ Ss. 313 – 322 Penal Code; First Schedule; Ss. 10 and 11 Criminal Procedure Code.

⁵⁶ There are no such precedents.

⁵⁷ For summary trials before the Magistrate's Court for offences under the Penal Code : Chapter XVII, Ss. 182 – 192 Criminal Procedure Code; For High Court trials for offences under the Torture Act : Chapter XVIII, Ss. 193 – 203 Criminal Procedure Code.

⁵⁸ S.41, S.1 Judicature Act, S. 260 and Criminal Procedure Code. NGOs are not allowed to participate.

⁵⁹ *Bandaranayake vs. Jagathsen* (1984) 2 SLR 397: "Under S. 260 of the CPC every aggrieved party has the right to be represented in "any criminal court" by an attorney-at-law and implicit in this right is the right to address court and make submissions. This right is not confined to a Court of First Instance; the expression 'any criminal court' is wide enough to cover all Courts including Appellate Courts having the necessary Jurisdiction. S.41 (10) of the Judicature Act lends support to this interpretation. An attorney-at-law is entitled not only to assist and advise his clients but also to appear, plead or act on behalf of them in every court or other institution established by law for the administration of justice."

⁶⁰ Section 13 Criminal Procedure Code.

⁶¹ Moreover, in early 2000, 2796 cases had been referred to the Disappearance Investigation Unit by the IGP.

3.2. Investigations

In a considerable number of cases, complaints about torture, especially before the year 2000, have not been investigated promptly, adequately and impartially. This applies in particular to police investigations that have reportedly been characterized by an unwillingness to take action against other members of the police or the army. Examples of this are: inaction; insufficient use of investigation methods; manipulation of evidence; various forms of pressure being brought to bear on the victims and their families to withdraw complaints; and incriminating statements.⁶² Investigations generally take a fairly long time, from a few months to several years. After the recently instituted institutional changes, investigations conducted by the CID on the directive of the Attorney General's Department may be conducted more expeditiously and to a higher standard.

Public servants charged with offences are not generally suspended from their posts pending trial, though there is a provision for this.⁶³ There are still credible reports about incidences where torture survivors and relatives of torture victims have been threatened and intimidated when complaining about torture, though recently such cases appear to be less common.

The courts and police generally follow the procedures outlined above concerning the examination of torture survivors and the drawing up of medical reports. However, there have been reported instances in which doctors issued false or insufficient reports, sometimes simply stating that there are no injuries, usually in cases where police officers are present during the investigation. Examinations have also been delayed which has in rape cases had the result in the allegation no longer being proven.⁶⁴

While the Supreme Court has repeatedly issued orders to investigate cases of torture and prosecute the alleged perpetrators, lower courts have at times failed to take appropriate action. Confessions elicited through torture are not admissible in court.⁶⁵ Before leading the confession in evidence the prosecution has to prove that the confession has been made voluntarily. Generally Sri Lankan Courts have demonstrated caution before accepting a confession as evidence and, if an allegation of torture is made, normally will order a *voir dire* inquiry before declaring admissible such a confession. However, even where lawyers appearing for suspects inform the Magistrate of the fact that the suspect has been tortured resulting in injuries, some Magistrates have directed that treatment is to be provided to the suspect without getting him examined by a JMO and calling for a medical report on injuries.⁶⁶

⁶² Newman, Dwight, Patterns of Torture, Circumstances Facilitating Torture in Sri Lanka and Malaysia, in: Human Rights Solidarity, Vol.12, No.4, July 2002, at 18.

⁶³ Establishments Code, Vol. 2, Chapter XVIII, Rule 21.1.

⁶⁴ See Amnesty International, Rape in custody, supra, p.7, specifying the reasons why rape in custody cases are often unsuccessful.

⁶⁵ Ss. 24 – 27 of the Evidence Ordinance shut out confessions in criminal trials. However under the Prevention of Terrorism Act and the Emergency Regulations voluntary confessions made to a police officer not below the rank of an Assistant Superintendent of Police is admissible in evidence.

⁶⁶ The Supreme Court has commented on this attitude of some Magistrates: "In my opinion it is indeed a matter of concern and trepidation that Magistrates in spite of repeated reminders by this Court do not exercise what is their duty namely to question and probe from a person produced before them from Police custody and to so record his observations. It has been my experience that Magistrates did act so and it was a deterrent to breaches of fundamental rights even when they were not enshrined by a constitution. It is a further tragedy that some members of the legal profession do not act with courage and fearlessness in what is their duty. I say so with responsibility

3. 3. Prosecutions: Indictments, Convictions, Sentencing

The Torture Perpetrators Unit has filed 17 indictments against perpetrators of torture in Colombo, Negombo, Gampaha and several other High Courts. These cases are still pending and to date there have been no convictions under the Torture Act. In many of the cases investigated, the Unit has found that there was insufficient evidence for prosecution.

There has only been one case filed under section 321 of the Penal Code.⁶⁷ Criminal trials in the High Courts will normally take several years to be concluded. Perpetrators have raised a range of defences against torture.⁶⁸ Under the provisions of the Torture Act, if convicted, more stringent penalties will invariably be imposed. There have been no convictions for the crime of torture after 1994 and no known convictions for voluntarily causing hurt to extort confessions under section 321 of the Penal Code before 1994. However, there have been a few high profile convictions in torture related cases.

In 1998, the first case in which security forces were given heavy sentences for serious human rights violations, five members of the security forces were sentenced to death, having been found guilty of rape, disappearance and murder of Krishanty Kumarasamy, her mother, 16-year-old brother and neighbour in 1996.⁶⁹ In 1999, six members of the security forces and one school principal were sentenced to 10 years' imprisonment each for the "disappearance" of 25 people.⁷⁰

The police and the army have taken disciplinary measures against perpetrators of torture in some cases but the practice has been infrequent. However, the Supreme Court has taken various steps aimed at taking disciplinary action and prosecutions against perpetrators of torture, such as in torture cases sending judgements to the Inspector General of Police (IGP) to be maintained in the personal files of the officers

inasmuch as an allegation of assault and of torture has been made to the Superintendent of Police on the 17th of February 1998 after this release of the petitioner by the Magistrate in consequence of which the petitioner was produced before the JMO, but the Attorneys-at-Law did not bring this to the notice of the Magistrate. May be the medical report in the first instance would have been quite different if the petitioner was so produced on the instructions of the Magistrate." - L. H. G. Wijesekera J, Pradeep Kumar Dharmaratne vs. Inspector of Police Dharmaratne and others, S. C. Appn. No. 163/98, SCM 17. 12. 1998.

⁶⁷ On the order of the Supreme Court in Wimal Vidyamani's case – SCA 852/91 the Special Investigation Unit of the Police Headquarters investigated the matter and based on the findings of this investigation, the Attorney General's Department had instituted criminal proceedings against the suspects. The outcome of the case is not known. That is the only case instituted under the Penal Code in respect of allegation of torture.

⁶⁸ As shown by the objections filed by the respondents in FR applications before the Supreme Court, the main defences taken up by the respondents are: a. Use of minimum force to bring the person arrested under control when he tried to escape; b. Injuries caused due to a fall while running away at the time of arrest or while escaping from custody; c. Injuries received in the course of fight with the police or some other persons; d. Denial supported by failure to make a prompt complaint to the higher authorities. Perpetrators of torture may range the same defences as taken up in fundamental rights applications before the Supreme Court.

⁶⁹ See Amnesty International, Sri Lanka: Landmark judgement – end to climate of impunity?, 3 July 1998, AI Index: ASA 37/17/98.

⁷⁰ The "disappeared" persons, mainly students, were killed at the Sevana army camp, Embilipitiya, Ratnapura, District, in late 1989/early 1990. The Ratnapura High Court found the accused guilty of abduction with intent to murder and wrongful confinement. See Amnesty International, Sri Lanka-Judgement in landmark case-another step against impunity, 10 February 1999, AI-index: ASA 37/005/1999.

concerned.⁷¹ The Court has also directed the IGP to take appropriate disciplinary action against the perpetrator; to inform the Court of the action taken⁷² and has directed the Attorney General to consider taking steps under the Torture Act against the respondents in a recent torture case.⁷³

The HRC has so far not played a major role in the investigation and subsequent prosecution of torturers.

IV. CLAIMING REPARATION

1. AVAILABLE REMEDIES

1.1. Constitutional Law

The Constitution does not provide for an express right to reparation. However, article 26 stipulates that every person is entitled to a remedy for the infringement of fundamental rights by State action.⁷⁴ The Supreme Court has a wide discretionary power to grant relief in fundamental rights cases.⁷⁵ In granting relief (especially rights to freedom from arbitrary arrest and detention, and torture), it has construed the relevant constitutional provisions as containing a right to compensation.⁷⁶ In calculating compensation in fundamental rights applications, pecuniary and non-pecuniary aspects may be taken into consideration.⁷⁷ The Supreme Court may also award other forms of reparation.⁷⁸

The Supreme Court has held that the state is liable for the infringement of fundamental rights by its officials.⁷⁹ In recent years, the Supreme Court has

⁷¹ See e.g. SCA 189/97; SCA 228/94; SCA 131/95; SCA 106/97; SCA 858/97; SCA 235/96; SCA 109/95; SCA 157/91; SCA 433/93.

⁷² SCA 457-462/93; SCA 109/95; SCA 396-397/93; SCA 68/91; SCA 270/93; SCA 4/91.

⁷³ *Yogalingam Vijitha vs. Wijesekara & Others*, S.C. Application FR No.186/2001, 23 August 2002. See also SCA 623/00; SCA363/00.

⁷⁴ Article 26: "Every person shall be entitled to apply to the Supreme Court as provided by Article 168 in respect of the infringement or imminent infringement, by State action, including executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter, or by judicial action by courts exercising original criminal jurisdiction, of a fundamental right to which such person is entitled under Article 10."

⁷⁵ Article 126 (4): "The Supreme Court shall have power to grant such relief or to make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right."

⁷⁶ *Saman v. Leeladasa and Another*, S.C. Application No.4/88, October 6 and 7, 1988: Per Fernando, J.: "An impairment of personality- the violation of those interests which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation, and whether it be a public or private right-committed with wrongful intent established liability in the *actio injuriarum*; patrimonial loss, as well as damages for mental pain, suffering and distress can be recovered. When the Constitution recognised the right set out in Article 11, even if it was a totally new right, these principles of the common law applied, and the wrongdoer who violated that right became liable, and his master too, if the wrong was committed in the course of employment. It was not necessary for a new delict to be created by statute or judicial decision." Per Amerasinghe, J.: "Our Court has preferred to treat a violation of a Fundamental Right as something *sui generis* created by the Constitution and not as a delict."

⁷⁷ See *ibid*.

⁷⁸ See *infra*.

⁷⁹ *A.K. Velmurugu v. The Attorney-General and Another*, S.C. Application No.74/81, October 19, 20, 21, 30, 1981, Per Wanasundera, J.: "I am inclined to the view that the State should be held strictly liable for any acts of its high State officials... The liability in respect of subordinate officers should apply to all acts done under colour of office, i.e., within the scope of their authority, express or implied, and should also extend to such other acts that may be *ultra*

increasingly held perpetrators of torture personally liable to pay compensation to the victim.⁸⁰ The State may also take disciplinary or legal action against the official whose conduct led to state liability

A torture survivor may take legal action against the state and individual perpetrators before the Supreme Court, with a view to obtaining compensation and a declaration for infringement of fundamental rights, including torture.⁸¹ Relatives of a torture victim do not have standing, to invoke the fundamental rights provisions according to the wording of Articles 17 and 126 of the Constitution and earlier jurisprudence. However, the Supreme Court held in a recent judgment that persons other than the victim can have standing under Article 126 (2) of the Constitution, at least in cases where the infringement resulted in the death of the victim.⁸² A case has to be brought within one month of the infringement,⁸³ and has to be proved by balance of probability or by preponderance of the evidence.⁸⁴ At the time of filing a fundamental rights application the victim can request the Court to call for the medical reports from the hospital or for an order directing a JMO to examine the person and furnish a report. This is the practice that is generally followed.

Awarding of costs is left to the discretion of the Court. Where applications are dismissed, the petitioner is generally not ordered to pay costs, unless it is a frivolous case brought without any justification. Costs awarded in fundamental rights

vires and even in disregard of a prohibition or special directions provided that they are done in the furtherance or supposed furtherance of their authority or done at least with the intention of benefiting the State." Per Sharvananda, J.: "It is to be noted that the claim for redress under Article 126 for what has been done by an executive officer of the State is a claim against the State for what has been done in the exercise of the executive power of the State. This is not vicarious liability; it is the liability of the State itself; it is not a liability in tort at all; it is a liability in the public law of the State."

⁸⁰ See e.g. SCA 623/2000; SCA 290/98; SCA 66/97; SCA 98/97; SCA 477/96; SCA 615/95.

⁸¹ Article 17 of the Constitution: "Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter" and Article 126, 1) of the Constitution: "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognised by Chapter III or Chapter IV."

⁸² S.C. (F.R.) Application No. 471/2000- Case of Kotabadu Durage Sriyani Silva, Pettawatta, Gomarankada, Payagala v Chanaka Iddamalgoa, Officer-in Charge, Police Station, Payagala, Inspector & others, decided on 10 November 2002. a case where the wife of a deceased detainee who had apparently died as a result of torture, filed a compensation claim. Justice Dr. Shirani Bandaranayake observed: "Consequently, the deceased detainee, who was arrested, detained and allegedly tortured and who met with his death subsequently, had acquired under the Constitution to seek redress from this court for the alleged violation of his fundamental rights. It could never be contended that the Fundamental Rights ceased and would become ineffective due to the intervention of a death of a person, especially in circumstances where death in itself is the consequence of injuries that constitutes the infringement. If such an interpretation is not given it would result in a preposterous situation in which a person who is tortured and survived could vindicate his rights in the proceedings before this court, but if the torture is so intensive that it results in death, the right cannot be vindicated ... In my view a strict literal construction should not be resorted to where it produces such an absurd result.. Hence, when there is a causal link between the death of a person and the process which constitutes the infringement of such person's fundamental rights any one having a legitimate interest could prosecute that right in a proceeding instituted in terms of Article 126 (2) of the Constitution."

⁸³ Article 126 (2) of the Constitution: "Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement..." The recently proposed reform to extend the time limit to three months does not appear to be far reaching enough to allow victims sufficient time to prepare their cases and take legal action.

⁸⁴ *Channa Pieris and Others v. Attorney-General and Others (Ratawesi Peramuna Case)*, (1994) SLR 1.

applications are often nominal.⁸⁵ Legal representation and legal aid is available for pursuing a complaint of violation of fundamental rights.⁸⁶ There are several human rights organizations that provide legal representation and legal aid to torture survivors. The vast majority of the fundamental rights applications alleging torture have been filed with the assistance of legal aid.

If the Court has awarded compensation against an individual defendant who refuses to pay damages or has no means to do so, the damages awarded against the individual defendant cannot be recovered from the State. The course of action left to the torture survivor is to apply for a writ of execution against the individual in order to seize his movable and immovable property.

1.2. Civil Law

Reparation can be claimed through a civil action for damages for torts in the District Court under the common law, which is based on Roman Dutch Law. Pecuniary and non-pecuniary aspects are taken into account in the calculation of damages in civil claims but neither rehabilitation nor satisfaction are awarded.

Compensation might be claimed by the victim and his or her relatives against the State pursuant to the Crown (Liability in Delict) Act 1969 for unlawful injury caused by law enforcement personnel.

Torture survivors or relatives of torture victims may also bring a claim in damages for pecuniary and non-pecuniary losses incurred as a result of torture against an individual before the District Court.⁸⁷ Civil suits must be brought within two years from the time when the cause of action has arisen.⁸⁸ In cases against the State, which are brought against the Attorney General, there is a notice period of one month before a suit can be instituted.⁸⁹ The burden of proof lies on the plaintiff who has to prove the case by the balance of probability or by preponderance of evidence.⁹⁰ The victim may base his calculation of damages on such factors as the cost of rehabilitation and measures of satisfaction and the Court may take them into consideration in awarding damages. Costs are calculated according to the rules of courts.⁹¹

In civil actions, enforcement procedures are governed by the Civil Procedure Code.⁹² The creditor can apply to the District Court to obtain a Writ of Execution for the

⁸⁵ The awards do generally cover less than one tenth of the actual costs incurred. The amounts awarded vary from Rs. 750 – Rs. 5000.

⁸⁶ Article 126 (2) states: "Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed..he may himself or by an attorney-at-law on his behalf apply to the Supreme Court...praying for relief or redress in respect of such infringement."

⁸⁷ The procedures are governed by the Civil Procedure Law.

⁸⁸ Prescription Ordinance, S.9.

⁸⁹ Sections 456 and 461 Civil Procedure Code.

⁹⁰ Sections 101 and 102 Evidence Act No.3 of 1961.

⁹¹ Chapter XXI, specially S. 214 Civil Procedure Code. The plaintiff has to pay lawyers' fees as well as stamp duty for every document tendered to the Court according to the value of the claim.

⁹² S.218 Civil Procedure Code.

attachment of assets and seizure of goods belonging to the debtor. All assets of the debtor, with the exception of his salary, are liable to be seized for enforcement.

1.3. Criminal Law

Compensation cannot be claimed as part of criminal proceedings. However, compensation may be awarded by the Court pursuant to s.17 (4) of the Criminal Procedural Code. This provision, which is usually invoked for the benefit of the accused, stipulates that a court can award compensation to be paid by the offender in cases where it refrains from imposing a prison sentence or from proceeding to conviction. The maximum amount of compensation that a Magistrate's Court can award to an aggrieved party is Rs.500.⁹³ This provision is only applicable in cases of action filed under the Penal Code for voluntarily causing hurt which are being dealt with by the Magistrate's Court, and not in torture cases.

A rape victim may obtain compensation from the offender according to the provisions stipulated in the Penal Code Amendment Act No.22 of 1995.⁹⁴

1.4. The National Human Rights Commission

Torture survivors can also obtain reparation through the HRC. Any torture survivor or relative can make a complaint to the HRC. It has no power to make orders, but may recommend compensation.⁹⁵ The Commission has no power to enforce its recommendations.

Seeking redress through the HRC does not exclude recourse to the courts. It is supplementary and complementary. Those who cannot come before the Supreme Court within one month can make a complaint to the HRC or to any of its provincial offices. The period in which the matter is pending before the HRC is excluded in calculating the one month period for making an application to the Supreme Court.⁹⁶ The Supreme Court also refers complaints to the HRC for inquiry and report.

⁹³ S.17 (7) Civil Procedure Code.

⁹⁴ S.364 (1) Penal Code: "Whoever commits rape shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine, and shall in addition be ordered to pay compensation of an amount determined by the Court." S.364 (4) states that: "Where he fails to pay the compensation ordered, he shall be punished with a further term of imprisonment which may extend up to two years."

⁹⁵ Section 15 (3)(c) Human Rights Commission of Sri Lanka Act, No.21 of 1996.

⁹⁶ Ibid., Section 13 (1).

2. THE PRACTICE

2.1. Use and Effectiveness of Available Remedies

Since 1978 there have been several hundred fundamental rights applications filed in the Supreme Court by torture survivors seeking relief and redress. While the record of the Supreme Court in awarding compensation is impressive, a considerable number of torture survivors have not been able to invoke this remedy. The main obstacle is the short time limit of one month within which a fundamental rights application has to be filed with the Supreme Court.⁹⁷ One of the consequences of this short time limit is the fact that medical reports are usually not available to the victims at the time of filing the application. This means that they are not in a position to make a proper assessment of the amount of compensation to be claimed supported by available evidence. Furthermore, until recently only the victims of torture themselves were recognised as being entitled to file a fundamental rights application.⁹⁸ This has left relatives of torture victims without an effective constitutional remedy. It remains to be seen whether the recent judgement cited above heralds a fundamental change in the jurisprudence of the Supreme Court in this regard.

Even if an application is made in time, falsified medical reports, missing entries in Police Information logs as well as the absence of sufficient evidence have proved to be further major obstacles for torture survivors in pursuing claims before the Supreme Court.

There are no judicial precedents of claims relating to reparation for torture before the Civil Courts.⁹⁹ This is mainly due to the fact that civil litigation is very costly and takes a long time. It usually takes between three to four years before a final judgment is rendered. Most torture survivors can therefore not afford to take legal action before civil courts. It is moreover doubtful whether acts of torture would qualify as delicts under the State (Liability in Delict) Act. .

The procedures enabling torture survivors to claim compensation as part of the criminal trial have also not been used in practice, as they are not applicable to torture as such and moreover only allow the victim to claim Rs.500 (which is slightly more than \$4.50 at the time of writing), a sum which is clearly inadequate to compensate for any harm suffered.

2.2. Reparation Cases

The Supreme Court has held in a considerable number of cases that there had been an infringement of Article 11 and awarded compensation against the state and/or the

⁹⁷ In a large number of Supreme Court cases time limits were at issue. The Supreme Court has shown some flexibility in admitting cases where the applicants could not adhere to the time limit.

⁹⁸ See the recent judgement of the Supreme Court on this issue, *supra*.

⁹⁹ Abeyratne, alias Taxi Abey, a torture survivor, filed a suit for damages for torture against officers of the DID, IGP and AG before the District Court Colombo in 2000, the first of its kind. According to the information received in December 2002, the parties were intending to settle the case.

individual perpetrators of torture.¹⁰⁰ In a recent case, the Supreme Court also awarded compensation for sexual torture in custody.¹⁰¹

In earlier cases, the Supreme Court ordered only the State to pay compensation. More recently, both the State and the individual perpetrators were ordered to pay compensation. In awarding and calculating compensation, the Supreme Court has taken the gravity of the injuries, the methods of torture employed and the harm caused into consideration. The amounts of compensation awarded vary from Rs. 5,000 to Rs. 250,000 (ca. \$ 50 – 2,600).¹⁰²

Compensation has been awarded for pecuniary and non-pecuniary damages. The Supreme Court has also noted that compensation has the function of acknowledging regret and providing relief for the hurt caused to the victim.¹⁰³ In so doing, it expressly rejected awarding punitive damages as compensation.¹⁰⁴ It may take into consideration the gravity or the serious nature of the injuries caused requiring long term medical treatment and rehabilitation in the assessment of the amount of compensation although there are no such precedents.

In ordering compensation personally to be paid by the perpetrator¹⁰⁵ and directing the higher authorities to take disciplinary and other action, the Court has taken into account the punitive aspect as well as the need of guaranteeing non-repetition of the violation.¹⁰⁶ It has also emphasized that holding perpetrators personally accountable involves an element of satisfaction.¹⁰⁷ Moreover, the Supreme Court judges have highlighted that “a meaningful course of action to minimize violations of Article 11 should include other measures (than enacting legislation) making torture an offence.” Thus, it drew attention to the need for education and certain procedural steps that the State should adopt, citing Articles 10 to 13 of the Convention against Torture.¹⁰⁸ In so doing, the Court has shown its willingness to contemplate ordering measures aimed at guaranteeing the non-repetition of torture.

Compensation orders are enforced without too much difficulty because the Court can deal with the defaulters by treating them as in contempt of court. However, the Court has repeatedly lamented the fact that its orders to the Inspector General of Police to take disciplinary action against the perpetrators, and to the Attorney

¹⁰⁰ See statistics in annex.

¹⁰¹ Yogalingam Vijitha vs. Wijesekara & Others, S.C. Application FR No.186/2001, 23 August 2002.

¹⁰² See annex. 250, 000 Rupees were awarded in the case cited in the preceding footnote.

¹⁰³ *Saman v. Leeladasa and Another* (op. Cit.), Per Amerasinghe, J. (Ranasinghe C.J. agreeing): “When in an appropriate case compensation is awarded for the violation of a Fundamental Right, it is, I think, by way of an acknowledgement of regret and a *solatium* for the hurt caused by the violation of a Fundamental Right and not as a punishment for duty disregarded or authority abused.”

¹⁰⁴ *Ibid.*

¹⁰⁵ See e.g. SCA 623/2000; SCA 290/98; SCA 66/97; SCA 98/97; SCA 477/96; SCA 615/95.

¹⁰⁶ See e.g. SC No.4/91.

¹⁰⁷ *Abasin Banda v. S.I. Gunaratne and Others*, S.C. Application No. 109/95, October 6, 1995, Amerasinghe, J.: “The award of compensation is useful because it provides an opportunity to demonstrate society’s abhorrence of such conduct... The fact that a transgressor is personally required to pay a part of the compensation assessed by the court as being just and equitable is useful to the extent that it will to some extent assuage the wounded feelings of the victim.”

¹⁰⁸ Per Amerasinghe, J. in: *Abasin Banda v. S.I. Gunaratne & Others*, S.C. Application No.109/95 [1995] 1 Sri L.R., p.256.

General to take criminal action, have not been implemented.¹⁰⁹ In fundamental rights' applications, all victims have received compensation awarded as the legal system adequately secures enforcement of these orders.

The same kind of reparation as awarded by the Supreme Court can be and has been recommended by the National Human Rights Commission. The Commission does not recommend to the state to pay compensation. But sometimes it has successfully recommended that compensation be paid to the victims by the police or army officers. In so doing, it has functioned as an important supplementary mechanism for torture victims who could not apply to the Supreme Court due to time bar or lack of supporting medical evidence.

V. GOVERNMENT REPARATION MEASURES

The Government has not established a reparation scheme in support of torture victims. There is also no compensation scheme for victims of crime. The Government has however provided some limited relief in disappearance cases. In 1994 the Government appointed three Commissions - the Presidential Commissions of Inquiry into Involuntary Removals and Disappearances of Persons, which so far have received a total of about 30,000 complaints. (these include multiple complaints in respect of many of the disappeared persons). The Final Report of the fourth Presidential Commission of Inquiry that was set up in 1998 to inquire into remaining complaints was published and released to the public in July 2002. The Commissions have made comprehensive recommendations for reparations providing a wide range of relief, redress and restitution of losses sustained to the families of those who disappeared. Of these, only the recommendations regarding the payments for the relatives of disappeared have been partially implemented. The Rehabilitation of Persons, Properties and Industries Authority (REPPIA) is responsible for paying compensation to families of disappeared persons on the basis of a death certificate. Whereas the relatives of a disappeared public servant receives 150,000 rupees, relatives of other missing persons only receive 50,000 rupees. According to its chairperson, from 1995 until September 1999, REPPIA had, paid a total of 410 million rupees as compensation to 12,242 families of disappeared persons.¹¹⁰

To date, the other measures recommended, have not been put into practice. The Government has in particular not implemented the recommendations by the Commissions to compensate a specific category of torture survivors, the so-called category of returned detainees or removal cases, i.e. persons who had been involuntarily taken into custody, unlawfully detained and tortured while in custody who had subsequently been released or had escaped.¹¹¹

¹⁰⁹ *Nalika Kumdi, Attorney-at-Law (On Behalf of Malsha Kumari) v. Nihal Mahinda*, O.I.C. Hungama Police and Others, S.C. Application No. 615/96, October 30,1996; August 28,1997; per Fernando, A.C.J: "In many cases in the past this Court has observed that there was a need for the Inspector-General of Police to take action to prevent infringements of fundamental rights by Police Officers, and where such infringements occur, this Court has sometimes directed that disciplinary proceedings be taken. The response has not inspired confidence in the efficacy of such observations and directions, and persuaded me that in this case compensation is the appropriate redress."

¹¹⁰ See UN Doc.E/CN.4/2000/64/Add.1 (op.cit.), para.54.

¹¹¹ M.C.M. Iqbal, *The Phenomenon of Disappearances in Sri Lanka*, in: Law & Society Trust, *The State of Human Rights in Sri Lanka*, 2001.

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. PROSECUTION OF ACTS OF TORTURE COMMITTED IN A THIRD COUNTRY

1.1. The Law

1.1.1. Criminal law

The jurisdiction of Sri Lankan Courts is generally limited to acts committed within its territorial limits. However the Convention against Torture Act allows for the prosecution of acts of torture committed outside Sri Lanka on the basis of universal jurisdiction (with a presence requirement) as well as the active and passive personality principle. Article 4(1) of the Act stipulates that: "The High Court of Sri Lanka shall have the jurisdiction to hear and try an offence under this Act committed in any place outside the territory of Sri Lanka by any person, in any case where- a) the offender whether he is a citizen of Sri Lanka or not, is in Sri Lanka, or on board a ship or aircraft registered in Sri Lanka; b) the person alleged to have committed the offence is a citizen of Sri Lanka; or c) the person in relation to whom the offence is alleged to have been committed is a citizen of Sri Lanka."

1.1.2. Extradition law

As a general rule, under the Extradition Law, No. 8 of 1977 there has to be an extradition treaty between Sri Lanka and the State requesting extradition. However, the Government of Sri Lanka may extradite perpetrators of torture even without an extradition agreement on the basis of the Torture Act.¹¹² The Minister of Foreign Affairs can, by Order published in the Gazette, treat the Torture Convention as an extradition agreement made by the Government of Sri Lanka with the Government of that State.

While torture is an extraditable offence under the Convention against Torture Act, extradition may be refused if the request has been made: i) for an offence of a political character; ii) for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions, iii) if he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions; or iv) if it appears, that if charged with that offence in Sri Lanka he would be discharged under any rule of law relating to previous acquittal or conviction.

Sri Lankan nationals can be extradited provided that there is an extradition agreement between Sri Lanka and the other country and criminal proceedings pending in the foreign Court for an extraditable offence. In instances where the person accused of torture is not extradited, the case shall be submitted to the relevant authorities, so that prosecution for the offence which such person is accused of, or other appropriate action may be considered.¹¹³

¹¹² S. 9 (2) Convention against Torture Act.

¹¹³ S.7 (3) Torture Act.

1.2. Practice

There have been no cases in which persons alleged to have committed acts of torture abroad have been prosecuted in Sri Lanka or extradited pursuant to the Extradition Law and the Convention against Torture Act.

2. CLAIMING REPARATION FOR ACTS OF TORTURE COMMITTED IN A THIRD COUNTRY

An individual who has been tortured in another country cannot invoke the fundamental rights jurisdiction of the Supreme Court. Generally, Courts in Sri Lanka have no extra-territorial jurisdiction.¹¹⁴ A civil court (district court) will only have jurisdiction to hear a case relating to torture if the cause of action has arisen within the territorial jurisdiction.¹¹⁵ As this is understood to be the act constituting a tort that would be the basis for claiming compensation, courts in Sri Lanka do not appear to have any jurisdiction to entertain such claims.

Consequently, a torture survivor cannot take legal action against a foreign State for lack of jurisdiction. Moreover, states enjoy immunity according to the State Immunity Act.

There have been no cases in which torture survivors from third countries have claimed reparation before the courts of Sri Lanka against foreign perpetrators or a foreign State.

¹¹⁴ S.9 Civil Procedure Code.

¹¹⁵ S.9 Civil Procedure Code.