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## FOREWORD

Torture continues to be a major concern in India, Nepal and Sri Lanka and the ensuing physical and psychological suffering of survivors of torture and their relatives has been largely ignored. Reparation, which is taken to refer to restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, is not only a legal imperative that assists in restoring dignity to survivors and helps to rebuild their lives, is also the manifestation of governments and of societies taking the prohibition of torture and the call for justice seriously.

The Redress Trust, a London-based human rights organization with a mandate to seek reparation for torture worldwide, together with the Commonwealth Human Rights Initiative, based in India, organized this seminar to draw attention to the systematic practice of torture in India, Nepal and Sri Lanka and to expose the extraordinary difficulties that survivors face in the aftermath of torture.

We recognise that the seminar and this Report are but small steps – the problems are endemic and of monumental proportions, and the efforts that are needed to tackle them are complex and wide-ranging. Hopefully, the discussions and conclusions of the seminar and the detailed analysis of country experts from India, Nepal and Sri Lanka will strengthen the resolve of governments and civil society to tackle the scourge of torture once and for all, and to restore dignity and hope to survivors.

We wish to thank all those who have contributed to making the seminar both a reality and a fruitful event, in particular:

- Mr. C. Raj Kumar for his untiring support, especially in identifying and enlisting speakers as well as in ensuring the smooth functioning of the seminar;
- Justice Leila Seth;
- All speakers: Justice J.S. Verma, Chairperson, National Human Rights Commission, India; Mr. Soli J. Sorabjee, Attorney General of India; Ms. Carla Ferstman, Legal Director, REDRESS; Mr. Kalyananda Tiranagama, Executive Director, Lawyers for Human Rights and Development, Sri Lanka; Dr. Bhogendra Sharma, Director, Centre for Victims of Torture, Nepal; Mr. P.M. Nair, IPS, NHRC Nodal Officer, Mr. Ravi Nair, Executive Director, South Asia Human Rights Documentation Centre (SAHRDC); Mr. C. Raj Kumar, Lecturer, School of Law, City University of Hong Kong and D.K. Srivastava, Professor of Law, School of Law, City University of Hong Kong;
- All session chairs: Dr. M.P. Singh, Professor of Law, University of Delhi; Mr. B.B. Pande, Professor of Law, University of Delhi; Dr. Vijay K. Gupta, Professor of Law, Jamia Malia Islamia; Dr. K. Chockalingam, Professor of Criminology & Victimology, Vice-Chancellor, Manonmaniam Sundaranar University; Mr. V.S. Mani, Professor of International Law, Jawaharlal Nehru University; Dr. Paramanand Singh, Dean & Professor, Faculty of Law, University of Delhi;

- The participants, not only for turning up in great numbers on a Saturday morning, many having travelled from afar, but also for the many valuable and productive contributions;
- The country experts: Mr. Kalyananda Tiranagama, Sri Lanka; Dr. Bhogendra Sharma, Nepal for their country studies on the right to reparation in Sri Lanka and Nepal respectively; Mr. Iqbal, Mr. Ganesalingam and Ms. Thotagamuwa for their contribution to the Sri Lanka country study; Mr. Trilochan Upreti and Mr. Kedar Prasad Poudyal for their contribution to the Nepal country study; Professor Krishnadeva Rao, Mr. P.M. Nair, Professor Singh and Mr. C. Raj Kumar for providing expertise and comments on the India country paper and Ms. Maria O'Sullivan for her research assistance;
- The European Community for generously funding the seminar as part of the Redress Trust's ***Audit Project: A Survey of the Law and Practice of Reparation for Torture in 30 Countries Worldwide;***
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## **EXECUTIVE SUMMARY**

The Redress Trust, London, together with the Commonwealth Human Rights Initiative, New Delhi, organised the seminar Responses to Human Rights Violations: The Domestic Implementation of the International Right to Reparation for Torture Victims in India, Sri Lanka and Nepal, held on 14 September 2002 at the India International Centre, New Delhi. Over fifty participants attended, including human rights lawyers, judges, law professors, members of national human rights commissions, police officers, medical doctors, journalists, NGO representatives and others working towards the eradication of torture in the region and beyond.

The aim of the seminar was to strengthen torture survivors' right to reparation in the region by bringing together those working on the subject and providing a forum for the exchange of experiences, ideas and strategies. It also served to raise awareness amongst participants and wider segments of society of the need to take specific measures to combat torture, and provided the forum for the development of holistic strategies to this end. The seminar was meant to serve as a catalyst for the initiation and implementation of country specific and/or regional projects specifically designed to improve the position of torture survivors.

## **INAUGURAL SESSION**

The Inaugural Session opened with the reading of a statement of the Union Law Minister, Mr. Krishnamurthy. Justice Verma, Chairman of the National Human Rights Commission delivered the Inaugural Address and Mr. Soli Sorabjee, Attorney General of India, the Key-Note Address, both noting the universal nature of the problem of torture. They stressed the importance of reparation for torture survivors, reminded participants of the clear recognition of the right to reparation in international law and condemned all forms of immunities and amnesties accorded to perpetrators of torture. They stressed that torture is still a daily reality in all three countries, as elsewhere, despite its prohibition in both domestic and international law. Perpetrators are rarely punished and survivors and their families almost never receive any form of reparation. In this respect, India, Nepal and Sri Lanka share a number of similarities. In each country, the practice of torture is systematic. It is a regular instrument of law enforcement agencies and security forces who in many instances condone the practice as a justifiable method of obtaining the truth.

## **OVERVIEW OF INTERNATIONAL STANDARDS**

The first session provided an overview of international standards and outlined current international developments relating to the right to reparation. Reparation has been recognised to include such components as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>1</sup> In the case of torture, this will include the criminal accountability of perpetrators and ensuring that torture survivors are adequately recompensed – financially, morally and psychologically. A variety of international instruments at the universal and regional level, make reference to the right of victims to an effective remedy, and to obtain restitution, compensation

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<sup>1</sup> The Right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report of the Special Rapporteur, M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, E/CN.4/2000/62, 18 January 2000. See also, The Administration of Justice and the Human Rights of Detainees: The Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised Final Report prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119 (UN Doc. E/CN.4/Sub.2/1997/20/Rev. 1).

and rehabilitation.<sup>2</sup> Furthermore, United Nations treaty-based bodies and European, Inter-American and African human rights organs have dealt extensively with the right to a remedy and reparation as well as States' obligations to guarantee these rights.<sup>3</sup> Additionally, thematic and country mechanisms of the Commission on Human Rights have also developed comprehensive doctrine on the question.<sup>4</sup> The right to reparation for serious violations of human rights, including torture, is also said to constitute a basic principle of general international law. As established by the Permanent Court of International Justice and upheld by international jurisprudence, the breach of an international obligation entails the duty to make reparations.<sup>5</sup> The International Law Commission has also re-affirmed this principle.<sup>6</sup>

## COUNTRY SPECIFIC PROBLEMS IN INDIA, NEPAL AND SRI LANKA

The second and third sessions focused on country specific problems in India, Nepal and Sri Lanka, followed by lively discussion and debate. India, Nepal and Sri Lanka are each under an obligation to provide reparation in accordance with their international obligations. Nepal and Sri Lanka, as parties to the Convention against Torture and all three countries, including India, as a matter of customary international law have obligations to provide torture survivors with effective and enforceable remedies. However, only Sri Lanka has extended jurisdiction to the UN Committee against Torture to receive complaints from aggrieved individuals, when domestic remedies fail.

In respect of criminal and administrative remedies, the legal frameworks of India, Nepal and Sri Lanka pose a number of challenges. In India and Nepal, for example, torture is not expressly defined as a criminal offence, making the investigation and prosecution of acts of torture more

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<sup>2</sup>See for example, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention of the Rights of the Child, and the United Nations Convention on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also contain references to the right to reparation. As well, several regional instruments, e.g. the Inter-American Torture Convention, contain the obligation of states to afford reparation. The African Charter of Human and Peoples' Rights, the American Convention of Human Rights and the European Convention of Human Rights include the obligation to afford effective remedies as well as adequate compensation. The Statutes of the two UN Ad Hoc Tribunals make reference to the right to compensation and the Rome Statute<sup>2</sup> contains elaborate provisions on reparations to victims. The array of instruments regulating the laws and customs of war also contain provisions related to the right to reparation.

<sup>3</sup>The jurisprudence and commentaries of treaty-based bodies like the Human Rights Committee and the Committee Against Torture have explicit references to the right of victims to effective remedies, restitution, rehabilitation and compensation. As well, the Inter-American Commission and Court of Human Rights, together with the European Court of Human Rights have interpreted extensively the provisions of the right to reparation for victims of human right violations and the scope and appropriate forms of such remedies. See for example, *Caso Velazquez Rodriguez*, *Indemnizacion Compensatoria*, Sentencia de 21 Julio de 1989, (Art. 63.1 de la Convencion Americana sobre Derechos Humanos), Serie C No. 7 para. 25; *Caso Godinez Cruz*, *Indemnizacion Compensatoria*, Sentencia de 21 de Julio de 1989, (Art. 63.1 Convencion Americana sobre Derechos Humanos), Serie C No. 8, para. 23; *Aloboetoe et. al. case*, *Reparations* (Art. 63(1) American Convention on Human Rights), Judgment of September 10, 1993. Series C No. 15, para. 43). *Soering v. United Kingdom*, ECHR App. No. 14038/88 Judgment of 7 July 1989; *Aksoy v. Turkey* ECHR App. No. 21987/93 Judgment of 18 December 1996.

<sup>4</sup> See e.g. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and Declaration on the Elimination of Violence against Women.

<sup>5</sup> *Factory at Chorzow*, Jurisdiction, Judgement No. 8, 1927, P.C.I.J., Series A, no. 17, p. 29; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184; *Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxieme phase, avis consultatif*, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 ("ILC draft Articles on State Responsibility").

<sup>6</sup> See Report of the International Law Commission - 53<sup>rd</sup> session (23 April - 1<sup>st</sup> June, 1 June and 2<sup>nd</sup> July - 10 August 2002) Official document of the General Assembly, 56<sup>th</sup> Session, Addendum No 10 (A/56/10).

difficult and resulting in a failure to acknowledge both the specificity and seriousness of torture.<sup>7</sup> In all three countries, the applicable laws accord victims few, if any, procedural rights and the wholly inadequate protection victims receive in the investigation and prosecution phases act as an additional impediment, making victims retract their statements for fear of retribution and making less and less come forward in the first place. In both Nepal and India, the only independent bodies empowered to investigate allegations of torture are the Human Rights Commissions, though they have not been accorded the power to bring prosecutions, and many of the recommendations that they have made continue to lay dormant. In Sri Lanka, a 'Prosecution of Torture Perpetrators Unit' in the Attorney General's Department has recently been established, which it is hoped will address the serious backlog of allegations that have thus far gone unanswered.

In practice, all three countries have demonstrated a lack of political will to prosecute and punish perpetrators of torture. In India, for example, several laws providing perpetrators of torture with immunity from prosecution exist and are still applied. While the recent introduction of the Prosecution of Torture Perpetrators Unit in Sri Lanka might signal a greater willingness on the part of the Sri Lankan government effectively to combat torture, impunity is widespread there, as in India and Nepal. The handful of successful prosecutions are, for this very reason, well-known exceptions to the rule.

While there are many factors that contribute to a culture of impunity, in the case of India, Nepal and Sri Lanka, one key component is the strong protectionist culture of the police and security forces who have successfully shielded perpetrators coming from their ranks, often frustrating investigations by National Human Rights Commissions and others. Torture survivors, while having the right to make a complaint, are not guaranteed personal protection afterwards and have in numerous cases been subjected to further harassment and intimidation for the act of coming forward, as have their relatives and the human rights defenders and lawyers supporting them. The judiciaries have rarely held perpetrators accountable, having failed in several cases to probe deeper into allegations raised in the course of proceedings and to demand answers from law-enforcement personnel. Equally, they have rarely imposed appropriate sentences on the few occasions when the guilt of perpetrators has been established.<sup>8</sup>

None of the three countries provide torture survivors with simple, accessible and affordable legal mechanisms through which they are able to claim adequate reparation. With the exception of the Nepalese Torture Compensation Act,<sup>9</sup> which itself has a number of failings that will be described later in the Report,<sup>10</sup> there are no acts or similar pieces of legislation expressly stipulating a right to reparation and providing a direct mechanism for claiming it. There are also no state or administrative compensation schemes in place for torture survivors in any of the three countries. While the constitutions of India and Sri Lanka provide for remedies in cases of fundamental rights violations, which have been invoked successfully in a number of cases,<sup>11</sup> the applicable time

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<sup>7</sup> As defined in Article 1, (1) of the Convention against Torture: "For the purpose of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

<sup>8</sup> See for further details, the sections on the country specific practice in Chapter III, 3) of the respective country reports, *infra*.

<sup>9</sup> Torture Compensation Act 2053 BS (1996).

<sup>10</sup> See Nepal Country Report, *infra*, IV, 1.1 and 2.

<sup>11</sup> See the respective country reports, *infra*, IV, 2.

periods for submitting claims are overly short and in respect of Sri Lanka, the lack of standing for relatives of victims severely inhibits claims. Furthermore, the jurisprudence has not been consistent which has the effect of making justice selective and less predictable.

Without a supportive legal framework and sufficient political will, the obstacles are so huge that many torture survivors refrain from seeking reparation in the first place. Even in Nepal, the one state with a specific law of reparation, there have only been a few successful cases, the first coming several years after the enactment of the Torture Compensation Act. The jurisprudence of the Supreme Courts of India and Sri Lanka is more encouraging in terms of the numbers of instances in which they have found in favour of torture victims, however reparation has mainly been confined to small amounts of monetary compensation and directions demanding disciplinary action of the perpetrators have not been implemented in practice.

## **STRATEGIES AND CONCLUSIONS**

In the fourth session, strategies to strengthen the right to reparation for torture survivors in each country were developed. Two presentations on possible courses of actions were made, followed by substantial and wide-ranging discussions on the most effective methodologies to accomplish this end. In the concluding session, speakers emphasised that the empowerment of survivors, who often belong to the most marginalised groups in society, should be at the core of any project, programme or effort aimed at making justice and reparation a reality.

The emerging picture is one where state apparatuses tolerate torture and do little to alleviate the suffering of victims. Their right to reparation, if acknowledged at all, has not been taken seriously. While all participants agreed that substantial legal and institutional reforms would be required to effect real change, there was a difference in emphasis on how such changes should be brought about. Whereas some took a broader perspective, arguing the need to tackle the underlying causes through education and awareness-raising in the family, public institutions and mass media, others advocated for more specific legal reforms and legally oriented strategies, such as bringing more legal challenges in domestic courts, and continuing to press for the investigation and prosecution of perpetrators. It is clear that an interdisciplinary approach that integrates both socio-political and legal strategies is required.

It was agreed that the actual needs and wants of torture survivors, as the right holders and beneficiaries, are paramount and should be at the forefront of any forward-looking strategy.

# COUNTRY REPORTS

## INDIA

### **I. INTRODUCTION**

#### **1. THE LEGAL FRAMEWORK**

##### **1.1. Constitution**

India has a population of over a billion people and is the second most populated country in the world. There are numerous ethnic groups and religions, the majority being Hindu while Muslims constitute a considerable minority.

The Republic of India gained independence from the United Kingdom on 15 August 1947. It adopted its Constitution on 26 January 1950. According to the Constitution, India is a Federal Republic, consisting of 28 states and 7 union territories. The Constitution guarantees fundamental rights, such as the right to equality, freedom of expression, procedural rights, right to life and personal liberty, freedom of religion as well as cultural and education rights and the right to redress in courts.<sup>12</sup>

The Indian judiciary has a single pyramidal structure with the lower or subordinate courts at the bottom, the High Courts of the States in the middle, and the Supreme Court at the top. The Court system is composed of courts with civil and criminal jurisdiction as well as administrative tribunals. Civil Courts are divided into City Civil Courts and Small Claims Courts at the Metropolitan City Level and District Courts at the District Level. Criminal Courts are divided into Session Courts and Magistrates Courts at both levels as well as Metropolitan Courts at the Metropolitan City Level.

The High Courts and the Supreme Court have mainly appellate functions and the power to receive fundamental rights petitions. The Supreme Court, which is exclusively under the regulative powers of the Union has the power to review High Court judgments and declare legislation unconstitutional.<sup>13</sup> The independence of the judiciary is not expressly guaranteed but ensured by various provisions in the Constitution.<sup>14</sup>

##### **1.2. Incorporation and Status of International Law in Domestic Law**

India has ratified the following relevant international human rights and humanitarian law treaties<sup>15</sup>

- Geneva Conventions (9 November 1950)
- Genocide Convention (27 August 1959)
- CERD (03 December 1968)
- ICCPR (10 April 1979)

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<sup>12</sup> See Part III of the Constitution, Sections 12-30.

<sup>13</sup> See Part V, Chapter IV, Sections 124 et seq. of the Constitution.

<sup>14</sup> See in particular Sections 124, 4) and 125, 2) of the Constitution.

<sup>15</sup> As of 21 August 2002, <http://www.unhcr.ch/pdf/report.pdf>, (last visited 13 November 2002).

- ICESCR (10 April 1979)
- CRC (11 December 1992)
- CEDAW (09 July 1993)

India has signed (14 October 1997) but not yet ratified the Convention against Torture.

There are no explicit provisions in the Indian Constitution regulating the incorporation and status of international law in the Indian legal system. However, Article 51 (c) stipulates, as one of the directive principles of state policy, that: "The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with another."

International treaties do not automatically become part of national law. They have to be transformed into domestic law by a legislative act.<sup>16</sup> The Union has the exclusive power to implement international treaties.<sup>17</sup> To this end, it has passed the Geneva Conventions Act but has not yet adopted any law incorporating the provisions of the International Covenant for Civil and Political Rights.<sup>18</sup> The status of customary international law in domestic law follows the common law of England.<sup>19</sup> Accordingly, a rule of customary international law is binding in India provided that it is not inconsistent with Indian law.<sup>20</sup>

While national legislation has to be respected, even if it contravenes rules binding on India under international law, Indian Courts, in particular the Supreme Court, have consistently construed statutes so as to ensure their compatibility with international law.<sup>21</sup> The judicial opinion in India as expressed in numerous recent judgments of the Supreme Court of India demonstrates that the rules of international law and municipal law should be construed harmoniously, and only when

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<sup>16</sup> See *State of Madras v G.G. Menon* AIR 1954 SC 517 and *People's Union for Civil Liberties v Union of India* (1997) 3 SCC 433. See for the proposition that some provisions of international treaties might be self-executing Shah, J., Sep.Op., in *Maganbhai Ishwarbhai Union of India*, AIR 1969 SC 783, at 807 and comments by Verma, S.K., International Law, in: Verma, S.K. and Kusum (eds.), Fifty Years of the Supreme Court of India, Its Grasp and Reach, Oxford University Press, Indian Law Institute, 2000, 621-649, at 632.

<sup>17</sup> Article 253 provides that: "Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Entry 14 of the Union List of the Seventh Schedule empowers Parliament to legislate in relation to "entering into treaties and agreement and implementing of treaties and agreement with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

<sup>18</sup> The Geneva Conventions Act, 1960.

<sup>19</sup> Article 372 of the Constitution: "Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India, immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislative or other competent authority." See in relation to English common law *Director of R & D v Corp. of Calcutta* AIR 1960 SC 1355 at 1360; *Builders Supply Corp. v Union of India* AIR 1965 SC 1061 at 1068; *State of West Bengal v Corpn. Of Calcutta* AIR 1967 SC 997 at 1007, cited in Verma, supra, at 623, Fn.4.

<sup>20</sup> *Gramophone Co. of India Ltd v Birendra Bahadur Pandey* AIR 1984 SC 667, at 671: "The comity of Nations require that Rules of International Law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, Municipal Law must prevail in case of conflict."

<sup>21</sup> *SC. Vosjala & Others v. State of Rajasthan & Others* 1997 (6) SCC 241: "(it is) now an accepted rule of judicial construction that regard must be had to international conventions and norms of construing domestic law when there is no inconsistency between them and there is a void in domestic law;" *Apparel Export Promotion vs. A.K. Chopra* 1999 (1) SCC 759: "In cases involving violation of human rights, the courts must ever remain alive to the international instruments and conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field."

there is an inevitable conflict between these two laws should municipal law prevail over international law.<sup>22</sup>

The Supreme Court has even gone a step further by repeatedly holding, when interpreting the fundamental rights provisions of the Constitution, that those provisions of the International Covenant on Civil and Political Rights, which elucidate and effectuate the fundamental rights guaranteed by the Constitution can be relied upon by courts as facets of those fundamental rights and are, therefore, enforceable.<sup>23</sup>

## **2. PRACTICE OF TORTURE: CONTEXT, OCCURRENCE, RESPONSES**

### **2.1. The Practice of Torture**

Torture has been practiced frequently in India since Independence regardless of the government in power. While torture is committed on a regular basis by law-enforcement officials in the course of criminal investigations, it was employed systematically during the Emergency Period of 1975 to 1977. Reportedly, torture has frequently been resorted to in the course of the armed conflict in Jammu/Kashmir, the militant struggle in Punjab and in other regions undergoing a political crisis. The Prevention of Terrorism Ordinance and the Prevention of Terrorism Act, adopted in 2000 and 2002 respectively, are widely seen as facilitating the use of torture against those who are either suspected of being terrorists or are simply labelled as terrorists by the police and the army. The police have also been accused of turning a blind eye or encouraging inter-communal violence involving acts amounting to torture, such as in early 2002 in the state of Gujarat.

The main perpetrators of torture have been police officers and other law-enforcement officials, such as paramilitary forces and those authorities having the power to detain and interrogate persons.<sup>24</sup> Members of the army have reportedly also committed acts of torture, especially in Jammu/Kashmir. The victims of torture have been those who come into contact with law-enforcement personnel, especially those suspected of having committed crimes, members belonging to marginalized groups and ethnic communities who are believed to engage in a terrorist struggle against the Indian government.<sup>25</sup> Women have also been subjected to torture, particularly in the form of rape in custody, a phenomenon that appears to have increased over the last few years.<sup>26</sup> Torture is predominantly employed to obtain confessions or information in

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<sup>22</sup> See also Verma, CJ, in *Vishaka v State of Rajasthan* (1997) 6 SCC 241, at 251 for cases, here gender equality and guarantees against sexual harassment, in which there is no domestic law: "(a)ny international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Art.51 (c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Art.253 with Entry 14 of List 1 of the Schedule."

<sup>23</sup> *People's Union of Civil Liberties v Union of India & Anor*, supra, affirming jurisprudence of Supreme Court in earlier cases concerning Article 9 (5) ICCPR that provides for a right to compensation for victims of unlawful arrest or detention. Remarkably, the Supreme Court has found Article 9 (5) ICCPR to be enforceable in India even though India has not adopted any legislation to this effect but had even entered a specific reservation to Article 9 (5) ICCPR when ratifying the Convention in 1979, stating that the Indian legal system did not recognise a right to compensation for victims of unlawful arrest or detention. See also the case of *Prem Shaker Shukla v Delhi Administration* AIR 1980 SC 1535 and *Visakha* supra.

<sup>24</sup> See on torture in India G.P. Joshi, *Police Brutality in India*, Commonwealth Human Rights Initiative, November 2000, and in relation to one particular state, Amnesty International, *India: Time to act to stop torture and impunity in West Bengal*, AI-Index: ASA 20/033/2001, 10/08/2001, pp.22 et seq.

<sup>25</sup> Krishnadeva Rao: "A Sikh youth from Punjab, a Muslim from Kashmir, a tribal from North-east, a youth from the Telangana districts of Andhra Pradesh, a Tamil from deep South or a Muslim in Bombay, Madras, Rajasthan or Gujarat after the serial bomb blasts in the wake of destruction of Babri mosque provide the living testimonies of torture."

<sup>26</sup> See the report by the People's Union for Democratic Rights on "Custodial Rape." 1994.

criminal cases,<sup>27</sup> as a means of extortion or to break political opposition. It has also apparently been used to punish members of ethnic communities for their political demands, specifically in Jammu/Kashmir and Punjab.<sup>28</sup> While torture generally takes the form of severe beatings, there have been numerous reports of more severe forms of torture, many of which resulted in the death of the victims.<sup>29</sup> The number of deaths in custody cases is particularly high in India.<sup>30</sup>

## 2.2. Domestic Responses

The Supreme Court and High Courts have adopted a pro-active stance in directing the Government and/or law-enforcement bodies to take various steps to tackle torture and have repeatedly criticised the latter for failing to do so.<sup>31</sup> Civil liberties and human rights groups in India have played a major role, through public interest litigation and other means, to seize the Supreme Court and to highlight and combat the prevalence of torture.<sup>32</sup>

The National Human Rights Commission (NHRC), which was established by the Protection of Human Rights Act, 1993 is the main body entrusted with promoting and protecting human rights.<sup>33</sup> The Act also provides for the establishment of State Human Rights Commissions ("SHRC") and Human Rights Courts ("HRC") at the district level in each state.<sup>34</sup> The Human Rights Act vests the NHRC with a broad mandate but it only has the power to issue recommendations and does not

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<sup>27</sup> See conclusions of Padmanabhaiah Committee, Police Reforms which presented its report and recommendations to the government in October 2000. "A large section of people strongly believe that the police cannot deliver and cannot be effective if it does not use strong-arm methods against the criminals and anti-social elements of society. And these people include India's political class, the bureaucracy, and large sections of the upper and middle class... In their own perception, the policemen feel that they are doing a job. They resort to torture for 'professional objectives' - to extract information or confession in order to solve a case... another 'professional objective' of the police often follows, which is, to terminate the criminality of a professional criminal, who could be a burglar, a robber or a gangster, or even a terrorist... by maiming him, by making him lame, rendering him incapable of further crime".

<sup>28</sup> In relation to the Punjab, see: Amnesty International, Breaking the cycle of impunity and torture in Punjab, AI-Index: ASA 20/002/2003, January 2003, pp.4 et seq. and 18 et seq.

<sup>29</sup> See as to the methods of torture used in India the judgment of the Supreme Court *Munna v State of Uttar Pradesh* AIR 1982 SC 806. See also the torture techniques listed in: Letter to Chief Ministers/Administrators of all States/Union Territories with a request to adopt the Model Autopsy form and the additional procedure for inquest, Appendix A, in: National Human Rights Commission, Important Instructions/Guidelines, New Delhi, 2000, pp.27,28.

<sup>30</sup> According to the NHRC's annual reports, deaths in police custody increased from 136 in 1996 to 188 in 1997 and 193 in 1998. In 1999, 183 deaths in police custody were reported. From April to August 2002, 79 people died in police and 580 in judicial custody. See also for the assessment of the torture practice by a Supreme Court judge, Dr. A S Anand JJ in *DK Basu v State of West Bengal* (1997) 1 SCC 416: "However, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights takes place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police, or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the creditability of the Rule of Law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder."

<sup>31</sup> See by way of example *DK Basu v State of West Bengal*, supra.

<sup>32</sup> In the early years of Public Interest Litigation, the court focussed on the rights of prisoners and prison conditions. See *Hussainara Khatoon v State of Bihar* (1 to 6) (1980) 1 SCC 81, *Kadra Pahadiya v State of Bihar* (1981) 3 SCC 671, *Sunil Batra v Delhi Admn.* (1980) 3 SCC 488, *Veena Sethi v State of Bihar* (1982) 2 SCC 583, *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v Union of India* (1984) 6 SCC 731, *Citizens for Democracy v State of Assam* (1995) 3 SCC 743.

<sup>33</sup> Protection of Human Rights Act, 1993 (India); National Human Rights Commission, The Protection of Human Rights Act, 1993 (1994) [hereinafter PHRA or Human Rights Act].

<sup>34</sup> See *ibid.* §§ 21, 30. The Human Rights Courts envisaged in the act have not been set up subsequently. See Sripathi, Vijayashri, India's National Human Rights Commission: A Shackled Commission, in: Boston University International Law Journal, 1 Spring 2000, 18. See NHRC, Annual Report 1999-2000, pp. 81, 82 concerning the setting up of State Human Rights Commissions.

have any effective enforcement mechanism at its disposal. The scope of the NHRC's work and the zeal of victims of human rights violations to seek the Commission's attention is manifested by the fact that starting with 496 complaints in the first six months after it was established, the NHRC registered 50,634 complaints during 1999-2000.<sup>35</sup>

The NHRC has taken a pro-active role in advocating against torture<sup>36</sup> and urging the Government of India to ratify the Convention against Torture. In this regard, it noted in its Annual Report 1998-1999 that it is distressing to know that, even though the Permanent Representative of India to the United Nations signed the Convention on 14 October 1997, the formalities for ratification are yet to be completed. The Commission urged the earliest ratification of this key Convention and the fulfilment of the promise made at the time of signature, namely that India would "uphold the greatest values of Indian civilization and our policy to work with other members of the international community to promote and protect human rights."<sup>37</sup> It is important to note, however, that these measures by the NHRC have not been successful.<sup>38</sup>

Another body, the National Police Commission (NPC), was appointed by the Government of India in 1977 with wide terms of reference covering police organisation, its role, functions, accountability, relations with the public, political interference in its work, misuse of powers, evaluation of its performance etc.<sup>39</sup> The NPC made several recommendations aimed at reducing the use of torture, which were subsequently not implemented by the Government.<sup>40</sup> In 1996 a writ petition was filed in the Supreme Court by two retired police officers requesting that the Government of India be ordered to implement the recommendations of the NPC. Following the Supreme Court's orders in this case, a Committee on Police Reforms was set up by the Government under the leadership of J.F. Ribeiro (a retired police officer). The report of the Ribeiro Committee was finalised in October 1998 but no subsequent action has yet been taken.<sup>41</sup>

Several proposals for reform, such as inserting a section 113 B) into the Evidence Act,<sup>42</sup> the passing of a State Liability in Tort Act, compensation for custodial crimes and for victims of rape and sexual assault<sup>43</sup> have all failed to win sufficient political support to be enacted. Equally, the recommendation to incorporate a specific right against torture and to compensation, proposed by the National Commission to Review the Working of the Constitution in February 2002 still awaits

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<sup>35</sup> NHRC, Annual Report 1999-2000, p.83, para.16.1.

<sup>36</sup> See e.g. its "Important Instructions/Guidelines" relating to custodial deaths/rape and encounter deaths, supra.

<sup>37</sup> See NHRC, Annual Report, 1998-1999, III.C, 3.22.

<sup>38</sup> See NHRC, Annual Report 1999-2000, pp. 45 and 65, 66.

<sup>39</sup> This was the first Commission appointed at the national level after Indian independence.

<sup>40</sup> These recommendations included: A). Surprise visits by senior officers to police stations to detect persons held in illegal custody and subjected to ill treatment; B) the magistrate should be required by rules to question the arrested person if he has any complaint of ill treatment by the police and in case of complaint should get him medically examined; C) there should be a mandatory judicial inquiry in cases of death or grievous hurt caused while in police custody; D). Police performance should not be evaluated on the basis of crime statistics or number of cases solved; and E) training institutions should develop scientific interrogation techniques and impart effective instructions to trainees in this regard. For a comprehensive reading and understanding of most recommendations of the NPC see Commonwealth Human Rights Initiative, Some Important Recommendations of (i) National Police Commission, (ii) Ribeiro Committee on Police Reforms and (iii) Padmanabhaia Committee on Police Reforms, 2001.

<sup>41</sup> See G.P. Joshi, Ribeiro Committee Report on Police Reforms- A Critical Analysis, CHRI, 1999.

<sup>42</sup> According to this proposal, a court may, in cases concerning the prosecution of a police officer for an alleged offence of having caused bodily injury to a person, presume that the injury was caused by the police officer if there is evidence that the injury was caused during the period when the person was in the custody of the police.

<sup>43</sup> See for details on these proposals infra Part V.

implementation.<sup>44</sup> Moreover, while several positive measures such as human rights training programmes for the police have been implemented, various officials from State Governments have made statements which could be seen as giving law enforcement personnel a licence for human rights violations.<sup>45</sup>

### 2.3. International Responses

India has hardly opened itself to outside international scrutiny of its human rights performance. It has neither ratified the Torture Convention nor the Optional Protocol to the ICCPR. As there are no regional human rights treaties, India has only consented to periodic reporting obligations. To date, it has not issued an invitation to the Special Rapporteur on Torture despite several requests to this effect. The Special Rapporteur on Torture has nevertheless commented on India, assessing the situation on the basis of information that he has received over the years, as follows:

“While the size and diversity of the country make it difficult to characterize the intensity of the problems all over, it certainly appears that there is a tradition of police brutality and arbitrariness in much of the country, the degree of brutality frequently being sufficiently unrestrained to amount to torture, often with fatal consequences. The brutality is sometimes linked to corruption and extortion and is often deployed in the service of local vested interests, be they economic or official. The use of excessive and indeed unprovoked and unjustified forces is common, especially in response to protests demanding rights. The persecution of those pursuing complaints against the police is a not infrequent phenomenon. In areas characterized by armed resistance, the security forces seem notably prone to resort to extreme and often lethal violence, even if individual abuses not carried out as part of organized military operations may be sanctioned. In general, while not absolute, the level of impunity among police and security forces seems sufficiently substantial as to conduce a general sense among such officials that their excesses, especially those committed in the line of duty, will at least be tolerated, if not encouraged.”<sup>46</sup>

The Human Rights Committee, in 1997, in its scrutiny of India’s country report expressed its concerns at: “allegations that police and other security forces do not always respect the rule of law and that, in particular, court orders for *habeas corpus* are not always complied with, in particular in disturbed areas. It also expresses concern about the incidence of custodial deaths, rape and torture...”<sup>47</sup>

Recently, concerns have been raised by the Special Rapporteur on Violence against Women on the large number of reported cases of rape in custody.<sup>48</sup>

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<sup>44</sup> It recommended the insertion of a new subsection 2 and 3 to section 21, reading respectively: “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment” and “every person who has been illegally deprived of his right to life or liberty shall have an enforceable right to compensation.” See Report of the National Commission to review the working of the Constitution, Vol. I, Universal Publishers, Delhi, 2002.

<sup>45</sup> See various quotations in Joshi, *Police Brutality in India*, supra.

<sup>46</sup> Report of the Special Rapporteur on Torture, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights Resolution 2000/43, UN Doc. E/CN.4/2001/66, 26 January 2001, para.57

<sup>47</sup> UN Doc. CCCPR/C/79/Add.81, 4 August 1997, para. 23.

<sup>48</sup> UN Doc. E/CN.4/2002/83/Add.1, paras. 27-39.

## **II. THE PROHIBITION OF TORTURE UNDER DOMESTIC LAW**

Neither the Indian Constitution nor statutory law contains an express prohibition of torture. The Indian Supreme Court has, however, construed Article 21 of the Constitution<sup>49</sup> as including a prohibition of torture.<sup>50</sup> In *Mullin v Union Territory of Delhi*, the Supreme Court declared: "Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21."<sup>51</sup>

The Penal Code stipulates criminal offences that could be used to punish torturers but contains no explicit criminal offence of torture. While the Indian Evidence Act and the Criminal Procedure Code contain safeguards against the extraction of confessions by means of torture, they do not explicitly prohibit the use of torture as a means of obtaining evidence.<sup>52</sup> The acts governing the exercise of police powers include rules against excessive use of force but no express prohibitions of the use of torture. Consequently, there is no definition of torture in Indian legislation. Even though the Supreme Court has not defined torture in its decisions, it has held that certain acts constitute torture.<sup>53</sup>

## **III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE**

### **1. THE SUBSTANTIVE LAW**

#### **1.1. Criminal Offences and Punishment**

The Indian Penal Code criminalizes certain acts that can amount to torture. The following criminal offences might be used to prosecute those responsible for torture: the offence of voluntarily causing hurt<sup>54</sup> to extort confession or to compel restoration of property is punishable by up to seven years imprisonment and liable to a fine.<sup>55</sup> If the hurt caused is

<sup>49</sup> Article 21 reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

<sup>50</sup> *Sunil Batra v Delhi Administration*, AIR 1978 SC 1675.

<sup>51</sup> AIR 1981 SC 746.

<sup>52</sup> See sections 24 et seq. of the Indian Evidence Act and Section 164 of the Criminal Procedure Code (hereinafter Cr. PC).

<sup>53</sup> See Dr. A S Anand JJ in *DK Basu v State of West Bengal*, supra, para.10: "'Torture' has not been defined in the Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word *torture* today has become synonymous with the darker side of human civilisation. 'Torture' is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in you, chest, cold as ice and heavy, as a stone paralyzing as steep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."- Adriana P. Bartow." Rape has been recognised by the Supreme Court as a violation of a Fundamental Right, namely the Right to Life contained in Article 21, see *Bodhisattwa Gautam v Subhra Chakraborty*, (1996) 1 SC 490, at p.500.

<sup>54</sup> Section 319 Penal Code: "Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."

<sup>55</sup> Section 330 Penal Code: "Whosoever 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 detention of any offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

grievous,<sup>56</sup> the maximum punishment is ten years imprisonment and liability to pay a fine.<sup>57</sup> Wrongful confinement to extort confession or compel restoration of property carries a maximum punishment of three years imprisonment and liability to pay a fine.<sup>58</sup> A public servant disobeying the law, with intent to cause injury<sup>59</sup> to any person, is liable to a punishment of up to one year imprisonment and/or a fine.<sup>60</sup> A public servant concealing the design to commit an offence that it is his/her duty to prevent commits an offence, the punishment of which depends on the imprisonment or fine provided for the concerned offence.<sup>61</sup>

As far as general offences against physical and sexual integrity are concerned, assault or use of criminal force incur up to three months imprisonment and/or a fine.<sup>62</sup> Culpable homicide carries, depending on the circumstances, a punishment ranging from various terms of imprisonment up to imprisonment for life and a fine.<sup>63</sup> Murder which covers acts where the offender intended to cause death or inflicted bodily injury or committed other acts sufficient or likely to cause death is punishable with death or life imprisonment and a fine.<sup>64</sup> However, culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by committing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty.<sup>65</sup> If death is caused by negligence, the maximum punishment is imprisonment of two years and/or a fine.<sup>66</sup> Rape carries a punishment ranging from seven years to life imprisonment<sup>67</sup> whereby rape in custody is considered to be an aggravating circumstance carrying a heavier punishment.<sup>68</sup> Cruelty

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<sup>56</sup> Section 320, Grievous hurt: "The following kinds of hurt only are designated as "grievous":- First- Emasculation; secondly- Permanent privation of the sight of either eye; thirdly- Permanent privation of the hearing of either ear; fourthly- Privation of any member or joint; fifthly- Destruction or permanent impairing of the powers of any member or joint; sixthly- Permanent disfiguration of the head or face; seventhly- Fracture or dislocation of a bone or tooth; eighthly- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits."

<sup>57</sup> Section 331 Penal Code: Voluntarily causing grievous hurt to extort confession, or compel restoration of property.

<sup>58</sup> Section 348 Penal Code: "Whoever wrongfully confines any person for the purpose of extorting from the person confined, or any person interested in the person confined, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined or restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall be liable to fine."

<sup>59</sup> The word injury denotes according to Section 44 of the Penal Code "any harm whatever illegally caused to any person, in body, mind, reputation or property."

<sup>60</sup> Section 166 Penal Code: "Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

<sup>61</sup> Section 119 Penal Code.

<sup>62</sup> Section 352 Penal Code: "Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both."

<sup>63</sup> Sections 299 and 304 Penal Code.

<sup>64</sup> Sections 300 and 302 Penal Code.

<sup>65</sup> Section 300, Exception 3 Penal Code.

<sup>66</sup> Section 304 Penal Code.

<sup>67</sup> Sections 375 and 376 (1) Penal Code.

<sup>68</sup> Ibid.: "Whoever, being a police officer commits rape within the limits of the police station to which he is appointed; or in the premises of any station house whether or not situated in the police station to which he is appointed; or on a woman in his custody or in the custody of a police officer subordinate to him; or being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in

to a child is punishable with up to six months imprisonment and/or a fine according to the Children Act, 1960.<sup>69</sup>

Moreover, the commission of acts of torture in the course of armed conflict is punishable under the Geneva Convention Act as a grave breach of the Geneva Conventions and carries a punishment of up to fourteen years imprisonment or life imprisonment.<sup>70</sup>

## 1.2. Disciplinary Sanctions

Government Service Rules are in the domain of the concerned states, except the Central Civil Service Rules that apply to the employees of the Government of India and the All India Service Rules that apply to All India Services (IAS (Indian Administrative Service), IPS (Indian Police Service) and IFOs). Thus, all public servants, including members of the Indian Police Service, are subject to disciplinary sanctions ranging from censure to dismissal.<sup>71</sup> Members of the Army are also subject to a range of disciplinary measures for wrongdoing, including torture.<sup>72</sup>

## 2. THE PROCEDURAL LAW

### 2.1. Immunities

Indian legislation contains various provisions providing immunity from prosecution to certain groups of public officials for any offence committed in the discharge of duties unless specifically sanctioned by the Central or State Government. This applies to judges and magistrates, public servants not removable from their office save by or with the sanction of the Government and members of the armed forces of the Union.<sup>73</sup> Members of the armed forces are also expressly

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force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or (e) commits rape on a woman knowing her to be pregnant; or commits rape on a woman when she is under twelve years of age; or commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine : Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years."

<sup>69</sup> Section 41 (1) of the Children Act, 1960: "Whoever, having the actual charge of, or control over, a child, assaults, abandons, exposes or wilfully neglects the child or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such child unnecessary mental and physical suffering shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both."

<sup>70</sup> See Article 3 Geneva Conventions Act, 1960.

<sup>71</sup> Section 311 of the Constitution and The All India Services (Discipline and Appeal) Rules, 1955, as well as the Central Service Rules of India and the individual States, the Police Act, 1861 and the provisions of the Police Acts of the individual Union States.

<sup>72</sup> See Sections 71-79 and 80, 83 and 84 Army Act 46 of 1950.

<sup>73</sup> Section 179 of the Cr.PC.: "(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction- (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government; (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government...(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein,

protected from arrest for "anything done or purported to be done in the discharge of official duties except after obtaining the consent of the Central Government."<sup>74</sup> Moreover, no prosecution may be instituted except with the sanction of the Central or State Governments for the use of armed force or civil force to disperse an assembly.<sup>75</sup> The Armed Forces Special Power Acts for Jammu and Kashmir as well as Punjab and Chandigarh also contain provisions providing immunity from prosecution unless sanctioned by the Central Government.<sup>76</sup>

According to recently introduced legislation to prevent terrorism, "no prosecution or other legal proceedings shall lie against any serving member or retired member of the armed forces or other para-military forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism."<sup>77</sup>

The jurisprudence on the need for a prior consent of the government to prosecute alleged offences of government officials has not been consistent. While the Supreme Court has suggested that such sanction is not required when the alleged act was not done in furtherance or discharge of the officer's official duties,<sup>78</sup> it has not followed this approach in later similar cases.<sup>79</sup> This also applies to the restriction that the government, in granting or denying authorisation, "shall pass an order giving reasons subject to judicial review."<sup>80</sup>

## 2.2. Statutes of Limitation

The Criminal Procedure Code stipulates the following limitation: six months for offences punishable with only a fine; one year for offences punishable with imprisonment for a term not exceeding one year; and three years for offences punishable with imprisonment for a term more than one year but not exceeding three years.<sup>81</sup> There is no statute of limitation for criminal offences carrying heavier punishments. However, several statutes enacted by Indian states, which have the power to legislate on the operation of the police forces, bar actions based on criminal complaints against police officers unless the complaint was brought within a specified time limit. In *Patel v State of Gujarat*,<sup>82</sup> the Supreme Court considered a statute from that State which barred prosecutions against police officers unless the complaint was brought within one year of the alleged offence.<sup>83</sup>

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the expression "State Government" where substituted...(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

<sup>74</sup> Section 45 (1) Cr. PC.

<sup>75</sup> Section 132 (1) in conjunction with sections 129, 130 and 131 of the Cr. PC.

<sup>76</sup> See identical section 7 of The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 and The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983: "No prosecution, suit or other legal proceedings shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act."

<sup>77</sup> Section 57 Prevention of Terrorism Act, 2002. However, according to Section 58 of the Act, "any police officer who exercises powers corruptly or maliciously, knowing that there are no reasonable grounds for proceeding under this Act, shall be punishable with imprisonment which may extend to two year, or with fine, or with both."

<sup>78</sup> *Shamboo Nath Mishra v State of Uttar Pradesh* AIR 1997 SC 2102.

<sup>79</sup> *State v BL Verma and another*, (1997) 10 SCC 772.

<sup>80</sup> *Naga peoples movement for Human Rights v Union of India* (1998) 2 SCC 109.

<sup>81</sup> Section 468 (1) and (2) Cr. PC. See for commencement of the period of limitation etc., sections 469-473 Cr. P.C.

<sup>82</sup> *Crim App 485*, 2000 SOL.

<sup>83</sup> The case concerned an arrest allegedly based on a false charge.

The Supreme Court upheld the validity of the limitation period as it construed the statute as applying to any act that could be committed only by virtue of the offender's official position.<sup>84</sup> The same Court came to a different decision in *Unnikrishnan v Alikutty*<sup>85</sup> where an individual tried to initiate criminal proceedings against police officers for alleged acts of torture. Such a prosecution would have been barred by the statute of the concerned State which prevented courts hearing cases based on complaints against police officers unless the complaint was filed within six months of the date of the alleged offence. The court in this case interpreted the statute as not applying to acts amounting to an abuse of authority.<sup>86</sup>

## 2.3. Investigations into Torture

### 2.3.1. Investigations by police and magistrate

A victim of torture may lodge a complaint with the NHRC,<sup>87</sup> the police<sup>88</sup> or a magistrate.<sup>89</sup> an investigation may also be instituted following directions by the High Court or the Supreme Court to the Government concerned. Courts can also order investigations by an outside agency such as the Central Bureau of Investigation (CBI).

The procedure differs depending on whether a complaint is lodged with the police or the magistrate.<sup>90</sup>

Complaints to the police may be made by any person in writing or are to be recorded when made orally.<sup>91</sup> The procedure to be followed by the police depends on whether the offence in question is cognisable or non-cognisable.<sup>92</sup>

Cognisable offences are investigated by the police. If the officer in charge of a police station refuses to record a complaint concerning a cognisable offence, the complainant may send the substance of the complaint, in writing, to the relevant Superintendent of Police. If the Superintendent is satisfied that such information discloses the commission of a cognisable offence, he or she shall either investigate the case him/herself or direct an investigation to be made by any police officer subordinate to him.<sup>93</sup> As a general rule, the officer-in-charge of the police station is required to examine information received to establish whether there is reason to suspect that a cognisable offence has been committed. Thus, upon receiving information about the commission of a criminal offence, the officer-in-charge is to draw up a First Information Report, which is to be

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<sup>84</sup> This case is discussed by Weisburd, Mark, Customary International Law and Torture: The Case of India, 2 Chicago Journal of International Law (Spring 2001) 81, at 84.

<sup>85</sup> Crim App 747, 2000 SOL.

<sup>86</sup> See Weisburd, supra, at 85. The wording of the concerned provision stipulating a time limit concerns complaints against police officers "on account of any act done in pursuance of any duty imposed or authority conferred on (them)."

<sup>87</sup> See infra 2.3.2.

<sup>88</sup> Section 154 Cr. PC.

<sup>89</sup> Section 200 Cr. PC.

<sup>90</sup> The seized Magistrate may hold its own inquiries and direct police investigations, section 202 Cr. PC., and has the power to issue summons and arrest warrants, section 204 Cr. PC.

<sup>91</sup> Section 154 (1) and (2) Cr. PC.

<sup>92</sup> See First Schedule of the Cr. PC. Criminal offences carrying a minimum punishment of more than three years are cognisable whereas all other offences, such as those in sections 330, 331 and 348 of the Penal Code, are non-cognisable.

<sup>93</sup> Section 154 (3) Cr. PC.

sent to the competent Magistrate, and to commence investigations.<sup>94</sup> However, a police officer has a certain discretion since he or she shall not investigate if "it appears to (him) that there is no sufficient ground for entering on an investigation."<sup>95</sup> In such cases, the police officer must inform the complainant about the reasons for not proceeding with the investigation.<sup>96</sup>

Complaints against public officials may be investigated by the police or the CBI, the latter often following recommendations by the NHRC, the Supreme Court or High Court. In its investigation, the police have the power to arrest a person suspected of having committed a cognisable offence without a warrant.<sup>97</sup> Members of the armed forces, however, may only be arrested with the consent of the Central Government.<sup>98</sup> In respect of medical evidence, a detainee has the right to have a medical examination in case of complaints relating to torture by police.<sup>99</sup> The Supreme Court has also directed the State to carry out medical examinations of detainees at regular intervals of 48 hours.<sup>100</sup> In cases of custodial deaths, an inquest, which is usually conducted by an executive magistrate, is mandatory.<sup>101</sup>

Generally, an investigation has to be completed expeditiously. Upon completion of the investigation, the competent police officer or the CBI sends a report to the area magistrate. This is either sent in the form of a charge sheet in cases where there is sufficient evidence against the suspect or as a final report in cases where the investigation is discontinued or closed, usually on the basis of insufficient evidence.<sup>102</sup> The Magistrate may either disagree with the conclusions of the report, in which case he or she calls for further investigations,<sup>103</sup> or accept it and, as the case may be, take cognisance of the offence.<sup>104</sup> The Magistrate should not accept a final report of closure without giving notice to the complainant and giving him or her an opportunity of being heard.<sup>105</sup>

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<sup>94</sup> Section 156 and 157, 1) Cr. PC. The NHRC has, in relation to killings of alleged members of the "Peoples War Group" in West-Bengal by security forces, issued instructions that the police must carry out a proper investigation in cases where a person is killed by the police and the latter invoke the right of self-defence. See NHRC, Important Instructions/Guidelines, supra, pp.36 et seq.

<sup>95</sup> Section 157 1 (b) Cr. PC.

<sup>96</sup> Section 157 (2) Cr. PC.

<sup>97</sup> Section 41 Cr. PC.

<sup>98</sup> Section 45 Cr. PC.

<sup>99</sup> Section 54 Cr. PC. See also the NHRC Guidelines regarding Arrest, in: NHRC, Important Guidelines/Instructions, supra, p.55: "When the person arrested is brought to the police station, he should, if he makes a request in this regard, be given prompt medical assistance. He must be informed of his right. Where the police officer finds that the arrested person is in a condition where he is unable to make such a request but is in need of medical help, he should promptly arrange for the same. This must also be recorded contemporaneously in a register. The female requesting for medical help should be examined only by a female registered medical practitioner. (S.53 Cr.PC.);" p.56: "As soon as the person is arrested, police officer effecting the arrest shall make a mention of the existence or non-existence of any injury(s) on the person of the arrestee in the register of arrest. If any injuries are found on the person of the arrestee, full description and other particulars as to the manner in which the injuries were caused should be mentioned in the register, which entry shall also be signed by the police officer and the arrestee. At the time of release of the arrestee, a certificate to the above effect under the signature of the police officer shall be issued to the arrestee."

<sup>100</sup> *D.K. Basu v State of West Bengal*, supra. See also the NHRC Guidelines, supra, p.56: "If the arrestee has been remanded to police custody under the orders of the court, the arrestee should be subjected to medical examination by a trained Medical Officer every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. At the time of his release from the police custody, the arrestee shall be got medically examined and a certificate shall be issued to him stating therein the factual position of the existence or non-existence of any injuries on his person."

<sup>101</sup> Section 176 Cr. PC.

<sup>102</sup> Section 173 Cr. PC.

<sup>103</sup> Section 173 (8) Cr. PC.

<sup>104</sup> Section 190 Cr. PC.

<sup>105</sup> *Bhagwant Singh v. Commr. Of Police*, (1985) 2 SCC 537, at pp.542-543.

There is no specific legislation granting victims of crimes, including torture, specific procedural rights or rights of protection. Victims have few procedural rights under the Criminal Procedure Code apart from the right to submit evidence and to make submissions to the Magistrate as outlined above.<sup>106</sup> While there is no express right to private prosecution, a petitioner may file a petition for an order of mandamus to compel a judicial inquiry into cases of custodial deaths and to prosecute the police officials concerned.<sup>107</sup> Moreover, Courts can issue interim orders for the protection of victims or witnesses where there are intimidations and threats.

### **2.3.2. National human rights commission**

The NHRC may inquire, *suo moto* or on petition presented by a victim or any person on his behalf, into complaints of i) violation of human rights or abetment thereof; or ii) negligence in the prevention of such violation, by a public servant.<sup>108</sup> It can only investigate allegations of human rights violations that have occurred within a year of filing the complaint.<sup>109</sup> The NHRC has wide-ranging powers in carrying out its inquiry into the complaints of human rights violations. It can either call for a report from the police, monitor the police investigations in other ways or conduct an inquiry itself. It may, where the inquiry discloses the commission of violation of human rights or negligence in the prevention of a violation, recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the NHRC may deem fit (s).<sup>110</sup> The Government or authority has to report within one month on the action it took on the NHRC's recommendation. The NHRC publishes the results of its investigations and decisions taken together with the action taken by the concerned government or authority in this regard.

The procedure differs however with respect to the armed forces. Here, the NHRC may only seek a report from the Government, and, after the receipt of the report, if the NHRC decides to take any action, it must make its recommendations to the Government. The Government has three months to respond after which the NHRC can publish its recommendations made to the Central Government and the action taken by the Government following such recommendations.<sup>111</sup>

Moreover, the NHRC, relying on Section 12 (h) of the Human Rights Act, can and has issued a considerable number of instructions and guidelines concerning such issues as custodial deaths/rapes, "encounter deaths", visits to police lock-ups/guidelines on polygraph tests and arrests as well as human rights in prison.<sup>112</sup>

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<sup>106</sup> Justice A.S. Anand, Judge, Supreme Court of India, *Victims of Crime-the unseen side*, in: (1998) 1 SCC (Jour) 3.

<sup>107</sup> *People's Union of Civil Liberties v Union of India & Anor*, supra.

<sup>108</sup> Section 12 (a), The Protection of Human Rights Act 1993.

<sup>109</sup> Section 36 (2) *ibid.*

<sup>110</sup> Sections 13 et seq., in particular Section 18, 1) *ibid.*

<sup>111</sup> Article 19, *ibid.*

<sup>112</sup> See NHRC, Important Instructions/Guidelines, supra.

## 2.4. Trials

The trial, which is conducted by the Public Prosecutor on behalf of the State,<sup>113</sup> takes place in the criminal court of first instance. This is, depending on the crime in question, the Magistrate or the Court of Session.<sup>114</sup> Members of the armed forces that have committed military and civil offences on duty are subject to the provisions of the Army Act,<sup>115</sup> and are tried by court-martial,<sup>116</sup> unless the criminal offence in question is one of murder, culpable homicide or rape committed in India while not on active service.<sup>117</sup> These proceedings are governed by the Criminal Procedure Code and the Indian Evidence Act, and provide for an adversarial system in which the guilt of the accused has to be proved beyond reasonable doubt by the prosecution. and the victim of a crime has the right to submit evidence.<sup>118</sup>

The court may award a fine, forfeiture of property, simple or rigorous imprisonment, imprisonment for life or the death sentence as punishment. The Government has the power to suspend and commute sentences.<sup>119</sup>

## 3. THE PRACTICE

### 3.1. Complaints

There have been a large number of complaints against the police throughout the years. During 1999, a total of 74,322 complaints were lodged against the police of which 10,485 were dealt with departmentally, 285 by Magistrates and 513 by judicial officers. A total of 4,036 First Information Reports were registered of which 70 cases resulted in a conviction. Departmental proceedings were initiated against 19,138 policemen, of which 888 were dismissed, 11,002 awarded major punishments and 24,644 awarded minor ones.<sup>120</sup> While this figure does not give a breakdown of the kind of conduct to which the complaints relate, it is believed that a considerable number of these complaints concern torture and other forms of ill-treatment.

The NHRC also regularly receives large numbers of complaints.<sup>121</sup> In 1999-2000, it registered 50,634 complaints, the majority of which were from the State of Uttar Pradesh. While no breakdown is available, most of these complaints related to ill-treatment, including torture. According to the NHRC: "Of the total number of cases admitted for disposal during 1999-2000, 54 cases pertained to "disappearances", 1,157 cases were about illegal detention/ illegal arrest, 1,647 cases were of false implications and 5,783 complaints against the police pertained to other issues. During this period, the Commission received 59 cases pertaining to indignity to women, 511

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<sup>113</sup> Section 225 Cr. PC. See Section 24 for the organisation of the Public Prosecution.

<sup>114</sup> Section 26 Cr. PC.

<sup>115</sup> Section 2 Army Act, 1950.

<sup>116</sup> See Chapter X and XI of the Army Act for the applicable procedure.

<sup>117</sup> Sections 69 and 70 *ibid*.

<sup>118</sup> The court has discretion to order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court. Section 312 Cr. PC.

<sup>119</sup> Section 432 and 433 Cr. PC.

<sup>120</sup> See the National Crime Statistics by the Government of India, National Crime Research Bureau for the year 2000.

<sup>121</sup> 120,000 complaints in the first six years. See Sripati, *supra*, 3.

complaints about jail conditions and 341 cases of atrocities against Scheduled Castes/Scheduled Tribes. 5,433 complaints pertained to failure in taking action."<sup>122</sup>

While there appears to be a large number of complaints, it is known that many torture survivors and relatives of torture victims have refrained from coming forward, especially members of marginalised classes, who are often unaware of their rights. Victims have also been reluctant to complain because of the stigma attached, especially in rape cases,<sup>123</sup> and the reportedly indifferent or hostile attitude of many members of the police forces towards complainants. In a number of cases, the perpetrators have openly threatened victims of torture with adverse repercussions if they dare to complain.<sup>124</sup>

### 3.2. Investigations

Complaints about torture and death in custody resulting from torture are in most cases not given due attention because of the closed and protective police culture. Upon receiving complaints, the police often fail to prepare a first information report. Permission to prosecute has been regularly refused. For investigations or prosecutions, evidence is generally difficult to obtain because the perpetrators and members of the police close to them refrain from co-operating, victims find it hard to identify the perpetrators and co-prisoners tend to be too afraid to become a prosecution witness. Independent medical examinations of detainees and victims are often not, carried out immediately or adequately, if at all, in disregard to existing Supreme Court directions and NHRC guidelines. Medical doctors have in the face of pressure by police officers failed to carry out their duties as established by several judicial inquiries.<sup>125</sup> Bodies of those who have died as a result of torture have been disposed of or the police have framed cases in such a way that the deaths appear to have occurred after release from custody or as a result of a so-called encounter.<sup>126</sup> Law-enforcement personnel have reportedly also manipulated evidence. Moreover, victims and human rights defenders have been harassed for pursuing complaints.

While the intervention and monitoring of the NHRC has at times led to more thorough investigations, it has apparently not resulted in a fundamental change of attitude of investigating authorities when examining complaints against public officials.<sup>127</sup> The Investigation Division of the NHRC has throughout the years investigated numerous cases of torture. It examined 1,747 cases

<sup>122</sup> NHRC, Annual Report 1999-2000, p.84, para.16.6.

<sup>123</sup> According to a report by the People's Union for Democratic Rights (PUDR) on custodial rape, *supra*, police officers were charged in 10 cases of rape in New Delhi between 1989-1993. They reported that the courts tended to ignore the victim's vulnerability, and often subject the victim to so much emotional strain that the case is dropped completely. Of the ten cases it is reported that six of the women wanted to withdraw the charges in order to end their ordeal; two of the women did not show up to complete proceedings; one of the remaining cases was still in progress, with all four defendants on bail. In the only remaining case, there was a failure to produce any of the accused in court.

<sup>124</sup> See e.g. Amnesty International, West Bengal, *supra*, pp.8 and 13, citing the 1998-1999 Annual Report of the West Bengal Human Rights Commission.

<sup>125</sup> In a survey conducted by the Indian Medical Association, New Delhi, 1995, 16% of doctors reported that they had witnessed cases of infliction of torture and 18% indicated that they knew of participation of Health Professionals in Torture, while 5% of the respondents even confessed their participation in torture by administering drugs to facilitate interrogation. See also assessment of the West Bengal Human Rights Commission cited in AI, West Bengal, *supra*, p.20 and AI, Punjab, pp.35 et seq.

<sup>126</sup> Some doctors did not appear to withstand pressure from the police to provide post-mortem reports that concealed the truth, see Krishnadeva Rao, Let us speak for the dead and protect the living, Torture, Volume 5, No.3, 1995, IRCT.

<sup>127</sup> As evidenced by repeated calls of the NHRC in each of its recent annual human rights reports and other statements to investigate cases of torture and death in custody more thoroughly.

of human rights violations, including torture, during the period 1999-2000.<sup>128</sup> Criminal prosecutions were launched against 55 officials and departmental action against 70 police officials on the basis of reports given by the Investigation Division.<sup>129</sup> While the NHRC has played an important role in the investigation stage, it has been criticised for its ineffectiveness in ensuring prosecution of the perpetrators. This is evidenced by the fact that hardly any of these cases resulted in a conviction.<sup>130</sup>

While some courts, in particular the Supreme Court and the High Courts, have ordered the commencement of investigations into alleged acts of torture in cases before them, lower courts have tended not to institute investigations in cases where criminal suspects have complained that their confessions<sup>131</sup> have been extracted by means of torture.<sup>132</sup> While the record of the courts is therefore a mixed one, the directions of the Supreme Court and the High Courts have often not been followed by the investigating and prosecuting authorities despite repeated exhortations by judges of these courts. Moreover, High Court justices have in several instances dismissed cases brought by torture victims instead of ordering the CBI to charge the police officers on the following grounds: delay in filing petitions, disputed facts, lack of evidence or because the Court had already given directions to approach the authorities or to file a civil or criminal suit.<sup>133</sup>

### 3.3. Prosecution: Indictments, Convictions, Sentencing

There are no overall statistics available but the general picture, as evidenced by the NHRC annual reports and other surveys, is one where only a minority of cases of torture result in prosecution, few of which in turn result in a conviction carrying a sentence proportionate to the gravity of the crime. While there have been several prosecutions, often due to the persistence of victims, many have resulted in acquittals on the grounds of insufficient evidence. For example, in 1999, 171 cases of custodial deaths were reported for which 108 policemen were arrested and 71 charge sheeted. None of them were subsequently convicted.<sup>134</sup>

Courts are often seen as taking the need to establish proof beyond all reasonable doubt to its extreme, ignoring the realities on the ground and the circumstances of the case in question.<sup>135</sup> In several cases, courts have apparently accepted the police's version of events that wounds were inflicted when using lawful force, or, in death in custody and disappearance cases, that either the

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<sup>128</sup> According to NHRC, Annual Report 1999-2000, p.85, para.16.10, 1586 of these cases were related to collection of facts and monitoring. Field investigations were conducted in 161 cases.

<sup>129</sup> NHRC, Annual Report 1999-2000, p.85, para.16.10; 16.11.

<sup>130</sup> Ravi Nair, Impunity and Torture in India, paper submitted at the occasion of seminar on the right to reparation for torture survivors in India, Nepal and Sri Lanka, New Delhi, 14 September 2002. See also AI, Punjab, supra, p.44, according to which the National Human Rights Commission in Punjab has confined itself to recommending compensation but has, in the period 1997-2001, not recommended a single prosecution of police officers even though there had been 26 cases of death in custody.

<sup>131</sup> Such confessions are excluded from evidence at trial according to Section 25 of the Indian Evidence Act: "No confession made to a Police Officer shall be proved as against a person accused of any offence may it be before or after investigation."

<sup>132</sup> AI, West Bengal, supra, pp.18,19 and AI, Punjab, supra, pp.30 et seq.

<sup>133</sup> Jaskaran Kaur, A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India, in: Harvard Human Rights Journal, Volume 15, Spring 2002, p.289, who also notes that victims often turn to the High Court judges because their approaches to the police and authorities had failed.

<sup>134</sup> P.M. Nair, The Role of the Police in Ensuring Accountability in Case of Torture, especially vis-à-vis Torture Survivors, paper submitted at the occasion of seminar on the right to reparation for torture survivors in India, Nepal and Sri Lanka, New Delhi, 14 September 2002.

<sup>135</sup> Anand, J., in *State of M.P. v Shyamsunder Trivedi* (1995) 4 SCC 262, at 273, para.17 quoted in *Basu v State of WB*, supra, at para.25.

victim never was in detention, died when trying to escape or in an encounter with the police etc.<sup>136</sup> The inordinate delays in all criminal cases diminish the chances of a successful outcome.<sup>137</sup>

Sentences in torture cases that resulted in conviction tend to be light, though those responsible for death in custody have on occasion received heavy punishment. By way of example, in the year 2000, four Delhi police constables were sentenced to life imprisonment for the death in custody of Darshan Singh.<sup>138</sup> In early 2002, following a CBI investigation ordered by the Supreme Court, two police men and three others were sentenced by the Additional Session Court in Patiala, to seven years rigorous imprisonment for torturing to death Amrik Singh since he could not pay a bribe demanded by one of the perpetrators.<sup>139</sup> The official statistics of the Government of India (National Crime Research Bureau) show that in the year 2000, a total of 888 police personnel were dismissed from service on charges including acts of violence and torture. Many were given departmental punishments. Disciplinary action was also taken against many others under the Army Act, though the exact numbers are not available. However, while disciplinary action has been taken against perpetrators of torture in some cases, the record is far from consistent, and in some instances torturers appear to have been promoted for their record in solving criminal cases.<sup>140</sup>

#### **IV. CLAIMING THE RIGHT TO REPARATION**

##### **1. AVAILABLE REMEDIES**

###### **1.1. Constitutional Law**

###### **1.1.1. Substantive rights**

The Indian Constitution does not contain an express right to an effective remedy or reparation for torture. However, according to the settled jurisprudence of the Supreme Court, an award of compensation by the Supreme Court pursuant to writ proceedings under Article 32<sup>141</sup> or by the High Court under Article 226<sup>142</sup> is a remedy available in law based on strict vicarious liability<sup>143</sup> for a contravention of fundamental rights to which the principle of sovereign immunity does not apply. Such an award is distinct from and in addition to the remedy in private law for damages.

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<sup>136</sup> Kaur, *supra*, pp.268 et seq.

<sup>137</sup> See for further information on this point <http://law.indiainfo.com/legal/remedy.html>.

<sup>138</sup> Joshi, *Police Brutality in India*, *supra*.

<sup>139</sup> *The Times of India*, Tuesday, 10 January 2002, 2 Punjab cops among 5 sentenced for murder.

<sup>140</sup> AI, West Bengal, *supra*, p. 27.

<sup>141</sup> Article 32. Remedies for enforcement of rights conferred by this Part: "1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed; 2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part..."

<sup>142</sup> Article 226. Power of High Courts to issue certain writs: "1) Notwithstanding anything in article 32, every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including [writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose]..."

<sup>143</sup> The State is vicariously liable for wrongful acts committed by its public officials/employees. See *Uttarakhand Sangharsh Samiti, Mussoorie v State of Uttar Pradesh* (1996) 1 UPLBEC 461.

Compensation for a breach of a fundamental right, namely Article 21 of the Constitution, was first raised in 1981 in the Supreme Court in the case of *Khatri v State of Bihar*,<sup>144</sup> also known as the *Bhagalpur Blinding* case.<sup>145</sup> The Court failed to order compensation because the responsibility of the police officers concerned was still under investigation but the Court ordered the medical treatment for the seven blinded prisoners to be paid by the State. The Supreme Court awarded compensation (35,000 Rupees) for the first time for a violation of Article 21 in the *Rudul Shah v State of Bihar* case, which concerned unlawful detention for a period of fourteen years. The Court explained the rationale of its decision by stating "one of the telling ways in which the mandate of Article 21 is secured, is to mulct its violators in the payment of monetary compensation." It also provided that "the State must repair the damage done by its officers to the petitioners' rights. It may have recourse against those officers."<sup>146</sup> In the case of *Sebastian M. Hongray v Union of India*,<sup>147</sup> a disappearance case, the Supreme Court issued a writ of Habeas Corpus for the production of the two missing persons, and, when the Army failed to do so, it directed the State to pay exemplary costs of One Lakh (100,000 Rs) each to the dependants of the disappeared persons for contempt of court.<sup>148</sup>

In 1989, the Apex Court held in *Rajasthan Kisan Sangthan v. State* that a person who was mistreated by the police in custody was entitled to monetary compensation regardless of the legality or illegality of detention.<sup>149</sup>

In *Saheli, A Women's Resource Centre v. Commr. Of Police, Delhi*,<sup>150</sup> a case in which a nine year old child died as a result of a police assault, the Supreme Court rejected the argument of state immunity from liability for wrongs of its servants and awarded 75,000 Rs. compensation. It also directed the state to recover the money from the responsible police officials. The ability of the State to have recourse to its officials was called into question in *State of Maharashtra v. Ravikant S. Patil*,<sup>151</sup> where the Court held that the concerned police officer who had paraded a handcuffed prisoner on the streets was not personally liable. The Court awarded Rs. 10,000 but left it open whether the State could take any legal action against the official following an inquiry into his action.

*Nilabati Behera v State of Orissa*,<sup>152</sup> a case of custodial death resulting from torture, is considered to be the leading case in which the Supreme Court laid down the constitutional basis and nature of compensation for the infringement of fundamental rights. The Court referred to its duty to enforce fundamental rights under articles 14, 21 and 32 of the Constitution, the need to make the guaranteed remedies effective and to provide complete justice.<sup>153</sup>

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<sup>144</sup> AIR 1981 SC 928.

<sup>145</sup> The acts in question, which consisted in piercing the eyeballs of the prisoners who filed the application and pouring acid into it, undoubtedly amounted to torture.

<sup>146</sup> (1983) 4 SCC, 141, pp. 147-148.

<sup>147</sup> AIR 1984 SC 571.

<sup>148</sup> See also the case of *Bhim Singh v. State of J & K*, (1985) 4 SCC 677, which concerned compensation under articles 21 and 22 (1) for unlawful arrest mala fide.

<sup>149</sup> AIR 1989 Raj 10, at p.16.

<sup>150</sup> 1990, 1 SCC 422.

<sup>151</sup> 1991, 2 SCC 373.

<sup>152</sup> *Dicta* of JS Verma and Dr A S Anand JJ in *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 (Ind SC) and of Kuldip Singh and DR A S Anand JJ in *DK Basu v State of WB*, supra, 443, referred to in case of *People's Union for Civil Liberties v Union of India & Anor*, supra.

<sup>153</sup> *Dicta* of JS Verma and Dr A S Anand JJ in *Nilabati Behera v State of Orissa*, supra.

Since 1993, the Supreme Court and the High Courts have awarded compensation under Article 21 in cases of rape,<sup>154</sup> of other forms of torture,<sup>155</sup> of death in custody,<sup>156</sup> of "disappearances",<sup>157</sup> of a case of death resulting from army action<sup>158</sup> as well as other cases concerning infringements of fundamental rights.<sup>159</sup> Perhaps the most important of these cases is *D.K. Basu v. State of West Bengal*,<sup>160</sup> a case of death in custody resulting from torture, where the Supreme Court strongly denounced torture and, in addition to awarding compensation, directed the respondent State to take a wide range of specific measures aimed at preventing torture.

The Supreme and High Court have discretionary power as to which (interim and final) relief to award. In their respective jurisprudence, both courts have awarded compensation for the infringement of fundamental rights in the form of exemplary damages.<sup>161</sup> Compensation may be final or may be awarded as interim relief.<sup>162</sup> In assessing compensation, the Court appears to have taken compensatory factors as well as considerations of deterrence into account. It declared in one judgement: "In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do,"<sup>163</sup> and in another judgement: "Money award cannot, however, renew a physical frame that has been battered and shattered due to the callous attitude of others. All that the courts can do in such cases is to award such sums of money, which may appear to be giving some reasonable compensation, assessed with moderation, to express the court's condemnation of the tortious act committed by the State."<sup>164</sup> The Supreme Court decides on the quantum of compensation on the basis of the particular facts

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<sup>154</sup> *Uttarakhand Sangharsh Samiti, Mussoorie v State of Uttar Pradesh*, delivered by the Allahabad High Court on 9 February 1996. See for a critical review of the jurisprudence of the Indian Supreme and High Court on rape cases: K.I. Vibhute, Victims of Rape and Their Right to Live with Human Dignity and to be Compensated: Legislative and Judicial Responses in India, in: Journal of the Indian Law Institute, Vol.41 (1999), 222-236.

<sup>155</sup> *Arvinder Singh Bagga v. State of U.P.*, (1994) 6 SCC 565.

<sup>156</sup> *Ajab Singh v. State of U.P.*, (2000) 3 SCC 521; *Amitadyuti Kumar v. State of West Bengal*, (2000) 9 SCC 404.

<sup>157</sup> *Union of India v. Luthukla*, (1999) 9 SCC 273; *State of Punjab v. Vinod Kumar*, (2000) 9 SCC 742.

<sup>158</sup> (1994) 2 SCC 1. See also *R.S. Sodhi v. State of U.P.*, 1994 Supp (1) SCC 142 and 143.

<sup>159</sup> See overview in Jaswal, Dr. Paramjit S., Public Accountability for Violation of Human Rights and Judicial Activism in India: Some Observations, (2002) 3 SCC (Jour) 6, Fn.48 and Sammaiah Mundrathi, Law on Compensation to Victims of Crime and Abuse of Power, New Delhi, 2002.

<sup>160</sup> (1997) 1 SCC 416.

<sup>161</sup> Justice Anand in *Nilabati Behera v State of Orissa*, supra, para.33 "... when the court moulds the relief by granting "compensation" in proceedings under Article 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. The payment of compensation in such cases is not to be understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

<sup>162</sup> In *State of Punjab v. Vinod Kumar*, (2000) 9 SCC 404, the Punjab and Haryana High Court directed the State Government to pay Rs. 2 Lakhs (200,000) each to the wife and children of the persons disappeared allegedly at the hands of the police by way of interim payment. In *Re Death of Sawinder Singh Grover* [1995 Supp (4) SCC, 450], the Union of India/Directorate of Enforcement was also directed to pay a sum of Rs. 2 Lakhs (200,000) to the widow of the deceased by way of *ex gratia* payment at the interim stage.

<sup>163</sup> *Basu v State of W.B.*, supra, para.54.

<sup>164</sup> *R.D. Upadhyay v. State of A.P.*, (2001) 1 SCC 437, at p.439.

of each case, taking into account the severity of the violation. While the Court had laid down a working principle on the amounts of compensation to be paid in case of death in 1987, it has since not adhered to it and awarded compensation in the cases reviewed ranging from 5,000 - 200,000 (\$104- \$4,193) Rupees.<sup>165</sup> It is now generally recognised that the State can have recourse to the officers responsible for the violation of fundamental rights.<sup>166</sup>

Courts have directed the State to: suspend public officials or impose other disciplinary measures, institute criminal investigations against them and to authorise their prosecution.<sup>167</sup> Moreover, the Supreme Court has declared that there is a genuine need to amend the law to protect the interest of detainees in death in custody cases. It has also issued orders directing the State or the police to introduce safeguards, undertake training and education, provide medical care and other measures designed to assist victims of official violation of fundamental rights.<sup>168</sup>

### 1.1.2. The applicable procedure

According to the text of the Constitution, the victim of an infringement of fundamental rights, including the relatives in those cases where the right-holder has died, is free to choose whether to apply for relief to the High or Supreme Court. While this freedom was recognised in earlier decisions of the Supreme Court, some recent decisions have noted that the party should first approach the High Court where relief is available under Article 226. The safer route for a victim would be to take legal action before the High Court if the sought after relief is available. There is no time limit for approaching the Supreme or High Court for relief. The power and jurisdiction of the Supreme Court cannot be curtailed by any statutory limitation.<sup>169</sup> The Supreme Court can also take up a case *suo moto* and has done so in death in custody cases.<sup>170</sup>

The State Government cannot invoke the principle of sovereign immunity in cases of torture or custodial deaths.<sup>171</sup> The Supreme Court held that where a citizen has been deprived of his or her life or liberty, otherwise than in accordance with the procedure prescribed by law, it is no defence to claim that the said deprivation was brought about while state officials were acting in discharge of their sovereign functions.<sup>172</sup> The Court noted that the defence of sovereign immunity does not

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<sup>165</sup> See overview in Jaswal, *Public Accountability*, supra.

<sup>166</sup> See e.g. *Rudul Sah v State of Bihar*, (1984) 4 SCC, at pp.147-148, para.10; *Arvinder Singh Bagga v State of U.P.*, (1994) 6 SCC 565, at p.568 and *Inder Singh v State of Punjab*, (1995) 3 SCC, at 706. However, the Supreme Court has not held the Government to be obliged to recover such damages from the responsible public official.

<sup>167</sup> In *Punjab & Haryana High Court Bar Association v State of Punjab and Ors*, (1996) 4 SCC 742, a case concerning the abduction and murder of an advocate, his wife and their two year old child for which the police appeared to be responsible on the basis of the available evidence, the Supreme Court held that: "The police officers in question must be suspended by the State and the trial is transferred to the Designated Court at Chandigarh. The Court is to direct the trial expeditiously within six months of its commencement. In accordance with the requirements of the Criminal Procedure Code the State of Punjab is to sanction the prosecution of the police officers immediately, within one month of receiving this order." In *Sebastian M. Hongray v. Union of India*, supra, the Supreme Court issued a mandamus to the Superintendent of Police directing him to take its judgement "as information of cognisable offence and to commence investigation as prescribed by the relevant provisions of the Code of Criminal Procedure." In *State of Punjab v. Vinod Kumar*, (2000) 9 SCC 742, the High Court directed the State Government to sanction the prosecution of the officials in question, as required by Section 197 of the Code of Criminal Procedure, without delay when asked by the investigating Central Bureau of Investigation.

<sup>168</sup> See for example *Basu v State of WB*, supra.

<sup>169</sup> *Parmajit Kaur v. State of Punjab* (1999) 2 SCC 131.

<sup>170</sup> *Re Death of Sawinder Singh Grover*, 1995 Supp. (4) SCC, 450.

<sup>171</sup> *People's Union for Civil Liberties v Union of India*, supra.

<sup>172</sup> Dicta of B P Jeevan Reddy in *Challa Ramkonda Reddy & Ors v State of AP* AIR 1989 AP 235 (Ind AP HC) and *Maharaj v Attorney General of Trinidad and Tobago* [1979] AC 385 (T&T PC) applied.

apply in such a case as regards public law remedies even though it may be available as a defence in private law in an action based on tort.<sup>173</sup> The process is governed by the respective rules of procedure of the Supreme Court and High Court.<sup>174</sup>

## 1.2. CLAIMING REMEDIES IN CIVIL COURTS

### 1.2.1. Substantive rights

A victim of torture can claim reparation on the basis of tort law<sup>175</sup> in civil courts.<sup>176</sup> Such claims are based on the tort of public misfeasance<sup>177</sup> or trespass to the person, namely assault and battery.<sup>178</sup> The State is vicariously liable for damages caused by public officials save for those that fall under the doctrine of sovereign immunity.<sup>179</sup> The Government (Liability in Tort) Bill, 1967, which called for liability of the State for unlawful acts done by its public servants in the exercise of their duty, was introduced in the Indian Parliament as far back as 1967 following the recommendations contained in the first report of the Law Commission of India on the Liability of State in Tort, but has not been adopted subsequently.

Damages are a matter of right and are awarded, if caused by the defendant's wrongful act, as *restitutio in integrum* to the extent that a monetary award can put the victim in a position he or she would have been had the tort not been committed.<sup>180</sup> Indian courts have recognised actual pecuniary loss, i.e. any expenses reasonably incurred by the plaintiff and future loss of income, as well as non-pecuniary damages for personal pain and suffering and loss of enjoyment of life. The amount of compensation depends on the facts and circumstances of each case. Exemplary damages are also recognised in cases where the damage has been caused by oppressive, arbitrary, unconstitutional action by the servants of the government.<sup>181</sup>

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<sup>173</sup> *Dicta* of J S Verma and Dr A S Anand JJ in *Nilabati Behera v State of Orissa*, supra, and of Kuldeep Singh and Dr A S Anand JJ in *D K Basu v State of WB*, supra, followed.

<sup>174</sup> In most cases the courts do order the state or the 'other party' to pay the costs of the petitioner. If the costs and compensation ordered by the courts are not paid up in time by the concerned party, it is a matter of contempt of court and the party can be punished in accordance with the Contempt of Court Act, No.70 of 1971. See especially sections 12 and 14. See also Rules to regulate proceedings for contempt of Supreme Court, 1975.

<sup>175</sup> The law of torts is based on English common law via the operation of section 372 of the Constitution, supra.

<sup>176</sup> See *Common Cause v Union of India*, 1999 SCC 667.

<sup>177</sup> *Ibid.*, para.21. Such a tort remedy would be available in cases where the public officer caused damage to the interest of the claimant in acting maliciously or with knowledge that the impugned action was likely to injure the interest of that person.

<sup>178</sup> See Bakshi, P.M., Law of Torts, in Verma/Kusum, Supreme Court, supra, pp.590-620, at 608. See also *Saheli v Commissioner of Police*, supra, para.13.

<sup>179</sup> See overview of Supreme Court jurisprudence in Bakshi, Law of Torts, supra, at 601 et seq.

<sup>180</sup> For an overview of Supreme Court jurisprudence, see *ibid.*, at 605. See also *Common Cause v Union of India*, supra, paras.28-30.

<sup>181</sup> See R.K. Bangia, *The Law of Torts (including compensation under the Motor Vehicles Act)*, 10th. Edn.) Allhabad, 1991,410 et seq. See also *Common Cause v Union of India*, supra, 30: "(Exemplary damages) are awarded whenever the defendant's conduct is found to be sufficiently outrageous to merit punishment for example, where the conduct discloses malice, cruelty, insolence or the like. In awarding punitive or exemplary damages, the emphasis is not on the plaintiff and the injury caused to him, but on the defendant and his conduct; para.31: "In an action of tort where the plaintiff is found entitled to damages, the matter should not be stretched too far to punish the defendants by awarding exemplary damages except when their conduct, specially those of the Govt. and its officers, is found to be oppressive, obnoxious and arbitrary and is, sometimes, coupled with malice."

### 1.2.2. Procedure

A victim of torture may file a suit for tort damages at the court of first instance in the place where the tort occurred or where the defendant resides.<sup>182</sup> A suit has to be filed within one year.<sup>183</sup> A victim of torture may file a suit against the individual perpetrator but in all likelihood he or she will fail to proceed against the State because it is shielded from legal actions for tort committed by its officials on the grounds of sovereign immunity. While sovereign powers are those that can be lawfully exercised only by a sovereign or by a person to whom such powers have been delegated, the scope of these powers has not been defined by law.<sup>184</sup> The liability of the State is still defined by reference to the Government of India Act, 1858 which makes the liability of the Government the same as that of the East India Company.<sup>185</sup> The courts have so far upheld sovereign immunity in civil law cases relating to "excesses" committed by police personnel while discharging their duties.<sup>186</sup> Moreover, the Central and State Government have been explicitly granted immunity from suit by Section 57 of the Prevention of Terrorism Act, No.15 of 2002.<sup>187</sup>

A public officer may in principle be sued in a private capacity for any wrongful conduct constituting a tort<sup>188</sup> unless he or she has been granted immunity by statutory law, such as under Section 157 Criminal Procedure Code or Section 57 of the Prevention of Terrorism Act.

Upon initiating a suit, the plaintiff is required to pay an *ad valorem* fee that may be waived in some circumstances.<sup>189</sup> The average rates for this non-recoverable fee range from 6 – 11 % of the damages claimed.<sup>190</sup> Legal aid for civil suits may be obtained by those deemed to be indigent persons.<sup>191</sup> The Civil Procedure Code and the Evidence Act govern the procedure. The victims may

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<sup>182</sup> Sections 19 and 20 Civil Procedure Code. See for the institution of suits section 26 in conjunction with the First Schedule, Order IV.

<sup>183</sup> Limitation Act No.36 of 1963, Schedule Part VII. See for notice, sections 79 and 80 Civil Procedure Code.

<sup>184</sup> Bangia, supra, 133.

<sup>185</sup> Section 65 of that Act reads: "The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate and all persons and bodies politic shall, and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the East India Company."

<sup>186</sup> The leading case is *Kasturi Lal Ralia Ram v. Union of India*, AIR 1965 SC 1039 which has been followed by the Courts in upholding immunity of the State for acts considered to be of a sovereign nature. See an overview of these cases and critique of sovereign immunity Aman Hingorani, *State Liability in Tort- Need for a Fresh Look*, (1994) 2 SCC (Jour) 7.

<sup>187</sup> "No suit, prosecution or other legal proceeding shall lie against the Central Government or a State Government or any officer or authority of the Central Government or State Government or any other authority on whom powers have been conferred under this Act, for anything which is in good faith done or purported to be done in pursuance of this Act; Provided that no suit, prosecution or other legal proceedings shall lie against any serving member or retired member of the armed forces or other para-military forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism."

<sup>188</sup> See a case decided by the Allahabad High Court concerning false imprisonment *State of U.P. v. Tulsi Ram*, A.I.R. 1971 All.162.

<sup>189</sup> See for details Court Fees Act, 1870, s.7 (1) & Schedule I.

<sup>190</sup> Anderson, Michael R., *Individual Rights to Environmental Protection in India*, in: Boyle and Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford, 1996, p.208, Fn.38 referring to Galanter, 'Affidavit', in Baxi (ed), *Mass Disasters and Multinational Liability: The Bhopal Case*, 179.

<sup>191</sup> See Order XXXIII [Suits by Indigent Person], Appendix to the Civil Procedure Code. "A person is an indigent person,- (a) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or (b) where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit." See also Article 39 A of the Constitution according to which "the State shall ensure that the operation of legal system promotes justice, on a basis of equal opportunity, and shall, in particular provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities" and the Legal Service Authority Act 1987.

give evidence in their capacity as parties to the suit<sup>192</sup> whereby the burden of proof lies on the person who has to prove the existence of any fact and would fail in his/her claim if no evidence at all were given on either side.<sup>193</sup> The Court has discretion in awarding costs which usually follow the event.<sup>195</sup> Judgments are enforced by way of decrees issued by courts and executed by competent officers.<sup>196</sup>

### 1.3. Criminal Law

A victim of a crime cannot claim reparation by way of an adhesion procedure as part of criminal proceedings. However, a court has the discretion, when imposing a sentence of fine to "order the whole or any part of the fine recovered to be applied in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court or when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death."<sup>197</sup> When a Court imposes a sentence that does not include a fine, it may, when passing judgment, order the accused person to pay compensation.<sup>198</sup> At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court will take into account any sum already paid or recovered by way of compensation.<sup>199</sup>

The criminal courts have very rarely used their discretionary powers to compensate victims of crime.<sup>200</sup> The Supreme Court has ruled on Section 357 (3) Cr.PC. in several cases, especially in the *Harikishan* case<sup>201</sup> and the *Chandraprakash* case,<sup>202</sup> holding *inter alia* that the requirement of social justice demanded that a heavy fine should be imposed in lieu of a reduction of sentence to compensate the victims of crime.<sup>203</sup> In the case of *Jacob George*, the Supreme Court reduced a

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<sup>192</sup> Sections 118, 120 *ibid*.

<sup>193</sup> Sections 101, 102 Indian Evidence Act.

<sup>194</sup> Sections 118, 120 *ibid*.

<sup>195</sup> Section 35 Civil Procedure Code. See however clause 2) of the said paragraph, which indicates that the costs are usually to be borne by the losing side: "Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing."

<sup>196</sup> Sections 38 et seq. Civil Procedure Code and Order XXI.

<sup>197</sup> Section 357 (1)(b) and (c) Cr. PC.

<sup>198</sup> Section 357 (3) Cr. PC. Many Indian States, such as Andhra Pradesh, Bihar, Karnataka, Madhya Pradesh, Rajasthan, Uttar Pradesh, West Bengal have passed amendments to this provision, according to which "the Court may" shall read "the Court shall" in those cases where the person against whom an offence is committed belongs to Schedules Castes or Schedules Tribes as defined in Clauses (24) and (25) of Article 366 of the Constitution of India except when both the accused person and the person against whom an offence is committed belong to either such castes or tribes.

<sup>199</sup> Section 357 (5) Cr. PC.

<sup>200</sup> See Vibhute, *supra*, 226, Fn.15 for further references on studies concerning compensation for the victims of crime in India.

<sup>201</sup> In *HariKrishan v State of Haryana*, AIR 1988 SC 2127, the Supreme Court awarded Rs 50,000 to the victims and directed the subordinate criminal courts to exercise the power of awarding compensation to victims of offences in such a liberal way that the victims may not have to rush to the civil courts for compensation.

<sup>202</sup> In *State of Maharashtra v Chandraprakash Kewal Chand Jain*, AIR 1990 SCC 486, the Supreme Court confirmed the sentence of 5 years imprisonment on the sub-inspector of police for raping a young girl and imposed a fine of Rs.1000.

<sup>203</sup> See for an overview of the Supreme Court jurisprudence, Vibhute, *supra*, p.227. Vibhute also cites the following observation of the Supreme Court on section 357 (3) in the case of *Hari Krishan & State of Haryana*, *supra*, at 2131: "It is an important provision but Courts have seldom invoked it perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgement of conviction. In addition to conviction, the court may order the accused to pay some amount by way of

sentence but imposed an extra fine of 1 lakh to be paid by the convicted person.<sup>204</sup> In *Ajab Singh*, the Court directed the accused to pay compensation of 500,000 to the families of the two deceased persons who had been shot dead even though the Court recorded an acquittal on the grounds of a private defence.<sup>205</sup>

#### 1.4. Alternative Avenues: The National Human Rights Commission

The NHRC may, after completing an inquiry, recommend that the responsible Government or authority grant immediate relief to the victim or the members of his family.<sup>206</sup> The Commission has held that "the 'immediate interim relief' envisaged under Section 18 (3) of the Act has to relate specifically to the injury/loss suffered as a result of the human rights violation, and that this will not absolve the State of its liability for compensation."<sup>207</sup> The NHRC noted that: "...for the purpose of award of compensation, substantiation on mere preponderance of probability, on the standard of civil evidence is sufficient. Even where a criminal charge may fail for want of evidence sufficient by standards requisite in criminal cases, yet a case of compensation can be sustained on a mere preponderance of probability."<sup>208</sup> In another case, the NHRC held that "This provision (18 (3) of the Protection of Human Rights Act, 1993) has been generously operated and the power conferred under it is widely exercised by the Commission in deserving cases. The Commission has in this connection kept itself alive to the spirit of various United Nations instruments."<sup>209</sup> While the State Government in question is obliged to pay compensation, the Commission has in several cases recommended the concerned Governments to recover the amount paid from the responsible public official.<sup>210</sup>

The NHRC also has the power to approach the High Court or Supreme Court for an order directing the responsible public body or person to pay the specified compensation.<sup>211</sup>

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compensation to victim who has suffered by the action of the accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to crime."

<sup>204</sup> *Jacob George v State* (1994) 3 SCC 430.

<sup>205</sup> *State of Punjab v Ajab Singh* (1995) 2 SCC 486. In *Bodhisatwa Goutam v Subha Chakraborty* (1996) 1 SCC 490 the Court held that it can enforce compensation against private bodies or individuals who violate the fundamental rights of the citizen.

<sup>206</sup> Section 18 (3), The Protection of Human Rights Act, 1993.

<sup>207</sup> NHRC, Annual Report 1998-1999, Rationale for Grant of Immediate Interim Relief/Compensatory Jurisprudence, Case No.144/93-94/NHRC.

<sup>208</sup> *Ibid.* Case No.294/13/98-99/CD.

<sup>209</sup> *Ibid.* Case No.3177/96-97/NHRC, Comment: "Article 9 of the International Covenant on Civil and Political Rights makes it explicit that everyone has the right to liberty and security of person and nobody shall be subjected to arbitrary arrest or detention. It further mandates that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1985 makes it an obligation of the State to ensure that in its legal system, the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. Principle 35 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), also prescribes for remedy of compensation, in case of any damage incurred because of acts of omission by public officials contrary to the rights contained in the Body of Principles."

<sup>210</sup> See overview of cases of custodial deaths and torture in Annual Report 1999-2000, pp.85 et seq.

<sup>211</sup> Such as for example in the Case concerning harassment of Chakmar refugees in Arunachal Pradesh, Writ Petition (CrI) No.13/98, see NHRC, Annual Report, 1998-1999, II., 2.19.

## 2. THE PRACTICE

### 2.1. Use and Effectiveness of Available Remedies

Torture survivors and relatives of torture victims only received reparation after the Supreme Court recognised a right to compensation for a breach of fundamental rights against the background of the difficulty, if not impossibility, of obtaining any kind of reparation under tort law. From the early 1990s on, there have been many applications for compensatory relief under Articles 32 and 226 of the Constitution to the Supreme Court and the High Courts respectively. Even so, many torture survivors have refrained from using the available remedies. In addition to the reasons outlined above,<sup>212</sup> victims of torture have at times been pressurised by the perpetrators into withdrawing their cases, either by means of threats or bribes. Also, many victims do not have the resources to apply for relief in order to see a case through. Even though numerous victims have received assistance from human rights organisations and lawyers acting on their behalf, a considerable number have not been able or willing to avail themselves of this assistance.

Torture survivors have apparently not filed cases before the Civil Courts which may be attributed to a combination of factors, in particular the resources required to pursue a case, evidentiary hurdles and the small amounts of compensation awarded, if any.

### 2.2. Reparation Cases

In numerous torture cases, the Supreme Court and the High Courts, as noted above, have awarded interim and final compensation and other forms of relief for a breach of Article 21 of the Constitution.<sup>213</sup>

From its inception up to 31 March 2000, the NHRC has ordered compensation for human rights violations, of which a considerable number related to ill-treatment and torture. In 598 cases, the total amount of compensation ordered was Rs 76,783,634. During 1999, it awarded monetary compensation in 14 cases where compensation ranged between 10,000 to 10,000,000 Rupees.<sup>214</sup>

In some cases of torture, rape and death resulting from torture the authorities have offered *ex-gratia* payments to the families or alternative forms of reparation, such as offers of employment to the victims.<sup>215</sup>

There are no known cases in which torture survivors received compensation pursuant to Section 357 (3) of the Cr.P.C.

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<sup>212</sup> Supra, Part IV, 3), which are also of relevance with regard to compensation claims, in particular difficulties of satisfying the burden of proof.

<sup>213</sup> See supra.

<sup>214</sup> NHRC, Annual Report 1999-2000, p. 85.

<sup>215</sup> Information provided by Professor Krishnadeva Rao during proceedings of the seminar on the right to reparation for torture in India, Nepal and Sri Lanka, Delhi, 14 September 2002.

## V. GOVERNMENT REPARATION MEASURES

There is no government reparation scheme or board for victims of human rights violations or crimes. However, there are special statutory compensation schemes for members of the "scheduled castes and tribes," such as the one set up under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, prescribing procedures for monetary relief and economic support programmes for victims of atrocities.<sup>216</sup> The Andhra Pradesh Government has also passed an order according to which a relative of a Dalit or member of the tribal class who died as a result of a police "encounter"<sup>217</sup> may receive 1 lakh in damages.

Several proposals have been put forward to establish a compensation scheme for victims of torture and ill-treatment. In 1992, when discussing the modalities for the setting up of the NHRC at the Chief Minister's conference, a scheme for compensation was suggested for custodial crimes on the basis of the Report of the Committee of Officers (1989/1, circulated in March 1990). This envisaged financial relief through a central registration system for cases of crime, including torture and rape, committed by agencies of state in custodial institutions. Under the scheme, the Sessions Court or Magistrate had jurisdiction to try a case following complaint by the victim or his/her representative. On receipt of the application, the court would direct a medical examination of the victim and a medical report to be submitted to the court within 7 days.<sup>218</sup> If a *prima facie* case was established, the court could order interim relief within 30 days,<sup>219</sup> and final compensation at the conclusion of the trial, with the maximum amount of relief of 50,000 for injury and of 5 lakhs in cases of death.

Following directions by the Supreme Court in its 1995 judgment,<sup>220</sup> a National Commission for Women drafted the "Compensation to the Rehabilitation of Victims of Rape and Sexual Assault" Bill in 1995. The Commission suggested minimum statutory compensation be awarded to all victims of sexual crimes as Rs.10,000 for sexual harassment and Rs.30,000 for rape if the victim was an unmarried girl and Rs.40,000 if the woman was married.<sup>221</sup> The bill further envisaged, for cases involving public authorities, that the authority in whose premises an incident is reported would be liable to pay compensation. In cases of custodial rape, the Government would pay compensation. The amount awarded was set at not less than one lakh if the offence resulted in the death of the victim. The Commission also proposed a new section 357A (Compensation in case of custodial rape) to be inserted in the Code of Criminal Procedure.<sup>222</sup>

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<sup>216</sup> See section 3 of the Act, which contains an enumeration of atrocities committed by persons who are not a member of a Scheduled Caste or a Scheduled Tribe. The list does not specify any act constituting torture but some acts or omissions that, if committed by a public official, would be considered to constitute ill-treatment.

<sup>217</sup> While this term is generally used for armed confrontations during which an exchange of fire takes place, victims of torture have in several cases apparently been shot and dumped at the site of the alleged encounter. Involved members of the police are known to have circulated stories or "armed encounters" between suspected insurgents and the police during which they claimed to have fired in self-defence. See NHRC, Important Instructions/Guidelines, *supra*, On Cases of Encounter Deaths, pp.31 et seq.

<sup>218</sup> In cases of custodial death, a post-mortem shall be conducted within 24 hours unless specific reasons for delay.

<sup>219</sup> 10,000 for injury and 1,00,000- 25,000 in case of death.

<sup>220</sup> Delhi Domestic Working Women's Forum v Union of India &Ors, (1995) 1 SCC 14.

<sup>221</sup> The heads of compensation will be a) deprivation of bodily integrity and invasion of sexual freedom; b) type and severity of the bodily injury; c) mental anguish; d) expenditure incurred or likely to be incurred for rehabilitation including medical treatment and psychological counselling; e) loss of gainful activity/employment; f) expenses consequential on pregnancy including abortion; g) general damages.

<sup>222</sup> It reads: "Where the court convicts a public servant of the offence of rape or attempt to commit rape, being an offence constituted by an act of such public servant against a person in his custody, the provisions of this section shall apply. 1) The court, when passing judgment in any case to which this section applies, shall order that the Government, in connection with the affairs of which such public servant was employed at the time when such act was committed, shall be liable jointly and severally with such public servant to pay, by

In 2001, a private member's bill "The Custodial Crimes (Prevention, Protection and Compensation Bill, 2001)" was put forward in Lok Sabha, the Indian Parliament, by G.M. Banatwalla. According to the Bill, no previous sanction of the government would be necessary for the prosecution of a police officer or a public servant accused of a custodial offence. If the offence is proven, the bill sets the amount of compensation to be awarded as no less than Rs. 25,000 in case of bodily injury and 200,000 in case of death. In determining the amount of compensation, the Court would have to take into account all relevant circumstances, including the type and severity of the injury suffered by the victim, the mental anguish suffered by the victim, the expenditure already or likely to be incurred on the treatment and rehabilitation of the victim, the actual and projected earning capacity of the victim and the impact of its loss on the persons entitled to compensation and other members of the family, the extent, if any, to which the victim himself contributed to the injury and the expense incurred in the prosecution of the case. The Bill suggests that a Central Vigilance Commissioner and a District Vigilance Commissioner be appointed to oversee implementation of the Bill.

None of the three proposed schemes or bills has been adopted.

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

### **1. PROSECUTION OF ACTS OF TORTURE COMMITTED IN THIRD COUNTRIES**

#### **1.1. The Law**

##### **1.1.1. Criminal law**

The Indian Penal Code neither recognises the principle of universal jurisdiction nor the passive personality principle. Offences committed outside Indian territory only fall within the ambit of the Penal Code if the perpetrator is a citizen of India and the act, if committed in India, is punishable under the Penal Code.<sup>223</sup> The Code therefore recognises the active personality principle only.<sup>224</sup>

However, universal jurisdiction can be exercised over perpetrators of grave breaches of the Geneva Conventions. Section 3 (1) of the Geneva Conventions Act, 1960, which provides that: "(1)

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way of compensation, such amount as may be specified in the order:- (a) in defraying the expenses properly incurred in the prosecution; (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a civil court; c) when the offence mentioned in sub-section (1) had caused the death of another person, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855, entitled to recover damages from the convicted, for the loss resulting to them from such death."

<sup>223</sup> Section 4. EXTENSION OF CODE TO EXTRA-TERRITORIAL OFFENCES: "The provisions of this Code apply also to any offence committed by -(1) any citizen of India in any place without and beyond India; (2) any person on any ship or aircraft registered in India wherever it may be. Explanation: In this section the word "offence" includes every act committed outside India which, if committed in India, would be punishable under this Code"; Section 188. Offence committed outside India: "When an offence is committed outside India- (a) by a citizen of India, whether on the high seas or elsewhere; or (b) by a person, not being such citizen, on any ship or aircraft registered in India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found: Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.

<sup>224</sup> See *Central Bank of India Ltd v Ram Narain*, AIR 1955 SC 36 at 38. The Indian Supreme Court has also recognised the applicability of the objective territorial principle for those cases where one of the constituent elements of the crime has been committed within its territory and the protective principle for acts affecting its security, integrity and independence. See overview in Verma, supra, 642 et seq. who cites *Mubarak Ali Ahmad v The State of Bombay* AIR 1957 SC 857, 860 and *G.B. Singh v Government of India* AIR 1973 SC 2667 respectively.

If any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions he shall be punished, a) where the offence involves the wilful killing of a person protected by any of the Conventions, with death or with imprisonment for life; and (b) in any other case, with imprisonment for a term which may extend to fourteen years." This section applies to persons regardless of their citizenship.<sup>225</sup>

Such offences are only tried by court equal or superior to that of a Chief Presidency Magistrate or a Court of Session.<sup>226</sup> The competent courts shall not take cognizance of any offence under the Act except on complaint by the Government or of such officer of the Government as the Central Government may specify by notification in the official Gazette.<sup>227</sup> The Act does not give a specific right to anyone to approach the Court, nor does it create a right in favour of victims who might otherwise be left without a remedy.<sup>228</sup> Finally, if a complaint is made by the Government or an authorised officer, questions relating to the application of the Convention to a conflict are to be determined by a Government Official, not the court.<sup>229</sup>

Universal jurisdiction over international crimes may also be exercised on the basis of recognised principles of customary international law.<sup>230</sup>

Persons covered by the Vienna Convention on Diplomatic Relations enjoy immunity from criminal proceedings as provided for in that Convention.<sup>231</sup>

### 1.1.2. Extradition laws

The extradition of alleged perpetrators of torture is governed by the Extradition Act, 1962. Extradition is conditional upon the existence of an extradition treaty that has been implemented in domestic law. The Extradition Act allows for the extradition of the crimes of culpable homicide, rape and "unnatural offences" but not for the crimes relating to the extortion of confessions by means of force laid down in sections 330, 331 and 348 of the Penal Code.<sup>232</sup> Acts of torture thus do not constitute extraditable crimes unless they result in the death of the tortured person or involve rape or other sexual acts of torture prohibited in the Indian Penal Code. A fugitive criminal shall, *inter alia*, not be surrendered or returned to a foreign State or Commonwealth country if the offence in respect of which his surrender is sought is of a political character.<sup>233</sup> The Government

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<sup>225</sup> Section 3 (2) Geneva Conventions Act.

<sup>226</sup> Section 5 Geneva Conventions Act.

<sup>227</sup> Section 17 Geneva Conventions Act.

<sup>228</sup> See the case of *Rev. Mons. Sebastio Francisco Xavier dos Remedios Monteiro v. The State of Goa*, AIR 1970 SC 329: ii) "The Geneva Conventions Act also gives no specific right to anyone to approach the Court. By itself it gives no special remedy. It does give indirect protection by providing for penalties for breach of the Convention. The Conventions are not enforceable by the Government against itself, nor does the Act give a cause of action to any party for the enforcement of the Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of the civilian population but there is no right created in favour of protected persons which the court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and has to leave the matter to the "indignation of mankind". (97 B-C)."

<sup>229</sup> Section 6 Geneva Conventions Act.

<sup>230</sup> See supra I, 1.2.

<sup>231</sup> See for details and exceptions, The Diplomatic Relations (Vienna Convention) Act 1972, Act No.43 of 1972.

<sup>232</sup> See the Second Schedule to the Act.

<sup>233</sup> See for this and other restrictions on the surrender of fugitives Section 31 Extradition Act.

has discretionary power with regard to the decision whether to extradite the person sought. It might refuse extradition even if there is a treaty and a good cause for extradition.<sup>234</sup>

## 1.2. Practice

There are no known cases in which India has either prosecuted or extradited a person alleged to have committed acts of torture in a third country.

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

### 2.1. Legal Action against Individual Perpetrators

The jurisdiction of Indian Courts is established either at the place where the defendant resides or at the place where the cause of action arises, either wholly or in part.<sup>235</sup> The latter includes not only the place where a tort was committed but also where the damages that make a tort actionable occurred.<sup>236</sup> Jurisdiction may also be established on the ground that the defendant carries out business or is personally working for gain in India.<sup>237</sup> To commence an action, summons has to be served on the defendant.<sup>238</sup> Foreign nationals may bring suits unless they are considered enemy aliens residing in India without permission of the Government.<sup>239</sup> A victim of torture that has been committed abroad can on these grounds take legal action against the perpetrator of torture in India if the latter either resides in India or any damages relating to the tort arose in India. There is no jurisprudence as to whether post traumatic stress disorder or other long-term damages resulting from torture would constitute such a ground.

High-ranking government officials of foreign States and diplomats in principle enjoy immunity from suit. According to the Civil Procedure Code, any ruler, ambassador or envoy of a foreign State or any High Commissioner of a Commonwealth Country or any such member of the staff of these as the Central Government may specify may not be sued in any Indian Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary

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<sup>234</sup> See sections 3, 1) and 29 of the Extradition Act. See also *Hans Muller of Nuremberg v Superintendent Presidency Jail, Cal & Others*, AIR 1955 SC 367.

<sup>235</sup> Section 20 *ibid.*, Other suits to be instituted where defendants reside or cause of action arises: "Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or (c) the cause of action, wholly or in part, arises."

<sup>236</sup> D.V. Chitale and K.N. Annaji Rao, *The Civil Procedure Code (V of 1908)*, Vol.1, Sections 1-101, A.I.R. Commentaries, 8<sup>th</sup> ed., 1971, at 465: "In a suit in respect of a tort the plaintiff has to prove both a tortious act and a consequent injury or damage. The damage or injury is, therefore, a material fact which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit."

<sup>237</sup> See on the grounds of jurisdiction, Diwan, Paras, *Indian and English Private International Law, A Comparative Study*, Bombay, 1977, pp.157 et seq.

<sup>238</sup> See details in Order V of First Schedule of Civil Procedure Code. See also Diwan, *supra*, pp.162 et seq.

<sup>239</sup> Section 83 Civil Procedure Code.

<sup>240</sup> See details in Order V of First Schedule of Civil Procedure Code. See also Diwan, *supra*, pp.162 et seq.

to that Government.<sup>241</sup> Except with the consent of the Central Government, certified in writing by a Secretary to that Government, no decree shall be executed against the property of any of the persons specified above.<sup>242</sup>

The applicable substantive law is that of the place where the tort was committed.<sup>243</sup>

There are no known cases in which victims of torture or ill-treatment committed in a third country have sued the perpetrators of such torture in India.

## 2.2. Legal Action against Foreign States

A foreign State may not be sued in any Indian Court except with the consent of the Central Government certified in writing by a Secretary to that Government.<sup>244</sup> Such consent may be given with respect to specified suit(s), and may specify the Court in which the foreign State may be sued. However, consent shall not be given, unless it appears to the Central Government that the foreign State has instituted a suit in the Court against the person desiring to sue it, or has expressly or impliedly waived the privilege accorded to it by this section.<sup>245</sup> Except with the consent of the Central Government, certified in writing by a Secretary to that Government, no decree shall be executed against the property of any foreign State.<sup>246</sup>

There are no known cases in which victims of torture or ill-treatment committed in a third country have sued a foreign State responsible for torture under international law.

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<sup>241</sup> Section 86 (4) in conjunction with 86 (1) of the Civil Procedure Code. Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the persons classified may be sued, but it shall not be given, unless it appears to the Central Government that any of the above specified persons has instituted a suit in the Court against the person desiring to sue him/her, or the privilege accorded to him/her by this section has been expressly or impliedly waived. Section 86 (4) in conjunction with 86 (2) (a); (d) *ibid*. The Central Government is thus competent to determine questions of State immunity whereby such decisions can be judicially reviewed by courts in respect of their reasonableness. See *Harbhajan Singh Dhalla v Union of India*, AIR (1987) SC 992.

<sup>242</sup> Section 86 (4) in conjunction with 86 (3) *ibid*.

<sup>243</sup> See Diwan, *supra*, pp.556, 557.

<sup>244</sup> Section 86 (1) Civil Procedure Code and on the particulars section 86 (2) (a); (d).

<sup>245</sup> Section 86, 2, a); d) *ibid*.

<sup>246</sup> Section 86, 3) *ibid*.

## NEPAL

### I. INTRODUCTION

#### 1. THE LEGAL FRAMEWORK

##### 1.1. Constitution

Nepal has a population of around 25 million people. The population is composed of numerous ethnic and religious groups. The majority of the population is Hindu.<sup>247</sup>

Nepal was unified in 1768 and has been an independent state ever since. According to its present Constitution, which came into force on 9 November 1990, the Kingdom of Nepal defines itself as follows: "Nepal is a multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom."<sup>248</sup>

The Constitution, in its part 3, guarantees fundamental rights, in particular a number of civil and political rights, but notably no express right to life. Article 23 stipulates an express right to a constitutional remedy before the Supreme Court for the enforcement of the rights conferred by part 3 of the Constitution.<sup>249</sup> Part 4 contains the directive principles and policies of the State, among which Article 25 (4) stipulates: "It shall be the chief responsibility of the State to maintain conditions suitable to the enjoyment of the fruits of democracy through wider participation of the people in the governance of the country and by way of decentralisation, and to promote general welfare by making provisions for the protection and promotion of human rights, by maintaining tranquillity and order in the society."

The judicial system of Nepal consists of the following three tiers: a) Supreme Court; b) Appellate Court; and c) District Court.<sup>250</sup> In addition, special courts or tribunals may be set up by law for the purpose of hearing particular types of cases. The King appoints all judges upon recommendations from the Constitutional Council or Judicial Council.<sup>251</sup> The Supreme Court supervises all lower Courts and presides over cases submitted by lower Appellate Courts. The Constitution grants the Supreme Court the power of judicial review to adjudicate the constitutionality of any law upon a petition by a Nepali citizen.<sup>252</sup> The Supreme Court is also empowered to issue orders and settle

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<sup>247</sup> See for information on land and people and the general political structure, Core Document Forming Part of the Reports of State Parties, Nepal, UN Doc. HRI/CORE/1/Add.42, 14 June 1994.

<sup>248</sup> Article 4 (1) of The Constitution of the Kingdom of Nepal 1990, Kathmandu, Law Books Management Board, Fourth Edition, December 2001.

<sup>249</sup> "The right to proceed in the manner set forth in Article 88 for the enforcement of the rights conferred by this Part is guaranteed." See next paragraph for Article 88.

<sup>250</sup> Article 85 of the Constitution.

<sup>251</sup> Article 87 of the Constitution.

<sup>252</sup> Article 88 (1): "Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either *ab initio* or from the date of its decision if it appears that the law in question is inconsistent with the Constitution."

disputes concerning the enforcement of fundamental rights.<sup>253</sup> The Constitution does not expressly stipulate the independence of the judiciary.

## 1.2. Incorporation and Status of International Law in Domestic Law

Nepal has ratified the following relevant international conventions on human rights and humanitarian law:

- Geneva Conventions 1949 (7 February 1964)
- Genocide Convention (30 January 1971)
- CERD (30 January 1971)
- CRC (14 September 1990)
- CEDAW (22 April 1991)
- Convention against Torture (14 May 1991)
- ICCPR (14 May 1991)
- First Optional Protocol to the ICCPR (14 May 1991)
- ICESCR (14 May 1991)
- Second Optional Protocol to the ICCPR (4 March 1998)

International treaties ratified or otherwise approved by the House of Representatives<sup>254</sup> are accorded superiority if and to the extent that they conflict with domestic law as specified in section 9 (1) of the Treaty Act 1990.<sup>255</sup> As the treaty provisions shall be applicable as Nepal law, the Convention against Torture is in theory directly enforceable. The Supreme Court has applied international instruments in several cases before it, quoting in one case various provisions of CEDAW, UDHR and ICCPR.<sup>256</sup> In contrast, the administration and other law enforcement authorities appear to have largely ignored international treaty obligations in the exercise of their duties. Customary international law is not part of Nepalese law unless it is transformed into domestic law.

The Government has not adopted any implementing legislation to incorporate the Convention against Torture into domestic law. The Torture Compensation Act was adopted to fulfil the constitutional obligation under article 14(4) of the Constitution, not the Convention against Torture.<sup>257</sup> The Supreme Court has so far not been called upon to address the issue of the direct applicability of the Torture Convention.

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<sup>253</sup> Article 88 (2): "The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or to settle the dispute. For these purposes the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including habeas corpus, mandamus, certiorari, Prohibition and quo warranto."

<sup>254</sup> Section 4 Nepal Treaty Act, 1990.

<sup>255</sup> Nepal Treaty Act, 1990, Kathmandu (*Nepal Press Digest Translation, cited from Nepal's Penal System*) "In case the provisions of a treaty to which the Kingdom of Nepal or His Majesty's Government has become a party following its ratification, accession, acceptance or approval by the Parliament conflicts with the provisions of enforced law, the later shall be held invalid to the extent of such conflict for the purpose of treaty, and the provisions of the treaty shall be applicable in that connection as Nepal laws," quoted in Rabintra Bhattarai and Stephen J Keeling (Ed), *NEPAL'S PENAL SYSTEM An Agenda for Change*, Kathmandu, Centre for Victims of Torture Nepal, June 2001.

<sup>256</sup> See Rina Bajracharya v. HMG, Council of Ministers et al.; Chandra Kanta Gnyawali et al. v. HMG, Council of Ministers et al and Meera Dhungaga v. HMG, Ministry of Law, Justice and Parliamentary Affairs et al., Supreme Court Bulletin, Vol.11, Issue 5 (2002), at p.13.

<sup>257</sup> Torture Compensation Act 2053 BS (1996).

## 2. PRACTICE OF TORTURE: CONTEXT, OCCURRENCE, RESPONSES

### 2.1. The Practice of Torture

From 1960 to 1989, during the Panchayat rule (system of non-party rule centred on the king), political parties were banned and a system of absolute rule by the monarchy was established following the revocation of the then Constitution, the dissolution of parliament and the repression of the political opposition. The Panchayat period was not only characterised by its suppression of any democratic political expression, but it was also accompanied by other human rights violations, including torture of political opponents and others, considered to be state-sponsored.

In 1990, after large-scale public protests, organised by the Movement for the Restoration of Democracy,<sup>258</sup> the Panchayat rule was abolished. A new Constitution was adopted and a new democratically elected government came into power. Torture became much less common, in part due to the heightened attention drawn to this practice by the media and human rights organisations and a greater willingness of the Government to respond to such concerns. The outbreak of the "People's War" in 1996 brought this period to an end, after which torture has been practiced on a widespread scale, predominantly as part of counter-insurgency operations.

This war was declared in February 1996 by the CPN (Maoist), a political group under the leadership of Pushpa Kamal Dahal, alias Prachanda, which broke away from the United People's Front in 1994. It has continued with varying degrees of activity ever since. The CPN (Maoist) has not only carried out armed attacks on members of the police and the armed forces but has also reportedly committed serious human rights abuses. The Government has responded to the attacks launched by the CPN (Maoist) with various operations which have been accompanied by serious human rights violations, such as extra-judicial killings and "disappearances" directed against the population in the areas concerned. In the course of 2001 and 2002, the government passed ordinances and the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA) widening its powers in the fight against terrorism.<sup>259</sup>

In November 2001, after the ceasefire that had been agreed in July of that year broke down, the Government declared an emergency, passed the above-mentioned ordinances and acts and called the army out. The conflict has since intensified.<sup>260</sup> Various government forces, police, the army and the paramilitary armed police force (APAF) engaged in joint operations, which resulted in a steep increase in reports about extra-judicial killings, "disappearances", torture and other serious human rights violations.<sup>261</sup>

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<sup>258</sup> The movement was a largely peaceful campaign of strikes and demonstrations, which was launched in February 1990 by the Nepali Congress Party and the communist United Left Front.

<sup>259</sup> See on this and the preceding paragraphs Amnesty International, Nepal, A spiralling human rights crisis, AI Index: ASA 31/016/2002, 4 April 2002, Chapter I, p.7 et seq. and Amnesty International, Nepal, A deepening human rights crisis, AI Index: ASA 31/072/2002, 19 December 2002, pp.1 et seq. An analysis of Nepal's human rights obligations and its anti-terrorism legislation can be found in International Bar Association, Nepal in Crisis: Justice Caught in the Cross-fire, September 2002, pp.37 et seq.

<sup>260</sup> Several attempts have been made over the last few years, among them the establishment of a "High Level Consensus Seeking Committee" in 1998, to find a peaceful solution to the conflict but have failed which is also due to the diametrically opposed positions of the CPN as a Maoist revolutionary movement and the Kingdom of Nepal as a constitutional monarchy.

<sup>261</sup> See on this section Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2000/31, Addendum, Mission to Nepal, UN Doc. E/CN.4/2001/9/Add.2, paras. 7 et seq., AI, Nepal, A spiralling human rights crisis, supra, Chapter 2, p.10 et seq. and AI, Nepal, A deepening crisis, supra, documenting Maoist abuses and human rights violations by security forces. AI stated that it believes that at least half of the officially acknowledged killings (4,366 out of which 4,050 were held to be "Maoists") may have been unlawful whereby the vast majority have been civilians.

While it is difficult to determine the true extent of the practice of torture, reports from Nepalese organizations dealing with torture victims indicate that there has been another dramatic rise of torture cases after 26 November 2001. From 1992 to 2000, at least 23 people have reportedly died as a result of torture and more than 200 persons disappeared between 1997 and 2002.<sup>262</sup>

The main perpetrators of torture are reportedly police personnel, including the Anti-Terrorist Unit, forest guards, authorised senior prisoners, local administrator officers and as of recently, military personnel and the armed police. A wide range of torture techniques are used.<sup>263</sup> Predominantly, victims have been those suspected of having committed a crime.<sup>264</sup> Torture is routinely used as an almost integral part of police investigations that rely heavily on confessions. In a national prison survey carried out by CVICT in 1996, 70% claimed to have been tortured in police custody.<sup>265</sup>

After 1996 and especially since November 2001, the majority of torture victims have been those suspected of supporting or belonging to the Maoist groups. Marginal and poor people, including children, as well as members belonging to ethnic minorities, among them also Bhutanese refugees, have been more victimised than others. This is seen to be due to their lack of influence in government, the media and the public in general. There have also been regular reports of rape by police officers.<sup>266</sup>

## 2.2. Domestic Responses

In the popular movement of 1990, the eradication of torture was one of the demands of those opposing the Panchayat regime. The leaders of the democratic movement expressed their full commitments in favour of torture-free investigations. As a result, Nepal ratified the Convention against Torture and the prohibition of torture was enshrined in the Constitution of 1990.

Two commissions were set up in 1990, under the Commission of Inquiry Act of 1969, to investigate a) "the loss of life and property" during the demonstrations in 1990 and b) "disappearances" during the Panchayat area. However, the recommendation to prosecute the alleged perpetrators of human rights violations was not put into practice. The only significant legal step to combat torture after 1990 has been the enactment of the Torture Compensation Act in 1996, as a measure to fulfil the obligations set out in the Constitution. While some officials have acknowledged the existence of torture, and the Government has run a number of human rights training programmes, it has failed to speak out expressly against torture and to take vigorous measures aimed at its prevention. Moreover, the National Human Rights Commission only became operational in May 2001, more than four years after the act envisaging its establishment had been

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<sup>262</sup> See annual human rights yearbooks of the NGO Informal Sector Service Centre, INSEC, cited in Nepal's Penal System, p. 56. The Centre recorded 137 cases of "disappearances" between 1997 and 2000. AI recorded more than 130 "disappearances" between 1998 and mid-2001. Since the state of emergency in late November 2001 until late August 2002 66 cases were recorded, AI, Nepal, A deepening human rights crisis, *ibid.*, p.11.

<sup>263</sup> See AI, Nepal, A spiralling human rights crisis, *supra*, pp.26 et seq. and AI, Nepal, A Deepening Crisis, *supra*, pp.12 et seq. for details.

<sup>264</sup> According to Mandira Sharma, Executive Director of Advocacy Forum, more than fifty percent of the accused (in custody) are suffering extreme physical torture, in: The Kathmandu Post, 19 September 2002: Mistreatment of people in custody alleged.

<sup>265</sup> Confirmed by a study of the Centre for Legal Research and Resource Development according to which 69 percent of the accused questioned had been subjected to ill-treatment. See CVICT, Nepal's Penal System, Agenda for Change, 56.

<sup>266</sup> See AI, Nepal, A spiralling human rights crisis, *supra*, for details., p. 26 et seq.

enacted.<sup>267</sup> The early indications relating to the impact of its work, which has reportedly been hindered by a lack of required funds and limited cooperation by official bodies, particularly the police and the army, are not promising.<sup>268</sup> Recently, human rights cells have been set up to, *inter alia*, investigate human rights violations by members of the respective forces. In July 2002, the Army set up a Human Rights Cell.<sup>269</sup> A human rights cell has also been established within the Home Ministry for the police forces and the APAF in January 2003.<sup>270</sup>

### 2.3. International Responses

In 1994, the Committee against Torture noted with concern the failure of Nepal to implement fully the Convention, in particular the lack of legislation incorporating the crime of torture.<sup>271</sup> The Special Rapporteur on Torture has followed up several cases of torture in Nepal and has highlighted the worsening situation in the course of the armed conflict.<sup>272</sup> It has commented on the inadequacies in the legal framework governing torture, noting the absence of penal provisions in the 1996 Torture Compensation Act.<sup>273</sup> Since 1996, UN bodies such as the Working Group on Arbitrary Detention<sup>274</sup> and individual states have expressed their concern over the increase of human rights violations, including torture, which have been well-documented by domestic and international human rights organisations.<sup>275</sup>

The Special Rapporteur on extra-judicial, summary or arbitrary executions, following a country mission in 2000, expressed his concerns over reports of extra-judicial killings and “disappearances” and the prevailing climate of impunity.<sup>276</sup> In December 2002, the European Union expressed its

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<sup>267</sup> See The Human Rights Commission Act, 2053 (1997).

<sup>268</sup> See *infra* III, 3.2.

<sup>269</sup> AI, Nepal, A deepening crisis, *supra*, p.18.

<sup>270</sup> See <http://www.nepalnews.com/>, News for 16 January 2003.

<sup>271</sup> UN Doc. CAT/C/SR.180, 26 April 1994, in the course of considering the initial report of Nepal submitted under Article 19 of the Convention (the only one submitted by Nepal at the time of writing), contained in UN Doc. CAT/C/16/Add.3, 16 December 1993, which the Committee considered as “in many respects incomplete.”

<sup>272</sup> Report of the Special Rapporteur on Torture submitted pursuant to Commission on Human Rights resolution 2000/43, UN Doc.E/CN.4/2001/66, 25 January 2001, para.823: “The consistency of the reports reaching the Special Rapporteur over the years is highly suggestive of a generalized problem of torture and ill-treatment at the hands of law enforcement officials, which the Government is strongly urged to address as a matter of priority.”

<sup>273</sup> Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62, Addendum, Summary of cases transmitted to Governments and replies received, UN Doc. E/CN.4/2002/76/Add.1, para.1104 et seq.

<sup>274</sup> See Report of the Working Group on Arbitrary Detention, Addendum, Visit to Nepal, UN Doc. E/CN.4/1997/4/Add.2, 26 November 1996, para.26: “While the prisoners seen by the Working Group very rarely reported ill-treatment in prisons, the same cannot be said for police detention centers. In the light of its inquiries into this matter, the Working Group considers that such dysfunctions are due primarily to the greater weight attached to confessions in the scale of evidence. This is probably one of the main reasons for the quite frequent cases of ill-treatment inflicted during investigations and, consequently, a source of judicial error...” The Working Group recommended, in para.35 j), the: “Adoption of domestic legislative measures to incorporate the provisions of the Convention against Torture, to which Nepal has acceded into national law so that persons who engage in torture can be prosecuted (and appropriate penalties imposed on those found guilty).”

<sup>275</sup> See especially the reports of Amnesty International, *supra*.

<sup>276</sup> Report of the Special Rapporteur on extra-judicial, summary or arbitrary executions, *supra*, para.43: “The case and incidents related above illustrate the pervasive climate of impunity for human rights violations, including extra-judicial executions, which prevails in Nepal”; para.44: “Legal remedies available for victims of human rights violations remain weak”; para.50: Under the Torture Compensation Act of October 1996, victims of torture and their relatives can seek compensation for their suffering and loss. However, the Special Rapporteur understands that this remedy has largely been ineffective, and that none of the cases filed under the Act so far have resulted in compensation being paid to the victims or their families. In this context, the Special Rapporteur further wishes to emphasize that paying compensation to victims and their families should in no way be seen as a substitute for investigating and prosecuting human rights violations.” The Special Rapporteur recommended, para.52, “that the Commission be authorized to award compensation to victims of human rights abuses and their families in quasi-judicial proceedings” and stated, para.60, that “there is an

concern at the deteriorating security and law and order situation and violations of human rights, including those by security forces in Nepal and urged the government of Nepal to take further immediate action in conformity with its international obligations.<sup>277</sup>

## **II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW**

The Constitution of Nepal prohibits torture. Its Article 14(4) reads: "No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment. Any person so treated shall be compensated in a manner as determined by law." In statutory law, the prohibition of torture is laid down in the Torture Compensation Act 2053 BS (1996) which stipulates that "torture shall not be inflicted on any person who is in detention for investigation or awaiting trial or for any other reason."

The Children Act, 1992, also includes a prohibition of torture and cruel treatment, albeit a qualified one.<sup>278</sup> Moreover, Article 9 of the Evidence Act, 1974, stipulates that confessions made through the use of torture are inadmissible as evidence in court.

The only available definition of torture is contained in the Torture Compensation Act according to which: "the term 'torture' shall be understood as physical or mental torture inflicted on a person who is in detention for investigation or awaiting trial or for any other reason, and this term includes cruel, inhuman or degrading treatment that person is subjected to."<sup>279</sup>

The prohibition of torture is absolute and cannot be suspended or derogated from.<sup>280</sup>

## **III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE**

### **1. THE SUBSTANTIVE LAW**

#### **1.1. Criminal Offences and Punishment**

There is no specific criminal offence of torture in Nepalese domestic law. Acts of torture could be prosecuted as criminal offences only by using the provisions of the Muluki Ain - a country code containing chapters on substantive criminal and civil law and procedural rules.<sup>281</sup>

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urgent need to put in place strong, independent and credible mechanisms to investigate and prosecute alleged human rights abuses... attributed to the police and other State agents."

<sup>277</sup> The Kathmandu Post, 19 December 2002. The statement issued by the Danish Embassy, Presidency of the EU in Kathmandu, on 18 December 2002 condemned the campaign of killings, harassment and destruction by the Maoist insurgents and human rights violations committed by security forces with impunity and called for a halt of such actions. See for further international reactions, AI, A deepening crisis, supra, p.6.

<sup>278</sup> Section 7: "No child shall be subjected to torture or cruel treatment. Provided that, the act of scolding and minor beating by his father, mother, member of family, guardian or teacher for the interests of the child shall not be deemed to violate the provisions of this section."

<sup>279</sup> Section 2 (a).

<sup>280</sup> See Article 115 (8) of the Constitution, which regulates emergency powers.

Inhuman detention, i.e. depriving a detainee of food and water, carries a punishment of imprisonment equalling the imprisonment of the victim of such treatment.<sup>282</sup> In certain cases, the punishment might be one and a half times or twice the length of the illegal detention.<sup>283</sup>

The Muluki Ain (Country Code) contains a chapter on battery.<sup>284</sup> There are three types of battery, i.e. intentional, causing serious bodily injury and accidental battery.<sup>285</sup> Intentional battery covers all other forms of battery not resulting in serious bodily injury as defined in No.2 of the said chapter. It is punishable by a maximum of two years imprisonment and a fine of 250 rupees (100 rupees = ca. \$1.3 at the time of writing). Grievous bodily harm caused by battery is characterised by the types of injuries inflicted which are listed as damaging a person's backbone, limbs and powers of sight, hearing, smell, taste and sexual reproduction as well as damaging a woman's ability to breastfeed. The offence carries a punishment of up to 8 years imprisonment and 10,000 Rupees fine if it causes the blindness or impotence of the victim, in all other cases up to 8 years imprisonment and a fine of 5,000 Rupees, and half of the prison term and the fine in those cases where the victim loses one but not both organs in question.

In cases of accidental battery, the offender is, depending on the consequences and the degree of negligence liable to pay between 250 and 500 Rupees for medical treatment, between 1000 and 2000 Rupees for medical treatment for each of the damaged organs and between 50 and 500 Rupees fine.

Rape is punishable by three to five years imprisonment if the victim is over 14 years old, and six to ten years imprisonment if the victim is below the age of 14.<sup>286</sup> Rape in detention by a government official carries an additional punishment of one year imprisonment.<sup>287</sup> Murder carries a punishment of life imprisonment and confiscation of property for various forms of intentional homicide<sup>288</sup>, ten years imprisonment for homicide which has been provoked<sup>289</sup> and up to two years imprisonment and/or 50 to 500 Rupees fine for accidental homicide.<sup>290</sup>

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<sup>281</sup> See CVICT, Nepal's Penal System, An Agenda for Change, 2001, p.16. In August 2000 a Criminal Justice Task Force was formed under the Attorney General to make recommendations for the reform of the criminal justice system. The task force reported to the government in August 2001. It reportedly recommended that a new Penal and Criminal Procedure Code would be drawn up to replace the Muluki Ain (Country Code) of 1962.

<sup>282</sup> Clause 3 Of Inhuman Detention, Country Code (Muluki Ain).

<sup>283</sup> If the detainee was detained with neck and handcuffs and held without food and water or if the detainee is a woman or a child.

<sup>284</sup> There has been some confusion as to whether the Nepalese term "Kutpit" means "assault" or "battery." This report follows the latter meaning in the sense of: "A person is guilty of battery if he intentionally or recklessly applies force to another person to which that person has not given a valid consent and which is unlawful." Fagan v. Metropolitan Police Comr., [1969] 1 QB 439.

<sup>285</sup> See No. 1, No.2 and No.3, Of battery Country Code (Muluki Ain) respectively. See for justifiable and excusable battery, No.4 and Country Code (Muluki Ain), No. 1, Of Punishment and Fine.

<sup>286</sup> No.3, Of Rape, Country Code (Muluki Ain).

<sup>287</sup> No.5, Of Rape, Country Code (Muluki Ain).

<sup>288</sup> No. 13, Of Murder, Country Code (Muluki Ain).

<sup>289</sup> No.14, Of Murder, Country Code (Muluki Ain).

<sup>290</sup> No. 6, Of Murder, Country Code (Muluki Ain).

## 1.2. Disciplinary Sanctions

Under the Torture Compensation Act, a civil court can order the concerned authority to take departmental action against the government employee who committed the act of torture,<sup>291</sup> however no follow-up procedure is envisaged. The Police Act 1955 also contains provisions which allow the superior police authority to impose a range of disciplinary measures against a police officer for a breach of duty. Disciplinary measures against civil servants can be imposed pursuant to the Civil Service Act. Disciplinary action against army members can be taken according to the Military Service Act.

However, disciplinary punishment may not, according to the Police and the Civil Service Act, be imposed for unlawful conduct if the government employee acted with good intentions.<sup>292</sup>

## 2. THE PROCEDURAL LAW

### 2.1. Immunities

There are no amnesty laws or general immunities. However, government employees who mistreat a person accused in a criminal case, are provided immunity if they had "good intentions" such as wanting to discipline the person."<sup>293</sup> Moreover, section 20 of the Terrorist and Disruptive Activities (Control and Punishment) Act enacted in April 2002 for the duration of two years, members of the security forces "or any other person" are immune from prosecution for "any act or work performed or attempted to be performed by him in good faith under the Act."<sup>294</sup>

### 2.2. Statutes of Limitation

The criminal offences of battery, inhuman detention and rape will only be prosecuted upon a complaint made within 35 days after the offence was committed. If battery results in serious bodily harm, the time limit is three months from the date of the incident. Homicide is not subject to any statutes of limitation.<sup>295</sup>

### 2.3. Investigations into Torture

#### 2.3.1. The legal framework

The Muluki Ain and the State Cases Act of 1993 govern the investigation and prosecution of most crimes. However, there are also numerous other acts vesting various bodies with power to investigate offences as specified.<sup>296</sup>

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<sup>291</sup> Section 7, Torture Compensation Act.

<sup>292</sup> See Section 37 of the Police Act 1955: "the Chief District Officer or the police employee ... while performing duties or exercising authority may not be punished for ... if performed with good intentions." A similar provision is contained in Section 57 of the Civil Service Act.

<sup>293</sup> Clause 5, Country Code (Muluki Ain). See also Police Act and Civil Servant Act for disciplinary punishment, cited supra.

<sup>294</sup> See AI, Nepal, A deepening crisis, supra, pp.1, 2.

<sup>295</sup> The statutes of limitation are stipulated in the respective provisions on the specific criminal offences.

<sup>296</sup> At least 53 statutes have been identified which vest the power of investigation, prosecution and adjudication concerning offences not covered by the State Cases Act with institutions other than the courts. This state of affairs has been criticized by the Center for

Under the Muluki Ain, prosecutions are private. This traditional system was partially supplanted by the first State Cases Act of 1961 that introduced an adversarial justice system and the new State Cases Act of 1993 according to which those crimes classified as State Crimes are for the first time prosecuted by the State.<sup>297</sup>

### 2.3.2. The criminal procedure

Victims of torture may either complain to the police or any other body charged with investigating such cases if the crimes are to be prosecuted according to the State Cases Act. They may also directly file a case against the alleged perpetrator in form of a private prosecution in the local court in order for charges to be brought under the applicable provisions of the Muluki Ain. Such complaints have to be brought within the limitation period prescribed in the governing Act.<sup>298</sup> In the absence of such limitation periods, the case may be filed at any time.<sup>299</sup>

In general, anyone can inform the police, either verbally or in writing, as a result of which a First Information Report is to be drawn up.<sup>300</sup>

According to the State Cases Act, the public prosecutor<sup>301</sup> is responsible for the prosecution of crimes and the police for conducting criminal investigations. While the Attorney General can direct the police to procure additional evidence if needed for prosecution, he/she does not monitor the investigation mechanism as such.<sup>302</sup> No specific or independent institution is charged with investigating complaints about torture. There are however Authority Abuse Cells which were set up in all regional police headquarters in 1993 and these are charged with investigating reports of human rights violations by the police.<sup>303</sup>

The police investigate crimes falling under the State Cases Act *ex officio*.<sup>304</sup> If the police refuse or do not register such a complaint, the complainant may file his/her complaint before a higher police authority which may then direct the police officer in question to begin an investigation.<sup>305</sup> The police may arrest and detain a suspect if there are sufficient grounds that he/she has committed a crime.<sup>306</sup> Evidence relating to torture may be obtained through medical reports, which should be

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Legal Research and Resource Development (CeLRRd) in: "Improvement in Criminal Legal Regime," available on its website [www.celrrd.com/html/page1.html](http://www.celrrd.com/html/page1.html). On 17 August 2000, the Government set up a Criminal Justice Study and Recommendation Task Force with the task of modernizing Nepal's "archaic laws" (in the words of a senior official at the Law Ministry). See Rudra Sharma, Report proposes radical reforms in criminal justice system, in: The Kathmandu Post, 29 August 2001.

<sup>297</sup> These crimes are listed in Schedule 1 of the State Cases Act 1993 as amended since. Murder, rape and battery causing grievous bodily harm, but not other types of battery or inhuman detention are currently listed in the schedule. See, Also Public Offences and Punishment Act, 1970, see P.47 Agenda for Change.

<sup>298</sup> No.27, Of Battery Country Code (Muluki Ain).

<sup>299</sup> No.36, Of Court Management, Country Code (Muluki Ain).

<sup>300</sup> Sec. 3 (1) and (2) State Cases Act.

<sup>301</sup> The Public Prosecutor works for the Attorney General's office. 75 District Prosecutor offices in each of the districts and 16 General Attorney's offices attached to the appellate courts. In 25 districts there is only one prosecutor and in the others there are two.

<sup>302</sup> Center for Legal Research and Resource Development (CeLRRd) in: "Improvement in Criminal Legal Regime," supra, 1.2.4.2.

<sup>303</sup> The working methods of the Authority Abuse Cells are however not clear because of a lack of transparency in their work, see Amnesty International, Spiralling Crisis, supra, p.16.

<sup>304</sup> See supra III 2.2.1.

<sup>305</sup> Sec.3, Sub-Section 5, State Cases Act.

available in all cases pursuant to the applicable provision of the TCA providing for medical examinations of detainees,<sup>307</sup> and an autopsy in case of death.<sup>308</sup>

Upon completion of their investigation, the police are required to submit a report with the collected evidence and their assessment as to whether there is sufficient evidence to file a case to the public prosecutor for a final decision. The latter may either direct the police to carry out further investigations, file an indictment within 25 days or close the investigation.<sup>309</sup> The victim or complainant does not have a right to appeal such a decision.

Victims do not enjoy any specific protection during the investigation nor are they granted any specific procedural rights.<sup>310</sup>

### 2.3.3. Investigations by national human rights commission

A victim of a human rights violation or any person acting on his or her behalf may also lodge a complaint with the National Human Rights Commission. The Commission can investigate a complaint about human rights violations within the limits imposed by Section 10 of the Human Rights Commission Act.<sup>311</sup> It has the power to make a recommendation to the concerned authorities to take the appropriate steps, such as prosecuting the alleged perpetrator(s) of torture, which is however not binding.<sup>312</sup>

## 2.4. Trials

If charges for acts of torture are brought against the alleged perpetrator, the competent court, usually the District Court in the area concerned, will hear the case. The trials are governed by the chapter in the Muluki Ain on court management, the State Cases Act and the Evidence Act. The Evidence Act sets out the applicable procedures and stipulates that the onus of proof rests on the prosecution. Victims of crimes, including torture, may submit evidence but do not enjoy any further procedural rights in cases prosecuted by the State. They may proceed to withdraw a state case where the Government has given him an order to do so provided that the concerned court consents and that the case should not affect a private party's property.<sup>313</sup> The Supreme Court

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<sup>306</sup> See Section on Court Management of the Country Code (Muluki Ain).

<sup>307</sup> Section 3 of the TCA provides: "2.) The concerned officer, at the time of detention and release of any person shall have that person's physical condition examined as far as possible by a doctor in government service and when the doctor is not available, by himself and shall keep and record thereof."

Explanation: For the purpose of this sub-section, the term "doctor" shall be understood as doctor, Kawiraj, health assistant, auxiliary health worker or Baidya in government service. 3). A copy of the report concerning the examination of the physical or mental condition referred to in sub-section (2) shall be submitted to the concerned district court."

<sup>308</sup> According to Sec. 11, 3) State Cases Act, government medical doctors shall carry out autopsies and submit a report to the investigating authorities within 24 hours of completing an autopsy.

<sup>309</sup> Section 17, State Cases Act.

<sup>310</sup> See Dr. Shanker Kumar Shrestha, A Step Towards Victim Justice System, 2001, p.116 et seq.

<sup>311</sup> The Commission may not investigate cases specified in the Army Act, cases certified by the Chief Secretary of His Majesty's Government in a treaty between HMG and any foreign state or international or inter-governmental institution or cases that negatively affect the security of the Kingdom of Nepal and cases certified by the Attorney General as negatively affecting the investigation of a crime or the identification of a culprit.

<sup>312</sup> Chapter 3, The Human Rights Commission Act, 2053 (1997).

<sup>313</sup> Section 29, State Cases Act, 1993.

upheld the legality of this provision in two recent judgments.<sup>314</sup> In case of a conviction, the Courts have discretion in deciding whether to reduce or to suspend sentences whereas amnesties can only be granted by royal decree.

Military personnel who commit offences in the course of their duty are brought before a court martial whereas other offences committed by military personnel are dealt with through the criminal justice system.

Finally, a civil court may order disciplinary action against the perpetrator to be taken by the concerned authority in cases brought under the Torture Compensation Act.<sup>315</sup>

### **3. THE PRACTICE**

#### **3.1. Complaints**

No statistics are available as to the overall number of complaints relating to torture and ill-treatment. The national human rights commission recorded a total of 528 complaints in its first year (June 2000 - July 2001), 255 of which related to political rights. Since the imposition of the emergency, "complaints of violations of law by the security personnel have been pouring in," according to the NHRC Chairman.<sup>316</sup> However, a large number of victims reportedly refrain from complaining about torture. This appears to be due to the widely held view that torture is a normal practice in the course of arrests seen as a legitimate method by police officers and accepted by victims out of ignorance of their rights or fear of reprisals.<sup>317</sup> Additionally, given the prevailing impunity, many victims decide against complaining because they do not trust the authorities to carry out appropriate investigations.

#### **3.2. Investigations**

Investigations tend to be slow and are not seen as being carried out impartially or thoroughly. Torture allegations against police officers are investigated by the police where the prevailing spirit is one of protecting fellow officers. The complainants are faced with a hostile reaction, ranging from deliberate inaction to outright threats and physical attacks, including further torture, also of family members. The provisions relating to medical examinations and drawing up of medical reports in the TCA are only rarely followed in practice, in some cases because they are simply not known by police officers, and in others because it is deliberately obstructed by the police. Police officers have in numerous cases refused to allow injured detainees to see a doctor, to consult a doctor in their absence or have delayed access to a doctor.<sup>318</sup> Moreover, the law only validates

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<sup>314</sup> Supreme Court, Supreme Court Bulletin, Year 5, Vol.24, p.12 and Supreme Court, Nepal Law Journal, Vol.66, Issue 7, 1994, pp.505-506, cited in: Dr. Shanker Kumar Shrestha, A Step Towards Victim Justice System, 2001, p.97, 98. In the latter case, Dil Bahadur Law vs. State, the Court reasoned that cases may need to be ended for the better advancement of the country and society, for social, religious and communal patience and harmony and for keeping diplomatic relations sound and better. The Court stressed that it should not consent in the absence of proper reason and in the presence of any abuse in the exercise of power.

<sup>315</sup> See infra IV, 1.1.1.

<sup>316</sup> See The Kathmandu Post, 2 April 2002: Govt indifferent to human rights: NHRC.

<sup>317</sup> See Dr. Shanker Kumar Shrestha, A Step Towards Victim Justice System, 2001, 150, 151, also citing various studies on the subject.

<sup>318</sup> See AI, A deepening crisis, supra, p.19, according to which security forces have repeatedly ignored district court orders to take prisoners for medical examination. In addition, in six report cases, the police did not allow medical examination of prisoners it had brought to hospital after it became clear that the prisoners could not pay for the treatment.

examinations carried out by government employees who are often lower level health professionals without the necessary expertise. Finally, investigations tend to be inadequate, largely due to the poor methods employed by the police in investigating crime.

The Human Rights Cell set up by the Army in July 2002 was investigating between six and ten cases in September 2002. While it has taken disciplinary action against army personnel held responsible for the torture of three individuals employed by GTZ (a German development organisation), it has apparently not initiated any criminal trials or court martial.<sup>319</sup>

It may be too early to assess the performance of the NHRC though at the time of writing it appeared that insufficient financing and staffing hampered its effectiveness. In 2000, the government allocated only 5 million Rupees (about \$65,400) against the 25 million Rupees (about \$330,700) requested by the Commission for its first year.<sup>320</sup> The record of cooperation by the police and other official bodies with the NHRC in its early stages has apparently been unsatisfactory.

### **3.3. Prosecution: Indictments, Convictions, Sentencing**

The overwhelming majority of cases have not resulted in a trial. Prosecutions have either been discontinued, dismissed for lack of evidence or the only action taken was disciplinary punishment.<sup>321</sup> The low number of indictments appears to be due to a combination of factors, in addition to the ones mentioned above, such as poor investigation techniques, a weak position of the prosecutors in directing the police to carry out more efficient investigations and a short deadline for bringing charges inducing prosecutors to drop cases.

This record appears to bear out the perception that the judiciary lacks genuine independence and is prone to outside influence, be it by the authorities or the accused themselves.<sup>322</sup> The judiciary has also not taken a proactive role in the prosecution of perpetrators of torture. While confessions obtained by means of torture are inadmissible according to Article 9 of Evidence Act 1974, the burden of proof is on the complainant who alleges he or she has been tortured.<sup>323</sup> Accordingly, a torture survivor has to seek a separate decision by the court during the criminal case against him or her with regard to the allegation of torture. As a consequence, torture survivors have found it difficult to prove torture and courts have hardly taken any action in urging authorities to investigate allegations of torture and prosecute the perpetrators, with the exception of asking the authorities to impose disciplinary punishment in the cases under the TCA.

Since its inception in May 2000, 65 cases of torture have been filed with the NHRC. It recommended disciplinary action and prosecution of the perpetrators in several cases but by

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<sup>319</sup> The information was provided to a delegation of Amnesty International during its visit to Nepal in September 2002. See for further details AI, Nepal, A deepening crisis, supra, p.18.

<sup>320</sup> The government had later provided another Rs 664,000 since the allocated money was not sufficient to pay the salaries. However, for 2001 it allocated again only Rs 5,000,000, which drew bitter criticism of the National Human Rights Commission in its first Annual Report published in 2002.

<sup>321</sup> There is no follow up to orders by courts under the TCA so that it is not known whether the disciplinary punishment ordered has actually been carried out.

<sup>322</sup> See International Bar Association, Nepal in Crisis, supra, in particular pp.33, 34.

<sup>323</sup> The rulings of the Supreme Court are inconsistent in this regard but appear to endorse this rule. See Amnesty International, Spiralling Human Rights Crisis, supra, p.29.

December 2002, it was not known to Commission members whether any such action had been taken.

According to information provided by the Inspector General of Police in 2000 to Amnesty International, action had been taken against 23 police officers for abuse of authority and human rights violations. Nine of the suspects were only subject to disciplinary action while the remaining fourteen were charged in relation to three cases of human rights violations, including charges of rape and murder but ultimately not convicted.<sup>324</sup> One of these cases concerned the death in custody of Suk Bahadur Lama from Dolakha district as a result of torture inflicted at Kawasoti Ilaka police post in 1999. A post-mortem showed clear signs of torture. The eight police officers were arrested but subsequently released before the start of the trial. All of the police officers, who were charged with murder, were acquitted by the Nawalparasi court on 6 November 2001. The only step taken against the alleged perpetrators was a recommendation by a three-member committee coordinated by the Joint Secretary of Home Affairs to take departmental action against the police officers responsible for the treatment of Suk Bahadur Lama which was described as "heavy-handed."<sup>325</sup>

In one case, a police officer who was convicted of "physical assault" in the Muluki Ain and ordered to pay a fine of Rupees 400 (\$5.5). While the court acknowledged that Sitaram Yadav, who was tortured in Sunsari District in 1998, had been beaten, it found that this treatment did not amount to torture.<sup>326</sup>

Moreover, in February 2001, the Dolakha District Court sentenced Assistant Sub-Inspector Rakesh Kumar Singh to four year's imprisonment for raping an 18-year old woman, Himali Gole, at gunpoint when on duty patrol in 2000. Thereafter he had been taken into custody and was suspended from his job. The court also ordered that half his property be transferred to the victim.<sup>327</sup>

#### **IV. CLAIMING REPARATION FOR TORTURE**

##### **1. AVAILABLE REMEDIES**

###### **1.1. The Torture Compensation Act**

###### **1.1.1. Substantive rights**

The Constitution spells out an express right to compensation for torture and some limited form of rehabilitation but not to other forms of reparation. Article 14(4) of the Constitution states: "Any person so treated (subjected to physical or mental torture or cruel, inhuman or degrading treatment) shall be compensated in a manner as determined by law." This law, the Torture Compensation Act (hereinafter TCA), which came into force in 1996, provides in its Section 4: "if it is held that any employee of His Majesty's Government has inflicted torture on any person, the

<sup>324</sup> Amnesty International, Nepal: Make Torture a Crime, March 2001, AI Index: ASA 31/002/2001, p.6.

<sup>325</sup> Amnesty International, Nepal: Spiralling Human Rights Crisis, supra, p.31.

<sup>326</sup> Amnesty International, Make Torture a Crime, supra, p.12.

<sup>327</sup> The Kathmandu Post, 27 February 2001: Cop gets jail term on rape charges.

victim shall be provided compensation in accordance with this Act." Only the government bears liability under the TCA. There are no express provisions providing for a right of the government to have recourse to the individual perpetrator for the compensation paid under the TCA nor are there any precedents to this effect.

Under the TCA, a torture victim, any adult member from his family or a legal practitioner may file a petition and the Court may order the physical or mental examination of the detainee within three days. If treatment is deemed necessary, it shall be undertaken by His Majesty's Government, who will cover the costs of such treatment.<sup>328</sup> Thus, a torture survivor has, under the conditions just outlined, a right to free medical treatment.

The maximum amount of compensation that can be awarded under the TCA is 100,000 Rupees (\$1,358).<sup>329</sup> Compensation can be claimed for pecuniary and non-pecuniary harm. In determining the amount of compensation, the Court shall take into consideration the following matters: the physical or mental pain or hardship caused to the victim and their gravity; the decline in income-earning capability of the victim resulting from physical or mental harm; the age of the victim and his/her family liabilities in case he/she has suffered physical or mental damage which cannot be treated; in circumstances when the damage can be treated, the estimated expenses of such treatment; in case the victim of torture dies, the number of members of his family dependent on his/her income, and the minimum amount necessary for their livelihood and finally any other proper and appropriate matters from among those contained in the claim filed by the victim.<sup>330</sup>

In addition to awarding compensation, the District Court shall, if it holds that torture has been committed in accordance with this Act, order the concerned authority to take a departmental action according to existing law against the government employee who committed the act of torture.<sup>331</sup>

### 1.1.2. Procedure

A victim of torture, or any adult member from his family or his legal practitioner in cases where the victim has died or cannot file a complaint himself, may file a complaint claiming compensation in the District Court of the District in which he was detained within 35 days of having been subjected to torture or of release from detention.<sup>332</sup> The complaint must, *inter alia*, contain the particulars of torture inflicted while in detention, the particulars of losses caused by such torture and the amount of compensation claimed.<sup>333</sup>

Upon a request by the victim or his/her relatives for a medical examination, the District Court may issue an order to the police to present the detainee to the government medical institution nearby.<sup>334</sup> The authorised medical personnel may provide medical treatment that is available and,

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<sup>328</sup> Section 5(3) TCA..

<sup>329</sup> Section 6: "... and, if the matter of the complaint is found to be true, may make adjudication to have compensation in maximum of one hundred thousand rupees paid by His Majesty's Government to the victim."

<sup>330</sup> Section 8 TCA.

<sup>331</sup> Section 7, TCA.

<sup>332</sup> Section 5, TCA.

<sup>333</sup> Section 5 (4) (b), (c) and (d) TCA.

<sup>334</sup> Section 5 (3) TCA.

if specialist treatment is required, they may refer him/her to the nearest government medical institution that has the necessary expertise and equipment. If the victim or his family fails to request the court for examination while in detention, the Court may not order the medical treatment requested.

Compensation cases under the TCA are heard by the District Court, which follows the procedures mentioned in the Summary Trial Procedure Act, 1971.<sup>335</sup> The Government Attorney shall, upon request of the head of the concerned office, defend the alleged perpetrator of torture.<sup>336</sup> The burden of proof lies on the plaintiff seeking compensation. When the victim requests a medical examination, the courts generally issue an order to this effect. If the medical report indicates the recent occurrence of torture, the court may consider it as a proof of the complaint. It is however not clear whether the courts are to accept as evidence a medical report by a private physician following an examination at the request of the victim since the TCA specifies that such examinations are to be carried out by government officials.<sup>337</sup> The court may also consider other circumstantial evidences in deciding on the merits of the case. The award of compensation under the TCA is independent of the outcome of any criminal proceedings.<sup>338</sup>

While court fees are not required for criminal and certain other types of legal action provided for by law, they are generally required for civil suits and seemingly also for cases under the TCA. In a case that is still pending, the father of a torture victim attempted to file a complaint in the Kathmandu District Court claiming 100,000 Rupees compensation. The Shreshtedar (Registrar) ordered the complainant to deposit court fees and refused to register the case on these grounds. However, on appeal, the judge ordered that the case be registered without court fee. This case illustrates the lack of legal certainty in regard to court fees and the award of costs under the TCA.<sup>339</sup> The torture survivor or the relatives of a torture victim have to bear the costs of the trial if their case does not succeed. Under the Legal Aid (Support) Act (1996), a party to a case is entitled to legal aid if he/she has an income of less than 40,000 rupees a year.

If the District Court awards monetary compensation, the victim has to ask for payment by way of an application to the District Administration Office within one year of the final decision.<sup>340</sup>

## **1.2. Compensation through Criminal Proceedings**

The victim may file a private criminal case directly to the competent court which may award compensation as part of the criminal punishment. While the torture survivor or relatives of a

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<sup>335</sup> Section 6, 1) TCA. According to recent reports, the Supreme Court is set to make public a Civil Procedure Guidelines with the purpose of ensuring homogeneity in court procedures to be adopted by all judges and other court officials throughout the country. The Kathmandu Post, 27 May 2002: Civil Procedure Guidelines to be public.

<sup>336</sup> Section 10 TCA.

<sup>337</sup> See Section 3 TCA. See for text, *supra*.

<sup>338</sup> See in this connection also Section 12 TCA, which provides that the institution of action for compensation under the TCA or receipt of compensation shall not be a bar to the institution of a separate criminal action.

<sup>339</sup> Moreover, pursuant to Section 6, 2) TCA, the District Court may impose a fine of up to 5,000 Rupees if it is found that the complaint was filed with malafide intention.

<sup>340</sup> Section 9, TCA: "(1) After the final adjudication made on providing compensation to the victim, the victim or in case of his death, his nearest heir, shall submit an application to the Chief District Officer of the District in which he was detained, accompanied by a copy of the District Court's adjudication on the provision of compensation, within one year of receiving information of the adjudication.2) The Chief District Officer shall provide the amount of compensation to the applicant within thirty-five days of the receipt of the application referred to in sub-section (1)."

torture victim may urge the Court in criminal cases to award compensation, the Court has discretion as to what kind of punishment to impose. According to the Muluki Ain, a court may order the perpetrator to pay up to 250 Rupees for treatment costs in assault cases. In grievous bodily harm cases, the sum ordered to be paid by the perpetrator to the victim for treatment is 500 to 2000 Rupees. In rape cases, a court may award 50% of the property of the perpetrator as compensation to the victim.

### **1.3. Compensation through the National Human Rights Commission**

Torture victims may also seek to obtain reparation through the National Human Rights Commission. While the National Human Rights Commission may institute an investigation into such complaints, it does not have the power to award reparation itself. It may only make recommendations to the responsible authorities to provide compensation to torture victims.<sup>341</sup> In April 2001, the NHRC passed regulations for awarding compensation according to which compensation can be recommended for up to 100,000 Rupees depending on the seriousness of the case. The NHRC may also recommend that part of the compensation be paid by the perpetrator him/herself.

## **2. THE PRACTICE**

### **2.1. Use and Effectiveness of Available Remedies**

Torture survivors and relatives of torture victims have filed only a few compensation cases. As of early 2002, around forty such cases had been filed. This is due to a combination of factors, such as lack of access to courts, especially in rural areas, a lack of financial resources to pursue a case and the inadequate implementation of the legal aid scheme. The short time limit also contributes to the relatively small number of cases before the competent District Courts. Moreover, victims, witnesses and victim's lawyers have in several cases been threatened and intimidated by police. In other instances, torture survivors and relatives of victims have reportedly been bribed to drop their case.<sup>342</sup>

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<sup>341</sup> Chapter 3, of The Human Rights Commission Act, 2053 (1997), 5 (1): "If, during proceedings by the Commission on the complaints and petitions filed within its jurisdiction pursuant to Section 11, the accused is found guilty, it shall write to the organization or authority concerned to take necessary action against the guilty person; 5, (2):" While writing pursuant to sub-section (1), if the Commission thinks it necessary to provide the victims with necessary compensation it shall also mention the nature of compensation in its recommendation; (3) "The basis and procedures to be followed for allowing compensation pursuant to sub-section (2) shall be as prescribed; (4): "Upon receiving written recommendation for action pursuant to sub-sections (1) and (2), the concerned body or authority shall take action as required by the Commission, or if such action cannot be taken, having set out the reasons therefore, the concerned body or authority shall send its report of the action taken within three months from the date of receipt of the intimation from the Commission."

<sup>342</sup> According to Amnesty International, during 1998 6 out of 12 complainants withdrew their claims for compensation because of intimidation and fear for their safety, in: Amnesty International, *Make Torture a Crime*, supra, p.10.

<sup>343</sup> According to Amnesty International, during 1998 6 out of 12 complainants withdrew their claims for compensation because of intimidation and fear for their safety, in: Amnesty International, *Make Torture a Crime*, supra, p.10.

<sup>344</sup> Ibid.

## 2.2. Reparation Cases

Before the coming into force of the TCA, the Supreme Court had decided one case relating to torture, the case of *Purna Bahadur Chhantel v. Chief District Officer, Dang et al.*<sup>345</sup> The petition for compensation was quashed by the Supreme Court on the ground of lacking legislation.

Victims have been awarded compensation in three cases under the TCA. However, only one decision has become final whereas the others are still under appeal.

- Minor Deepak Raut, a minor, was awarded 10,000 Rupees compensation by the Saptari District Court on 21 March 2001 in the case of *Ram Bahadur Raut v Dy. S. P. Sanandan Prasad Kurmi*. Minor Deepak Raut, who had claimed 20,000 Rupees compensation, was compelled to put his head in a bucket of water, forced to inhale water through the nose, had his hands beaten with sticks and was verbally abused. The case has been appealed and is under consideration of the Appellate Court.
- Amar Narayan Lonia was awarded 50,000 Rupees compensation by the Nawalparasi District Court in June 2001 in the case of *Amar Narayan Lonia v. Gambhira Prasad Sha and others*. It also awarded departmental action to be taken. In so doing, the court evaluated not only the evidence of both parties and medical reports but also a report of its own official regarding wounds on the victim's body. The case is also at the time of writing pending before the Appellate Court.
- In the case of *Hari Bhadur Lama v Inspector Dhiraj Pratap Singh and others* the Nawalparasi District Court awarded 5,000 Rupees compensation for beatings suffered at the hands of the police. The court arrived at its decision after it had summoned a key witness who corroborated the account of the plaintiff.
- Hasta Bahadur Chamling was awarded 5,000 Rupees compensation by the Ilam District Court in August 2000 but did not collect the award within the prescribed time limit.
- In the case of Bishu Lal Batar, the victim received Rupees 9,000, paid by the police officer who inflicted the torture, as the result of a mediation procedure pursuant to the Muluki Ain which had been followed by the court.

The family of Suk Bahadur Lama received 50,000 Rupees (ca.\$654) financial assistance from the Government, the first time that such assistance has been provided by the Government.<sup>347</sup>

In the rape case mentioned above, the victim was handed over half the property of the perpetrator.<sup>348</sup>

The NHRC has as of December 2002 recommended compensation to be paid in four out of its 113 cases of torture.<sup>349</sup> Compensation has been awarded in two cases. In its first compensation case,

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<sup>345</sup> Nepal Kanoon Patrika, Supreme Court of Nepal; Kathmandu, Vol.33, Issue 12, b (1992) at p.298.

<sup>346</sup> See details of this case of death in custody resulting from torture, supra III, 3.3.

<sup>347</sup> See details of this case of death in custody resulting from torture, supra III, 3.3.

<sup>348</sup> See supra III, 3.3.

which concerned the right to life, the NHRC decided that the families of two prisoners killed by the police in the Nepalgunj prison are to be compensated with Rs 100,000 each. 5 % of this amount should be borne by the then Chief District Officer of Banke who had ordered the shootings leading to the deaths and 2.5 % by Superintendent of Police Arun Kumar Singh.<sup>350</sup> In the second case of Harikirtan Chowk, a case of torture, the NHRC recommended that Rs. 10,000; 25,000; 25,000 and 40,000 respectively be paid to the four torture survivors by the government. At the time of writing, the NHRC has not been informed as to whether the recommended compensation had been paid to the victims.

## **V. GOVERNMENT REPARATION MEASURES**

There is presently no scheme of reparation for torture survivors and relatives of torture victims. A fixed amount of compensation has been paid to around 200 persons for imprisonment and torture suffered during the Panchyat rule. The money has been awarded by a high level political committee headed by the former Prime Minister Krishana Prasad Bhattarai since 1990 but presently no compensation is paid out due to lack of funds. The Government provides, upon request, free medical treatment to torture victims but neither runs its own nor supports independent rehabilitation centres, such as the Centre for the Victims of Torture in Kathmandu.<sup>351</sup>

## **VI. LEGAL REMEDIES FOR ACT 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 legal system of Nepal does not allow for the exercise of universal jurisdiction for acts of torture. As there is no general provision in the Muluki Ain or the State Cases Act on universal jurisdiction or prosecution of crimes committed abroad, such prosecution could only be carried out on the basis of specific legislation. Such legislation is in place in the Narcotic Drug (Control) Act, 1976, and the Trafficking of Person Act, 1986, and in form of the active personality principle, in the Treason and Punishment Act, 1989 and Detective Act, 1962. There is however no comparable legislation for acts of torture or any other international crimes. While a prosecution for torture and war crimes appears to be possible on the basis of the direct applicability of the Torture Convention and Geneva Conventions, in accordance with the Treaties Act, the lack of implementing legislation casts doubt whether the Nepalese prosecuting authorities and courts would deem the relevant treaty provisions a sufficient legal basis for prosecuting anyone suspected of having committed acts of torture abroad.

Diplomats are awarded immunity from criminal prosecution while in office according to the Privileges and Immunity to the Foreign State and Diplomatic Representative Act, 1970 that follows the treaty provisions of the Convention on Diplomatic Relations.

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<sup>349</sup> 85 of which related to state actors and 28 to non-state actors.

<sup>350</sup> The Kathmandu Post, 25 May 2001: NHRC awards compensation.

<sup>351</sup> See [www.cvict.org.np](http://www.cvict.org.np).

### 1.1.2. Extradition laws

Extradition is carried out pursuant to the Extradition Act 2045 BS (1988).<sup>352</sup> In general, extradition is carried out in accordance with an extradition treaty in line with the Extradition Act.<sup>353</sup> Accordingly, extradition should only be allowed for the most serious offences, there should be no extradition for political crimes and Nepalese nationals are not to be extradited.

### 1.2. The Practice

There are no known cases in which perpetrators of torture committed abroad have been prosecuted in Nepal or extradited following an extradition request.

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

Victims of torture committed abroad cannot claim compensation under the TCA. Nepalese civil law does not provide any legal avenues for claiming reparation for torture committed in third countries since the courts do not have jurisdiction to entertain such claims.

Diplomats are awarded immunity while in office according to the Privileges and Immunity to the Foreign State and Diplomatic Representative Act, 1970 Foreign States also enjoy immunity for official acts.

There have consequently been no known cases in which a victim of torture committed abroad has taken legal action in Nepal against individual perpetrators or a foreign State with a view to obtain reparation.

There is no criminal offence of torture as such. The existing corpus of criminal offences that might be applied to prosecute perpetrators of torture is inadequate as the crimes in question do not encompass all forms of torture.

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<sup>352</sup> Extradition Act 1990 (Sapurdagi Ain 2045), *Nepali Edition*, Kathmandu, Nepal Ain Sanghrah Purak Khanda (supplementary part) 1990, Law Book Management Committee. See also Acts and Rules Related to Police Administration, Chautari Publication, Kathmandu, Second Ed 1996, introductory comment.

<sup>353</sup> Politically, the most important extradition treaty is the one with India, which was concluded in the 1950s and is currently being reconsidered.

## **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 state<sup>354</sup> 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.<sup>355</sup> 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.<sup>356</sup> 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.<sup>357</sup>

##### **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)

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<sup>354</sup> Article 1(1) and 2) Constitution.

<sup>355</sup> This right has now been included in Article 8 of the 2000 Draft Constitution.

<sup>356</sup> Article 105(1) Constitution.

<sup>357</sup> Independence of the judiciary has been further strengthened by the 17<sup>th</sup> 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 17<sup>th</sup> 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.<sup>358</sup> 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.<sup>359</sup> 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.<sup>360</sup>

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 2<sup>nd</sup> 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 for years without trial. Several army camps and police stations earned notoriety as torture chambers. During this

<sup>358</sup> The negotiations of both parties regarding a political settlement of the conflict are ongoing at the time of writing.

<sup>359</sup> See, also on the historical background, Elisabeth Nissan, Sri Lanka: A Bitter Harvest, Minority Rights Group, London, 1996.

<sup>360</sup> E.g. the Draft Constitution of 3 August 2000.

period the government sanctioned torture and the state agencies carried out torture with its connivance.<sup>361</sup>

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.<sup>362</sup> 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.<sup>363</sup> 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.<sup>364</sup> 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.<sup>365</sup>

## 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

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<sup>361</sup> Amnesty International, Sri Lanka, Extra-judicial Executions, "Disappearances" & Torture, 1987-1990, London 1990.

<sup>362</sup> See Amnesty International, Sri Lanka: Rape in Custody, January 2002, AI Index: ASA 37/001/2002.

<sup>363</sup> 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.

<sup>364</sup> 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.

<sup>365</sup> See *ibid.*

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,<sup>366</sup> the lower courts have apparently shown less willingness to take a strong stance against torture.<sup>367</sup>

### 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.<sup>368</sup> 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".<sup>369</sup> 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.<sup>370</sup>

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 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."<sup>371</sup> The Committee "welcomed the significant efforts undertaken by the Government of Sri

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<sup>366</sup> "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.

<sup>367</sup> See *infra*.

<sup>368</sup> Several cases relating to torture and "disappearances" are presently pending before the Human Rights Committee.

<sup>369</sup> 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.

<sup>370</sup> Concluding observations of the Committee against Torture: Sri Lanka, UN Doc.A/53/44, paras.243-257, 19 May 1998, paras.249 et seq.

<sup>371</sup> 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.

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.”<sup>372</sup>

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,<sup>373</sup> the UN Special Rapporteurs on torture<sup>374</sup> and Violence against Women,<sup>375</sup> 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, 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

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<sup>372</sup> Ibid., paras. 195 and 179.

<sup>373</sup> Supra.

<sup>374</sup> 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.”

<sup>375</sup> 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.

penalty on the victim... or coercing the victim or third person to do or refrain doing something...<sup>376</sup>

### **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).<sup>377</sup>

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 hurt<sup>378</sup> to extort a confession or to compel the restoration of property.<sup>379</sup> 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.<sup>380</sup> Voluntarily causing hurt is subject to a punishment of a term of imprisonment of up to one year and/or a fine<sup>381</sup> and voluntarily causing grievous hurt shall be punished with a maximum of seven years imprisonment and a fine.<sup>382</sup>

<sup>376</sup> Amarasinghe J in *De Silva, Mrs. W. 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.

<sup>377</sup> S. 2 (4) Torture Act.

<sup>378</sup> Section 310 Penal Code defines causing hurt as: "Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."

<sup>379</sup> 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."

<sup>380</sup> Section 322 Penal Code.

<sup>381</sup> Sections 312 and 314 Penal Code.

<sup>382</sup> Sections 313 and 316 Penal Code.

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.<sup>383</sup> Culpable homicide and murder are crimes carrying heavy punishments, the latter being punishable with death.<sup>384</sup>

## 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.<sup>385</sup>

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.<sup>386</sup>

### 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.<sup>387</sup>

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<sup>383</sup> Section 364 (2) Penal Code.

<sup>384</sup> Sections 293-297 of the Penal Code. The death sentence has not been carried out in Sri Lanka since 1977.

<sup>385</sup> See *infra* III, 3.3.

<sup>386</sup> 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."

<sup>387</sup> Section 456 Criminal Procedure Code.

## 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;<sup>388</sup>
- Thirdly, to the Attorney General's Department by way of a written complaint;<sup>389</sup>
- Fourthly, a complaint can be filed with the National Human Rights Commission;<sup>390</sup> 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.<sup>391</sup> 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 from a government hospital that is normally not made available without a court order.<sup>392</sup>

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.<sup>393</sup> 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

<sup>388</sup> 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.

<sup>389</sup> 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.

<sup>390</sup> See *infra* III, 2.3.2.

<sup>391</sup> S.136, 1a) Criminal Procedure Code.

<sup>392</sup> 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.

<sup>393</sup> 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.

Special Investigation Unit at the Police Headquarters under a senior Deputy Inspector General of Police.<sup>394</sup>

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.<sup>395</sup> The police may decide to discontinue an investigation on the basis of a lack of evidence to prove a case beyond all reasonable doubt.<sup>396</sup>

The Attorney General has the power to review such a decision and give necessary directions to continue with the investigations.<sup>397</sup> 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.<sup>398</sup> 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.<sup>399</sup> 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 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).<sup>400</sup> 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

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<sup>394</sup> In 1997, there was also a Disappearance Investigations Unit established.

<sup>395</sup> S. 109(5)(a) Criminal Procedure Code; Ss. 109(5)(b), 114, 115(1), and 116(1) Criminal Procedure Code.

<sup>396</sup> S.109 (5) (b) Criminal Procedure Code.

<sup>397</sup> Ss. 393 and 397 Criminal Procedure Code.

<sup>398</sup> Section 2 (5) Torture Act.

<sup>399</sup> See section 122 Criminal Procedure Code.

<sup>400</sup> See Section 14 Human Rights Commission of Sri Lanka Act, No. 21 of 1996.

refer the matter for reconciliation or mediation.<sup>401</sup> 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.<sup>402</sup> 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.<sup>403</sup> 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.<sup>404</sup> 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.<sup>405</sup> The Commission can only make recommendations and has no power to make orders.<sup>406</sup>

## 2.4. Trials

Under the Torture Act, only the High Court has jurisdiction to try all persons indicted for torture.<sup>407</sup> A Magistrate's Court has power to try a person charged with voluntarily causing hurt under the Penal Code.<sup>408</sup> A Court Martial may have the power to try military personnel charged with torture.<sup>409</sup>

All trials relating to torture are conducted under the normal criminal procedure code of the country.<sup>410</sup> 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.<sup>411</sup> 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.<sup>412</sup> The Court has discretionary sentencing power.<sup>413</sup> The punishment for

<sup>401</sup> Ibid., Sections 15 (2) and 16.

<sup>402</sup> Ibid., Section 15 (3).

<sup>403</sup> Ibid., Section 15 (6).

<sup>404</sup> Ibid., Section 15 (7).

<sup>405</sup> Ibid., Section 15 (8).

<sup>406</sup> See for the powers of the Commission, *ibid.*, Section 11.

<sup>407</sup> S.2, Torture Act.

<sup>408</sup> Ss. 313 – 322 Penal Code; First Schedule; Ss. 10 and 11 Criminal Procedure Code.

<sup>409</sup> There are no such precedents.

<sup>410</sup> 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.

<sup>411</sup> S.41, S.1 Judicature Act, S. 260 and Criminal Procedure Code. NGOs are not allowed to participate.

<sup>412</sup> *Bandaranayake vs. Jagathseena (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."

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.<sup>414</sup> 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.

#### **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.<sup>415</sup> 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.<sup>416</sup> 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.

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<sup>413</sup> Section 13 Criminal Procedure Code.

<sup>414</sup> Moreover, in early 2000, 2796 cases had been referred to the Disappearance Investigation Unit by the IGP.

<sup>415</sup> 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.

<sup>416</sup> Establishments Code, Vol. 2, Chapter XVIII, Rule 21.1.

Examinations have also been delayed which in rape cases had the result in the allegation no longer being proven.<sup>417</sup>

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.<sup>418</sup> 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.<sup>419</sup>

### **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.<sup>420</sup> Criminal trials in the High Courts will normally take several years to be concluded. Perpetrators have raised a range of defences against torture.<sup>421</sup> 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.

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<sup>417</sup> See Amnesty International, Rape in custody, supra, p.7, specifying the reasons why rape in custody cases are often unsuccessful.

<sup>418</sup> 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.

<sup>419</sup> 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 inasmuch as an allegation of assault and of torture has been made to the Superintendent of Police on the 17<sup>th</sup> 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.

<sup>420</sup> 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.

<sup>421</sup> 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.

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.<sup>422</sup> 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.<sup>423</sup>

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 concerned.<sup>424</sup> The Court has also directed the IGP to take appropriate disciplinary action against the perpetrator; to inform the Court of the action taken<sup>425</sup> and has directed the Attorney General to consider taking steps under the Torture Act against the respondents in a recent torture case.<sup>426</sup>

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.<sup>427</sup> The Supreme Court has a wide discretionary power to grant relief in fundamental rights cases.<sup>428</sup> 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.<sup>429</sup> In calculating compensation in fundamental rights applications, pecuniary and

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<sup>422</sup> See Amnesty International, Sri Lanka: Landmark judgement – end to climate of impunity?, 3 July 1998, AI Index: ASA 37/17/98.

<sup>423</sup> 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.

<sup>424</sup> 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.

<sup>425</sup> SCA 457-462/93; SCA 109/95; SCA 396-397/93; SCA 68/91; SCA 270/93; SCA 4/91.

<sup>426</sup> *Yogalingam Vijitha vs. Wijesekara & Others*, S.C. Application FR No.186/2001, 23 August 2002. See also SCA 623/00; SCA363/00.

<sup>427</sup> 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."

<sup>428</sup> 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."

<sup>429</sup> *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 *achio 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

non-pecuniary aspects may be taken into consideration.<sup>430</sup> The Supreme Court may also award other forms of reparation.<sup>431</sup>

The Supreme Court has held that the state is liable for the infringement of fundamental rights by its officials.<sup>432</sup> In recent years, the Supreme Court has increasingly held perpetrators of torture personally liable to pay compensation to the victim.<sup>433</sup> 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.<sup>434</sup> 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.<sup>435</sup> A case has to be brought within one month of the infringement,<sup>436</sup> and has to be proved by balance of probability or by preponderance of the evidence.<sup>437</sup> At the time of filing a fundamental rights application the

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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."

<sup>430</sup> See *ibid.*

<sup>431</sup> See *infra.*

<sup>432</sup> *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 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."

<sup>433</sup> See e.g. SCA 623/2000; SCA 290/98; SCA 66/97; SCA 98/97; SCA 477/96; SCA 615/95.

<sup>434</sup> 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."

<sup>435</sup> 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."

<sup>436</sup> 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.

<sup>437</sup> *Channa Pieris and Others v. Attorney-General and Others (Ratawesi Peramuna Case)*, (1994) SLR 1.

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 applications are often nominal.<sup>438</sup> Legal representation and legal aid is available for pursuing a complaint of violation of fundamental rights.<sup>439</sup> 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.<sup>440</sup> Civil suits must be brought within two years from the time when the cause of action has arisen.<sup>441</sup> 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.<sup>442</sup> The burden of proof lies on the plaintiff who has to prove the case by the balance of probability or by preponderance of evidence.<sup>443</sup> 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.<sup>444</sup>

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<sup>438</sup> The awards do generally cover less than one tenth of the actual costs incurred. The amounts awarded vary from Rs. 750 – Rs. 5000.

<sup>439</sup> 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."

<sup>440</sup> The procedures are governed by the Civil Procedure Law.

<sup>441</sup> Prescription Ordinance, S.9.

<sup>442</sup> Sections 456 and 461 Civil Procedure Code.

<sup>443</sup> Sections 101 and 102 Evidence Act No.3 of 1961.

<sup>444</sup> 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.

In civil actions, enforcement procedures are governed by the Civil Procedure Code.<sup>445</sup> The creditor can apply to the District Court to obtain a Writ of Execution for the 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.<sup>446</sup> 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.<sup>447</sup>

### **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.<sup>448</sup> 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.<sup>449</sup> The Supreme Court also refers complaints to the HRC for inquiry and report.

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<sup>445</sup> S.218 Civil Procedure Code.

<sup>446</sup> S.17 (7) Civil Procedure Code.

<sup>447</sup> 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."

<sup>448</sup> Section 15 (3)(c) Human Rights Commission of Sri Lanka Act, No.21 of 1996.

<sup>449</sup> 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.<sup>450</sup> 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.<sup>451</sup> 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.<sup>452</sup> 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 individual perpetrators of torture.<sup>453</sup> In a recent case, the Supreme Court also awarded compensation for sexual torture in custody.<sup>454</sup>

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<sup>450</sup> 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.

<sup>451</sup> See the recent judgement of the Supreme Court on this issue, *supra*.

<sup>452</sup> 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.

<sup>453</sup> See statistics in annex.

<sup>454</sup> *Yogalingam Vijitha vs. Wijesekara & Others*, S.C. Application FR No.186/2001, 23 August 2002.

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).<sup>455</sup>

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.<sup>456</sup> In so doing, it expressly rejected awarding punitive damages as compensation.<sup>457</sup> 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 perpetrator<sup>458</sup> 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.<sup>459</sup> It has also emphasized that holding perpetrators personally accountable involves an element of satisfaction.<sup>460</sup> 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.<sup>461</sup> 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 General to take criminal action, have not been implemented.<sup>462</sup> In fundamental rights’ applications, all victims have received compensation awarded as the legal system adequately secures enforcement of these orders.

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<sup>455</sup> See annex. 250, 000 Rupees were awarded in the case cited in the preceding footnote.

<sup>456</sup> *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.”

<sup>457</sup> *Ibid.*

<sup>458</sup> See e.g. SCA 623/2000; SCA 290/98; SCA 66/97; SCA 98/97; SCA 477/96; SCA 615/95.

<sup>459</sup> See e.g. SC No.4/91.

<sup>460</sup> *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.”

<sup>461</sup> Per Amerasinghe, J. in: *Abasin Banda v. S.I. Gunaratne & Others*, S.C. Application No.109/95 [1995] 1 Sri L.R., p.256.

<sup>462</sup> *Nalika Kumdij, 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.”

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.<sup>463</sup>

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.<sup>464</sup>

## **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

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<sup>463</sup> See UN Doc.E/CN.4/2000/64/Add.1 (op.cit.), para.54.

<sup>464</sup> M.C.M. Iqbal, The Phenomenon of Disappearances in Sri Lanka, in: Law & Society Trust, The State of Human Rights in Sri Lanka, 2001.

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.<sup>465</sup> 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.<sup>466</sup>

## **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.<sup>467</sup> A civil court (district court) will only have jurisdiction to hear a case relating to

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<sup>465</sup> S. 9 (2) Convention against Torture Act.

<sup>466</sup> S.7 (3) Torture Act.

<sup>467</sup> S.9 Civil Procedure Code.

torture if the cause of action has arisen within the territorial jurisdiction.<sup>468</sup> 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.

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<sup>468</sup> S.9 Civil Procedure Code.

<b>Compensation awarded by the Supreme Court to Torture Victims in Sri Lanka 1986-2002</b>				
<b>Table compiled by Mr. Tiranagama, LHRD, except 2002 entry.</b>				
<b>Year</b>	<b>Case No.</b>	<b>By whom</b>	<b>Amount in SR Rupees</b>	<b>\$US Equivalent</b>
<b>1986</b>	186/86	State	10,000	416
<b>1987</b>	142/87 164/87	State State	10,000 40,000	357 1428
<b>1988</b>	4/88 125/88	State State	15,000 11,000	5356 392
<b>1989</b>	18/89 7/89	State State	11,500 26,500	383 883
<b>1990</b>	3/90 18/90 20/90  78/90  134/90	State State State Respondents State Respt. State	10,000 25,000 30,000 5,000 15,000 1,750 3,000	333 833 1000 167 500 58 100
<b>1991</b>	3/91 4/91 25/91 157/91  852/91	State State State State Respt. State	5,750 3,750 50,000 20,000 20,000 55,000	180 117 1562 625 625 1720
<b>1992</b>	42/92  137/92  914/92	State Respt. State Respt. State Respt.	30,000 5,000 10,000 5,000 1,500 4,000	790 132 250 125 37.5 100
<b>1993</b>	257/93 396/93  397/93  433/93  457/93	Respt. State Respt State Respt. State Respt. State Respt.	5,000 33,000 17,000 21,000 14,000 7,750 14,000 12,000 5,000	114 750 386 477 318 176 318 273 114
<b>1994</b>	126/94 228/94  258/94	Respt. State Respt. State Respt.	12,500 15,000 3,750 1,000 6,000	260 312.5 78 21 3750
<b>1995</b>	109/95  131/95  615/95	State Respt. State Respt. State Respt.	25,000 10,000 50,000 10,000 150,000 50,000	481 192 962 192 2885 962
<b>1996</b>	71/96  93/96 214/96  235/96  373/96 477/96 524/96	State Respt. State State Respt. State Respt. Respt. Respt. State Respt.	20,000 20,000 15,000 15,000 41,000 15,000 5,000 11,000 26,000 55,000 5,000	357 357 268 268 732 268 89 196 464 982 89
<b>1997</b>	66/97  98/97  106/97  117/97	State Respt. State Respt. State Respt. State	3,000 13,000 75,000 75,000 25,000 5,000 5,500	50 216 1250 1250 416 84 92

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	189/97	Respt.	27,000	450
		State	9,500	158
	837/97	Respt.	3,000	50
		State	17,500	292
<b>1998</b>	163/98	Respt.	50000	758
	290/98	State	2500	379
		Respt.	150,000	2272
<b>2000</b>	363/2000	State	30,000	337
	623/2000	State	100,000	1124
		Respt.	50,000	562
<b>2001</b>	213/01	State	55,000	585
<b>2002</b>	By Date			
	24/01/02	N/a	150,000	1,758
	28/02/02	N/a	25,000	293
	2/05/02	N/a	25,000	293
	12/05/02	N/a	25,000	293
	24/06/02	State	25,000	293
	31/07/02	State	50,000	586
		Respt.	100,000	1,172
	2/08/02	State	70,000	820
		Respt.	30,000	352
	23/08/02	State	100,000	1,172
		Respt.	150,000	1,758

## FINDINGS

The review of the law and practice in India, Nepal and Sri Lanka in relation to the right to reparation for torture from the perspective of international standards has revealed significant shortcomings in each of the three countries.

While torture has been or is practised routinely in all three countries, there has been almost complete impunity for torture in each case. The main reasons for the failure to hold perpetrators of torture accountable are the following:

- In India and Nepal there is no specific crime of torture, which contributes to a lack of awareness about the nature of torture and results in lesser charges brought, if any.
- No prompt, impartial and adequate investigations into allegations of torture have been carried out in any of the three countries although recent changes in Sri Lanka might result in such investigations being undertaken in future.
- There are no independent agencies responsible for investigating allegations of torture with the power to prosecute. While a Prosecution of Perpetrators Unit has been set up in Sri Lanka, it is too early to assess the effectiveness of its work.
- Neither the prosecution services nor the lower courts have taken a vigorous stance in bringing perpetrators of torture to justice. Orders by the Supreme and High Courts in India and Sri Lanka have not been properly implemented by law-enforcement authorities.
- The National Human Rights Commissions, while having investigated cases of torture, have failed to ensure the prosecution and punishment of perpetrators. This has mainly been due to a lack of adequate powers in their mandate.
- In India, officials enjoy quasi-immunity from prosecution as a prior permission from their superiors is required to prosecute them.
- Torture survivors have insufficient rights to participate during criminal proceedings and their protection as well as that of relatives, witnesses and human rights defenders has not been ensured.

Torture survivors have effective constitutional remedies to claim reparation in India and Sri Lanka. However, in Sri Lanka, short time limits and the wording of the Constitution limits the effectiveness of the remedy, particularly in respect of the rights of relatives of torture victims. There are also considerable practical obstacles in both countries, primarily relating to access to justice. This has meant that a large number of torture survivors are not afforded reparation. While Nepal has a specific act to provide compensation for torture, the law has considerable flaws, calling into question the effectiveness of the remedy provided. The low number of awards in torture cases in Nepal confirms these doubts. The Human Rights Commissions in India have played an important role in recommending the award of compensation to victims while the record of the Commissions in Sri Lanka and Nepal has been less successful. None of the three governments have put into place an accessible government reparation scheme for past and present human rights violations.

While the Indian and Sri Lankan Supreme Courts have gone a considerable way in awarding compensation for torture, their jurisprudence has failed to eradicate the widespread practice of torture as their orders to investigate and punish torturers and to put into place safeguards against torture have not been satisfactorily followed by the State organs.

## RECOMMENDATIONS

*This Conference, bringing together medical and psychosocial experts treating survivors of torture, judges, lawyers, academics and NGO representatives from India, Nepal and Sri Lanka;*

*Having gathered to discuss the continued practice of torture in India, Nepal and Sri Lanka, the lack of effective legal and institutional mechanisms to deal with the causes and consequences of torture, and the failure of States to provide accessible and effective remedies to survivors;*

*Reaffirming that torture, being one of the most serious and repugnant violations of human rights, is morally unacceptable in all parts of the world;*

*Emphasizing that the absolute prohibition of torture is universally accepted and that each state has clear obligations to take all possible measures to ensure freedom from torture;*

*Recognising that torture is endemic in India, Nepal and Sri Lanka;*

*Aware that torture will only be eradicated if the perpetrators of torture are brought to justice and the institutions which have allowed the practice of torture to continue unabated be substantially reformed;*

*Concerned that too little has been done to deal with the multiple causes and consequences of torture and the needs of survivors to justice and reparation;*

*Conscious that a multi-tiered and multi-disciplinary approach is needed to ultimately eradicate torture that takes into account the needs of survivors to restitution, compensation, psychological and physical rehabilitation, satisfaction and guarantees of non-repetition;*

Adopts the following RECOMMENDATIONS:

### **All Governments, particularly India, Nepal and Sri Lanka are urged to:**

#### 2) Ensure the Eradication of Torture by:

Carrying out institutional reforms, particularly relating to the operation of the police and army, including the development and dissemination of detailed guidelines and training modules for the eradication of torture focusing on acceptable investigative techniques, establishing independent complaint cells to receive complaints of torture and to carry out prompt investigations;

Ensuring that all substantiated allegations of torture lead to criminal investigations and ultimately, prosecutions;

Making the fact that torture is prohibited and that there is no instance when it can be condoned a central component of the training curricula of police armed forces academies and medical officers;

Prioritising reform within the law enforcement system that emphasises the prohibition against torture and the consequences that flow from it. This should include the strengthening of investigative and forensic techniques through practical training and re-education at all levels; and

Developing mechanisms of positive reinforcement for law enforcement and security forces personnel who promote and respect human rights and refrain from exercising torture.

2) Recognise torture survivors' rights and needs for reparation by:

Formulating and implementing clear policies committed to recognising and enforcing the right to reparation for serious human rights violations, and specifically torture;

Adopting specific constitutional and/or statutory provisions prohibiting torture, providing for the specific offence of torture in domestic Criminal Codes in line with the definition of torture set out in the UN Convention against Torture, and ensuring through adequate legislation that victims have an effective and enforceable right to reparation;

Ensuring that adequately funded State compensation/ reparation schemes are in place to provide accessible remedies in cases of mass crime or where individual perpetrators are judgment-proof. Such schemes should enable torture victims to claim reparation in an affordable, simple and accessible manner;

Enabling and encouraging national human rights commissions to play a stronger role in respect of the investigation of acts of torture, the monitoring of internal police and/or security force complaints mechanisms and the bringing to justice of alleged perpetrators; and

Enabling and encouraging national human rights commissions to play a stronger role in monitoring the extent to which survivors of torture are able to claim and receive reparation through existing methods.

3) Ensure the Individual Criminal Responsibility of Perpetrators of Torture and those who Order or Condone Acts of Torture by:

Making the punishment of all perpetrators of torture a policy goal and supporting this policy by directing official investigations into each and every allegation of torture. Equally, ensuring that the results of these inquiries are fully and publicly disseminated;

Ensuring an environment that enables victims of torture to raise allegations of torture in confidence. This recommendation will require substantial changes to the many institutions dealing with victims, including the police, prosecution, the judiciary and the medical profession. In order to assess how best to implement such changes, an independent audit should be undertaken to expose the difficulties faced by victims when approaching and dealing with these institutions;

Conducting investigations more efficiently and transparently by ensuring the independence of investigating and prosecuting bodies; and

Eliminating any immunities, amnesties and defences in relation to torture; particularly those provided for members of armed forces in general or in specific areas of conflict or for security forces by emergency laws or prevention of terrorism acts.

4) Strengthen Awareness of the Plight of Torture Survivors by:

Taking steps to increase dialogue within the police and security forces on the need to eradicate torture, its causes and consequences, and on the severe impact torture has on individual victims, their families and society at large;

Undertaking confidence-building measures between the police and other law enforcement officials and civil society, such as using community liaison officers, setting up victim and witness protection and support units, holding open days or public meetings in which the public has the opportunity to highlight concerns, with the aim of encouraging victims of torture to speak out, to name alleged perpetrators and to seek reparation;

Highlighting a culture of respect, tolerance and non-violence by including training modules in school curricula, civic education campaigns, and by using the mass media; and

Using June 26, the International Day for Victims of Torture, to organise activities aimed at publicising the plight of torture survivors in different communities and to encourage local initiatives to improve their situation.

5) Improve Procedures for Claiming Reparation for Torture by:

Improving access to justice for survivors of torture by ensuring greater access to legal aid, obliging the bar to allocate time to provide free legal services to torture victims, and simplifying and streamlining procedures for invoking legal remedies;

Ensuring that those subjected to pre-trial detention or imprisonment are provided with written guidelines or are otherwise informed, by the agency in the criminal justice process they come into contact with, be it police officers in the course of arrest and detention, the magistrate, the public prosecutor, prison directors, or others, on their right to be free from torture and the steps they may take if those rights are violated; and

Enabling victims to have a more active role in civil, criminal and administrative processes by streamlining procedures and removing bureaucratic impediments. This should be accomplished by ensuring that victims may initiate private prosecutions in a simple and affordable manner; by removing the structural and financial impediments to the lodging of civil claims; and by facilitating access to the judicial review of administrative decisions. Equally, this may be accomplished by ensuring torture victims' access to non-judicial remedies such as medical treatment and support and by adopting legislation to protect victims, their lawyers and other witnesses from intimidation and harassment and ensuring that allegations of intimidation and harassment are taken seriously and dealt with expeditiously.

**The Judiciary, in particular the Supreme Courts, are urged to:**1) Develop a consistent jurisprudence on reparation for torture, by:

Taking into account the gravity of torture as one of the worst violations of human rights and the severe impact it has on individual victims, their families and society at large when making determinations as to the appropriate nature and scope of reparation;

Incorporating the wide array of domestic and comparative constitutional jurisprudence, and invoking international human rights law in their judgments;

Not confining the scope of reparation to compensation but awarding measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition when ruling on reparation for torture victims, taking into account the particular needs and circumstances of torture survivors;

Refusing to countenance statements and confessions elicited through torture and ordering investigations into allegations of torture when they arise in the course of judicial proceedings;

Ensuring that magistrates and lower courts carry out appropriate investigations into allegations of torture by improving judicial education and training and sanctioning those judges who fail to carry out the necessary investigations;

Retaining a primary role in overseeing the enforcement of awards for reparation issued by their Courts; and

Ordering wide scale institutional reforms when systematic practices of torture are uncovered through judicial proceedings.

**Civil Society, in particular NGOs, academics, lawyers, the media and others are urged to:**

Develop a holistic and interdisciplinary approach to the culture of violence, particularly torture, and to take into account in their daily work the importance of redressing violations as a component in rebuilding victims' lives;

Increase public awareness by carrying out programmes, projects, studies and documentaries addressing the needs and rights of torture survivors and the families of torture victims to reparation as well as exploring strategies to further the realisation of such rights;

Take a more proactive stance in demanding accountability of perpetrators by supporting victims in lodging complaints, initiating legal challenges and providing pro bono legal services to torture victims;

Provide information and guidance through professional associations, directives and/or other actions to those most likely to come into contact with victims of torture (medical professionals, lawyers, prison officials, non-governmental organisations, citizen advice centres) on preliminary advice and assistance and specialist referral agencies.

## COUNTRY SPECIFIC RECOMMENDATIONS

### INDIA

#### **The Government of India is urged to:**

- 1) Take all necessary steps to ratify the Convention against Torture in the shortest possible time;
- 2) Amend the Constitution by incorporating an express prohibition of torture and by providing an express right to reparation for victims of human rights abuses including torture;
- 3) Adopt legislation making torture a specific criminal offence and ensuring the right to reparation for torture victims, *inter alia*, by providing for an effective remedy in cases of torture;
- 4) Revoke legislation stipulating the requirement of permission from the Central Government for prosecution of the armed forces personnel deployed in the areas declared "disturbed";
- 5) Ensure that all allegations of torture are investigated by an agency outside the realm of the perpetrator, such as the Criminal Investigation Department, Central Bureau of Investigation etc.;
- 6) Improve the capacity of the National Human Rights Commission and/or establish independent ombudsmen in all states and districts as an additional authority to receive and examine complaints;
- 7) Open a mandatory judicial inquiry into deaths in custody;
- 8) Develop and implement an effective witness protection scheme;
- 9) Ensure time-bound action in all cases of departmental proceedings and trial matters on allegations of torture;
- 10) Undertake an annual review of actions taken by the police administrators on allegations of torture relating to their subordinates, and publish and widely disseminate the findings;
- 11) Publish and disseminate a human rights handbook for police officers incorporating international human rights standards, taking into account the views of a cross-section of civil society, particularly human rights NGOs; and
- 12) Invite the Special Rapporteur on Torture to visit India.

#### **The National Human Rights Commission of India is urged to:**

- 1) Take a more proactive role by developing a programme specifically designed to ensure the right to reparation for victims of torture and other human rights violations;
- 2) Create a separate division responsible for making recommendations leading to the prosecution of perpetrators of torture;

- 3) Intervene in all cases of custodial violence;
- 4) Strongly advocate for the Union and territorial governments to take measures that will entail immediate suspension of concerned official in cases of custodial violence and to order prompt inquiries resulting in corrective measures based on the inquiry report.

## **NEPAL**

### **The Government of Nepal is urged to:**

- 1) Make torture an express criminal offence with the appropriate penalty;
- 2) Hold perpetrators of torture accountable under criminal law by promptly and impartially investigating torture cases and by imposing appropriate punishment against those responsible for torture;
- 3) Amend the *Torture Compensation Act* by:
  - ensuring the protection of victims when taking legal action;
  - providing victims with the means to pursue their cases;
  - broadening the scope of reparation available, such as awarding medical costs;
  - substantially increasing the limit of compensation available or abolishing such limits altogether; and
  - extending or abolishing the time limit for taking legal action.
- 4) Review domestic legislation in relation to reparation for torture and bring it into line with Nepal's international obligations;
- 5) Ensure the implementation of existing laws relating to the right to reparation for torture by pursuing a policy aimed at strengthening the rule of law, to be carried out, *inter alia*, by instituting necessary institutional reforms.
- 6) With the shortest possible delay, comply with its reporting obligations under the Convention against Torture and submit its first periodic report to the Committee against Torture;
- 7) Invite the Special Rapporteur on Torture to visit Nepal.

## **SRI LANKA**

### **The Government of Sri Lanka is urged to:**

- 1) Amend the *Torture Act* to enable the court to award suitable compensation to the victims as part of the sanctions to be imposed on the offender;
- 2) Amend constitutional provisions enabling the families of torture victims and concerned NGOs to make an application to the Supreme Court seeking relief against torture in their own right and on behalf of torture victims;

- 3) Amend constitutional provisions considerably by extending the presently prescribed period of thirty days specified for filing a fundamental rights application to the Supreme Court to at least six months;
- 4) Ensure that the concerned authorities take prompt and effective disciplinary action against perpetrators of torture;
- 5) Commence and support rehabilitation programmes for torture survivors providing counselling, psycho-social and other types of medical interventions on their behalf;
- 6) Implement the recommendations of the Commissions on Disappearances in general and the recommendations regarding reparation and prevention of human rights violations in the future in particular.

## ANNEXES

### ANNEX I: SUMMARY OF PROCEEDINGS

#### INAUGURAL SESSION

The inaugural session was chaired by Dr. M.P. Singh, Professor of Law, University of Delhi. The session was opened by an address from the **Union Law Minister, Mr. Krishnamurthy**, read by Mr. C. Raj Kumar, Lecturer of Law, School of Law, City University of Hong Kong.

**Justice Leila Seth**, Chairperson, the Commonwealth Human Rights Initiative (CHRI), welcomed the participants on behalf of the CHRI and emphasised the importance of justice and reparation for victims of torture. **Lutz Oette**, Coordinator of the Audit Project, REDRESS, welcomed the participants on behalf of REDRESS and elaborated on the objective of the seminar - to develop strategies to support torture survivors and to strengthen their right to reparation.

**Justice Verma**, chair of the Indian National Human Rights Commission, gave the inaugural address. He emphasised that any place in the world would have been suitable for such a seminar since, while the degree of torture might differ, the need to seek acceptable standards of treatment and reparation for torture survivors was universal. Reparation in its ordinary meaning denotes comprehensive justice to victims. In a broader sense, this meant justice to society as a whole because society is also the victim of an act of torture. International instruments make it clear that torture cannot be justified in any circumstance. Justice Verma therefore raised concern about the global frenzy and paranoia in the war against terrorism in which the language of justification for torture is being employed. It is a fallacy to combat terrorism with the tried techniques of 'counter-terrorism' since they, particularly torture, will simply breed more terrorists.

Article 20 and 21 of the Indian Constitution recognises the prohibition of torture as a non-derogable right. Acts of torture are punishable in accordance with the Penal Code.<sup>469</sup> The Indian Supreme Court has expressly recognised the right to compensation as a constitutional remedy that is distinct from the remedy for damages in private tort law. By so doing, it recognised that the State has a strict liability to provide reparation and the defense of sovereign immunity is inapplicable.

Justice Verma called upon the Government of India to ratify the Convention against Torture, remarking that existing standards in Indian law relation to the prohibition of torture and reparation were consistent with the Convention. He recognised that the provisions were largely theoretical and would need to be translated into action. He noted, for instance, that the National Human Rights Commission issued various guidelines to prevent torture and has taken a strong stance against the granting of amnesties to police officers in the Punjab who perpetrated torture in the course of counter-terrorism.

**Soli Sorabjee**, Attorney General of India, in delivering his keynote address, stressed the timeliness and need for the seminar as the subject is of concern to every human being. Torture, which is considered as the most brutal violation of a human person's personality and a calculated assault on human dignity, is outlawed in all international human rights instruments. While noting

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<sup>469</sup> Sections 330, 331 and 348 of the Indian Penal Code.

that torture is already recognised as a non-derogable fundamental right under Article 21 of the Constitution as interpreted by the Supreme Court, he called for a revision of the Constitution so as to include an express prohibition of torture. He highlighted the role of the judiciary in India in creating a remedy in public law and emphasised that as a first step, the mindset that legitimises and condones torture needs to be changed. The purpose of education is to sensitise others on the value of the human personality and to recognise that the end does not justify the means.

He stressed the importance of the right to reparation for victims and drew attention to international instruments providing for such a right, in particular Article 14 of the Convention against Torture. In this context, he called upon India to ratify the Convention, which would impose additional obligations on India, as quickly as possible. Mr Sorabjee firmly stated that there should be no amnesties for acts of torture in whatever form as the rationale of the Convention against Torture was that there should be no safe haven for torturers anywhere. Impunity is an impediment in the struggle against torture. He noted that it is immoral to permit a person who has committed heinous acts of torture to roam the streets at large while the victims suffer in silence. This leads to bitterness and anger and a violation of the perception of justice.

## **FIRST SESSION: INTERNATIONAL STANDARDS**

The first session on international standards was chaired by Professor B.B. Pande, University of Delhi.

**Carla Ferstman**, Legal Director of REDRESS, provided an overview of the right to reparation in international law. She analysed the historical underpinnings of the right in the context of legal liability for wrongful acts, noting the irony that somehow, the bigger the wrong, the less likely it is that reparation will be made. She specified that the right to reparation is not only about criminal responsibility or compensation for the harm suffered, it is equally about restitution, about rehabilitation, revelation of the truth of what happened, about changes to the laws and practices that allowed the violation to occur in the first place. The concept of reparation has evolved over the last century with the changing perspective of the victim in international law, and the movement from a state-centric to a rights-based approach.

She noted that the violation of States' obligation to respect and ensure respect for human rights gives rise to an independent international obligation to provide reparation. This is supported by both international human rights treaties and declarative instruments,<sup>470</sup> and has been recognized

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<sup>470</sup> At the Universal level it is possible to find among other: the Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (art.2(3) and art 9(5) and 14(6)), the International Convention on the Elimination of All Forms of Racial Discrimination (art 6), the Convention of the Rights of the Child (art. 39), the Convention against Torture and other Cruel Inhuman and Degrading Treatment, (art.14) and the Rome Statute for an International Criminal Court (art. 75). It is also established in the Rules of Procedure and Evidence of the International Tribunal for Yugoslavia and the International Tribunal for Rwanda (Rule 106), as well as in several regional instruments, e.g. the European Convention on Human Rights (art 5,5 13 41) the Inter-American Convention on Human Rights (arts 25, 68 and 63(1)), the African Charter of Human and Peoples' Rights (art. 21(2)), it is also important to mention the following international standards: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and Declaration on the Elimination of Violence against Women.

by international tribunals.<sup>471</sup> Similarly, the violation of the norms of international humanitarian law gives rise to a duty to make reparations.<sup>472</sup>

Reparation should be adequate, effective, prompt, proportional to the gravity and the harm suffered, and should include various forms (i.e. restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition).<sup>473</sup> She referred to the Draft basic principles and guidelines on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms,<sup>474</sup> noting their importance in contributing to the codification of international standards, and providing examples of their use by courts, legislators and others, even in draft form.

In respect of torture specifically, she referred to article 14 of the Convention against Torture which obliges parties to the Convention to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” She noted that the continued use of immunities, statutes of limitations and other procedural restrictions impeding the application of this Article. She made reference to the recent judgment of the European Court of Human Rights in ***Al Adsani v. the United Kingdom***,<sup>475</sup> where a small majority distinguished civil from criminal remedies in respect of the *jus cogens* character of torture in the context of a universal jurisdiction case. She also noted that in respect of criminal remedies, the greatest and most lasting impact is often felt when perpetrators are brought to justice by domestic courts. When local judges punish perpetrators, it reinforces the ‘wrong’ of torture and enhances the independence and impartiality of the justice system. Ms. Ferstman also referred to the innovations of the Statute and Rules of Procedure and Evidence of the International Criminal Court, which went far beyond the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, in recognising victims’ right to participate in proceedings and to claim reparations before the Court.

**Professor Pande** recalled the importance of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>476</sup> The declaration underscored the importance of access to justice and fair treatment for victims as well as the need for restitution, compensation and assistance. Professor Pande emphasised the importance of access to justice, as other remedies such as compensation will generally only follow if victims have access to legal mechanisms for asserting their rights. He confirmed the value of the exercise of universal jurisdiction, in that parties to the Convention against Torture often do not want to bring their own perpetrators to justice – universal jurisdiction ensures that there are no safe havens for perpetrators.

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<sup>471</sup> See, e.g. ruling of the Inter-American Court of Human Rights on the Velásquez Rodríguez Case. Serial C, No 4 (1989), par. 174 -. See also Papamichalopoulos vs. Greece / (Art. 50) E.C.H.R. Serial A, No 330-B (1995), p. 36.

<sup>472</sup> Under international humanitarian law, the Hague Convention regarding the Laws and Customs of Land Warfare (article 3, 1907 Hague Convention IV) includes specific requirements to pay compensation. Likewise, the four Geneva Conventions of 12 August 1949 contain a provision of liability for grave breaches and the 1977 Additional Protocol I (Art.91) specifically provides for liability to pay compensation. The Rome Statute of the ICC used the Draft Principles as a reference A/CONF.183/C.1/WGPM/L.2/Add.7, 13/07/1998, p.5, note 5.

<sup>473</sup> Theo van Boven. Final Report to the Sub-Commission on Prevention and Discrimination and Protection of Minorities; United Nations Commission on Human Rights, E/CN.4/1997/104, 16 January 1997.

<sup>474</sup> Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, E/CN.4/2000/62, 18 January 2000.

<sup>475</sup> *Al-Adsani v United Kingdom* (No.2) (35763/97) European Court of Human Rights, 21 November 2001.

<sup>476</sup> G.A. 40/34, annex, 40 U.N., GAOR Supp. (No.53) at 214, U.N. Doc. A/40/53 (1985).

In discussion, the role of Article 7 of the International Covenant on Civil and Political Rights<sup>477</sup> and General Comment No. 20 of the Human Rights Committee, 1992,<sup>478</sup> which contain a number of important statements concerning state party's obligations with respect to torture were explored.<sup>479</sup> Of note, the International Covenant's prohibition of torture is all the more important in the context of India, which has not yet ratified the Convention against Torture. Participants recognised the importance of universal jurisdiction in ensuring that there were no safe havens for perpetrators. They did not hold much hope for India's ratification of the statute of the International Criminal Court in the near future, though greater education on the role of international justice would enhance the likelihood of ratification.

Members of the audience called for the strengthening of domestic laws and procedures, and the simplification of procedures for victims access and participation. Participants noted that while the law needed to be strengthened, the existing laws were not being implemented – the track record of enforcement was wholly insufficient. They also noted the extreme difficulties for victims to pursue domestic remedies, given the complicated procedures, the prohibitive costs and the social stigma attached in making such a public confrontation and recommended a comprehensive interdisciplinary approach to address these obstacles. Others recommended strengthening the scope for judges to order investigations, and according the right to investigate to agencies independent from the police and/or security forces.

## REGIONAL EXPERIENCES AND PERSPECTIVES

The second session was chaired by **Dr. Yijay K. Gupta**, Professor of Law, Jamia Malia Islamia.

### 1. Nepal

**Dr. Bhogendra Sharma**, Director of the Centre for Victims of Torture, Nepal, presented his findings on the right to reparation for torture in Nepal. He noted that from November 2001 to the present, there has been the largest number of individuals tortured in the history of Nepal. In providing an overview of the Nepalese legal system, he indicated that while there have been some legislative changes following Nepal's ratification of the Convention against Torture in 1991, Nepal has in several respects failed to implement the Convention. He listed a number of problems with Nepal's law providing for reparation for torture,<sup>480</sup> and stressed that one of the most difficult

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<sup>477</sup> G.A. res. 2200 A (XXI), 21 U.N. GAOR Supp. (No.16) at 52. U.N. Doc. A/63/6 (1966) 999 U.N.T.S. 171. Article 7 reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

<sup>478</sup> CCPR General Comment 20, Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art.7), 10/04/1992.

<sup>479</sup> Ibid., para.14: "Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, State parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of State parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complaints must follow, and statistics on the number of complaints and how they have been dealt with"; Para.15: "The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."

<sup>480</sup> Torture Compensation Act 2053 BS (1996).

aspects was its exceedingly short statute of limitations. Complaints of torture must be filed within 35 days of the incident.<sup>481</sup> Also, the maximum level of compensation is the equivalent US \$1250, which does not come close to addressing the varied needs of victims. The only form of reparation made available to survivors is compensation, and it has only been awarded in very few cases. When compensation has been awarded, the quantum is very low. Perpetrators of torture have hardly ever had to face criminal prosecution.

Those administrative bodies charged with investigating human rights abuses including torture either do not have the power to prosecute, such as the *National Human Rights Commission*, or in the case of the *Commission on Investigation of Authority*. It has a mandate to prosecute but in practice has failed to prosecute torture cases.

In response to comments put forward by Indian participants that Nepal's experience with the Convention against Torture demonstrated that ratification has little meaning if the obligations were not implemented, Dr. Sharma noted that ratification was not enough. There is no sense to laws and obligations if they are not enforced. He agreed with participants that Nepal's compensation law had to be put to the test and more challenges had to be brought. Dr. Sharma stressed that a holistic approach was needed to combat torture by addressing and changing the prevailing culture of violence in Nepal.

## 2. Sri Lanka

**Kalyananda Tiranagama**, Executive Director of Lawyers for Human Rights and Development, Sri Lanka, presented his findings on the right to reparation for torture in Sri Lanka. He noted that Sri Lanka incorporated the definition of Article 1 of the Convention against Torture in domestic law and that rape had been recognised as degrading treatment. He also noted that the commonly held belief that 'torture is a necessary practice to fight crime' is one of the primary contributing factors to the practice of torture by the police in Sri Lanka. These prevailing attitudes proved to be more significant factors than the context of conflict and counter-insurgency measures. A culture of impunity prevails in Sri Lanka, despite certain recent changes regarding the conduct of investigations into allegations of torture and the prosecution of perpetrators.

Mr. Tiranagama also noted that the criminal investigation department carries out investigations into torture while the Attorney General is in overall charge of prosecutions. The minimum punishment for torture (not less than seven years imprisonment) stipulated in the Sri Lankan *Convention against Torture Act*<sup>482</sup> has discouraged judges from applying the relevant provisions. He explained further that the decisions of the Supreme Court of Sri Lanka, which had in several cases awarded reparation to victims for violations of fundamental rights, including torture, had not been consistent in terms of quantum. Victims of 'higher social standing' have been awarded higher amounts of compensation than other victims for similar violations. Mr. Tiranagama also highlighted the lack of rights for the relatives of victims who do not have standing to invoke the fundamental rights provisions of the Constitution.

Finally, he stressed that lawyers in Sri Lanka have often failed to stand up for victims and appeared to be more interested in maintaining good relations with the police. For the most part, lawyers have refrained from taking on cases against the police. **Mr. Iqbal**, another participant from Sri Lanka, formerly secretary to two Commissions on Disappearances, drew attention to the

<sup>481</sup> There is no time limit to lodge a complaint with the National Human Rights Commission.

<sup>482</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No.22 of 1994.

fact that the Commission uncovered ten "torture chambers" in Sri Lanka, though to date no action has been taken to deal with those responsible. The Commission, which also had the mandate to investigate the circumstances of persons who had been tortured, and were subsequently released or escaped custody, received approximately 500 of such complaints and recommended appropriate action. None of the complaints had been followed up by law enforcement agencies.

It was agreed that not only legal but also other complementary strategies were needed to eradicate the practice of torture in Sri Lanka, as in India and Nepal.

### 3. India

The third session was chaired by **Dr. K. Chockalingam**, Professor of Criminology & Victimology, Vice-Chancellor, Manomaniam Sundaranar University, Tamil Nadu.

**P M Nair**, IPS, Nodal Officer, Institute of Social Studies, New Delhi, presented an overview on the role of the police in ensuring accountability in cases of torture. Police officers' ignorance of the law, their belief that torture is a necessary instrument of investigation together with the pressure on them to 'produce results' all contribute to the continued practice of torture. Mr. Nair outlined the legal framework for police abuse of power and referred to several landmark rulings of the Supreme Court and the High Courts.<sup>483</sup> Moreover, he mentioned the circulars and instructions issued by the National Human Rights Commission aimed at ending the practice of torture and ensuring prompt investigations. He cited that there had been 74,322 complaints against the police in 1999 alone. In that year, a total of 171 custodial deaths were reported, for which 108 policemen were arrested and 71 charged. However, none of these were ever convicted. He believes that victims have lost faith in mechanisms for redress for torture because of the inordinate delays in the criminal justice process, the poor rates of conviction, 'tribalism' within the police department operating so as to shield perpetrators from scrutiny. He also noted the continued practice of police abusers to threaten victims and the complete absence of a victims' orientation or perspective in law enforcement. Other contributing factors include the lack of institutional mechanisms for claiming compensation and the inadequacies of the existing law.

Mr Nair emphasised the need for institutional changes within and outside of police departments. He suggested such measures as rewarding those officers with exemplary human rights records, establishing new independent complaints mechanisms, e.g. an easily accessible ombudsman, as well as independent investigative agencies. He suggested that 'human rights audits' should be carried out by an ombudsman in a transparent system with public participation. He also recommended that a proper witness protection scheme be developed together with a criminal injuries compensation board.

**Mr. Ravi Nair**, Executive Director of the South Asia Human Rights Documentation Centre, pointed out that torture is sanctioned practice in the administration of criminal justice in India. Not only is it a commonly used means of extracting confessions, but it is also often used as a means of extorting money. Torture in India has been variously described - as a cancer, as a sub-culture - but each of these metaphors, is outstripped by the bare evidence. The record of the Indian Government on the right to compensation and the eradication of torture has been abysmal. There is an utter lack of accountability and a prevailing culture of impunity for torture in India.

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<sup>483</sup> See supra, India Country Report, IV, 1.1.1), especially the case of Basu v State of West Bengal.

With regard to the Indian legal system, Mr Nair noted that both the Indian Penal Code (IPC) and the Code of Criminal Procedure (CrPC) prohibit the use of torture against suspects. However, the law is rarely, if ever, followed on the ground. In many cases, the Government itself legitimises torture by rewarding police officials who have used short cut methods to solve criminal cases. He made special mention of the provision in the *Prevention of Terrorism Act 2002* which provides that confessions made to a certain rank of police officer are automatically admissible as evidence, which he considered to amount to a license for torture. He also criticised the immunities granted to law-enforcement officials and the army by various laws, including the *Criminal Procedure Act* and the *Armed Forces Special Acts*. While the Constitutional Review Commission accepted the need for a statutory right to reparation, to date no progress has been made.

Mr. Nair pointed out that victims of torture are often too afraid to complain and that both the police and the National Human Rights Commission have failed to investigate cases of torture thoroughly. In response to participants' queries regarding the legitimacy and independence of such an institution, Ravi Nair referred to his study of the work of the National Human Rights Commission over the last six years. According to his findings, 176 investigations into allegations of torture took place. Interim compensation orders had on occasion been ordered however he had not been able to find a single case of a prosecution following an award of compensation. Compensation is only awarded in 'exceptional' cases and therefore only partially addresses the problem. Anecdotal examples of 'compensation awards' were cited, such as the grant of employment to a next of kin of a victim who had died in custody, a rape victim who had subsequently been provided a job in the police force.<sup>484</sup>

He noted that the practice of torture was institutionalised very early in Indian history, and commended P M Nair's recommendation that community policing methods be strengthened. He called upon nongovernmental organisations to take a stronger role in bringing cases and initiating private prosecutions.

Finally, he criticised the fact that the Government of India has not only refused to ratify the Convention against Torture but has also attempted to block steps to advance and strengthen the Convention.<sup>485</sup> When India ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979, it expressed reservations to Article 9 of the Covenant stating that under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State." While signing CAT on 26 June 1997, India once again expressed reservations to Articles 20, 21 and 22 of CAT. Also, India is yet to extend an invitation to the UN Special Rapporteur on Torture who had visited Pakistan in 1997 despite repeated requests of the Rapporteur over the past five years.

The Chair concluded by pointing out that the problem of torture is acute, and victims are far from justice. A lively discussion of how to tackle such problems continued.

## **STRATEGIES TO STRENGTHEN THE RIGHT TO REPARATION**

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<sup>484</sup> Clearly, this 'award' raises other concerns.

<sup>485</sup> It tried to block adoption of the Optional Protocol to the Convention Against Torture in March-April 2002 at the Commission on Human Rights. In July 2002, at the substantive session of the Economic and Social Council, India in the company of the United States and Libya, once again sought to block adoption of the Optional Protocol to CAT.

The fourth session was chaired by Professor **V. S. Mani**, Professor of International Law, Jawaharlal Nehru University.

**Raj Kumar**, Law Lecturer, School of Law, City University of Hong Kong noted that legal, judicial and institutional strategies were all important for the realisation of the right to reparation for torture survivors. He cited several examples of each approach, including the important role played by the US' *Alien Tort Claims Act*<sup>486</sup> and *Torture Victim Protection Act*,<sup>487</sup> and noted the importance of constitution protections. He also noted the role that has been played by the Indian and Sri Lankan Supreme Courts in awarding compensation in torture cases, which went far in acknowledging the 'wrong' of torture, though not far enough in enforcing real change. An institutional approach would adopt a method of establishing institutions at the local, national, regional and international levels with the specific mandate of examining complaints from torture victims and requests for reparation. He also stressed the importance of strong institutions at local, national and international levels.

**DK Srivastava**, Professor of Law at the School of Law, City University of Hong Kong focused his presentation on tort damages for torture. He gave several examples of torture cases and identified the specific intentional torts under which an action could be brought. He referred to the common law principles of vicarious liability and examined the circumstances in which a company or employer could be sued for acts of torture perpetrated by its employees. While noting that high sums of damages awarded in torture cases, especially in the United States, show that justice has in some instances been done to torture victims, he highlighted the difficulty of enforcing favourable decisions in cases of transnational litigation against the perpetrators of torture.

The chair invited comments from participants on the main themes that had been discussed throughout the day. A range of ideas and comments were generated by participants, resulting in the preparation of a formal set of recommendations.

## CLOSING SESSION

The session was chaired by **Dr. Paramanand Singh**, Dean & Professor, Faculty of Law, University of Delhi.

**Justice Leila Seth** stressed that eternal vigilance is needed to ensure justice and fair reparation to victims with the goal of ultimately eliminating torture. Reminding participants that the right to reparation comprises the right to know and the right to justice, she closed with the description of a case illustrating what the right meant at the grassroots level. In 1997, a pregnant Dalit woman complained about inappropriate police behaviour. The local police proceeded to insult and beat her, and dragged her naked to the police station where she was further abused and held for several weeks, as a result of which she suffered a miscarriage. No action was ever taken against the police officers concerned and the woman did not receive any reparation. This case demonstrates the helplessness of victims, particularly poor victims who are already marginalized in society. Justice Seth emphasized the need for empowerment of victims and society as a whole, and focused on the importance of education to transform society. Action had to be taken against perpetrators if the cycle of impunity was to be broken. She concluded by asking: "*If protectors*

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<sup>486</sup> 28 USC § 1350.

<sup>487</sup> Consolidated at 28 USC § 1350.

*become the perpetrators, where can we go? What compensation is there for loss of human dignity?'*

**Professor Parmanand Singh** noted that one of the main issues in talking about victims' right to reparation is the empowerment of people. It is also a question of use and abuse of power by state authorities.

**Lutz Oette**, REDRESS, concluded by emphasizing the importance of taking victims' actual needs, wants and expectations into account when addressing the right to reparation. He noted the immense need and scope for action in India, Nepal and Sri Lanka to strengthen the right to reparation, by lodging more complaints against perpetrators and advocating for the advancement of victims' rights.

**Professor Parmanand Singh** closed the seminar by saying that it had provided a useful international forum for a cross-section of people from different countries to discuss the crucial issue of torture.

**ANNEX II: LIST OF PARTICIPANTS**

	NAME	DESIGNATION	ADDRESS	TELEPHONE & FAX	E-MAIL
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