

Briefing Paper

The legacy of mass torture and the challenge for reform in Sri Lanka

A joint paper by AJAR and NPC



Acknowledgements

Research and publication costs for this paper were supported by the European Union. The contents of this document are the responsibility of AJAR and NPC, under no circumstances can they be regarded as reflecting the position of the European Union.

About AJAR

AJAR (Asia Justice and Rights) is a regional human rights organization based in Jakarta. AJAR works to increase the capacity of local and national organization in the fight against entrenched impunity and to contribute to building cultures based on accountability, justice and a willingness to learn from the root causes of mass human rights violations in Asia Pacific region.

Please visit: www.asia-ajar.org

About NPC

The National Peace Council (NPC) was established as an independent and impartial national non-government organization on 2 February 1995. The formation of the NPC was the culmination of a process that began with a campaign against election violence in July 1994, launched by an inter-religious group of individuals and organizations. The strategic interventions made by this group during the 1994 Presidential Election campaign specifically, and for a peaceful and permanent resolution to the protracted conflict generally, led to the organization of the first National Peace Conference the same year. The vision and mandate of a National Peace Council were formulated at this conference, leading to the establishment of the NPC the following year.

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I. Historical Context

Historical records indicate that Sri Lankan kings may have practiced 32 methods of torture, including, chopping off organs and limbs, beating with bamboo sticks, impaling on a stake, trampling by elephants, hanging, beheading, drowning, immersion in a cauldron of boiling oil, being forced to walk on hot coals, mutilation of the body and whipping.

From the 16th century onwards, Portuguese, Dutch and British colonizers also practiced forms of torture. When Sri Lanka came under British rule in 1815, the crown signed the Kandyan Convention with native leaders, stating “every species of bodily torture and all mutilation of limb, member or organ are prohibited and abolished.”¹ While the British themselves ruled with little respect for the Convention, there were some benefits from the colonial administration. The Asian Human Rights Council (AHRC) notes

During British colonialism in Sri Lanka, from 1815 to 1948, law was established as the overall organising factor in society... It can be said that after over a century of government based on law, law became imbedded in the Sri Lankan consciousness, and therefore a basic foundation for the rule of law was quite settled in Sri Lanka. However, the constitutional changes introduced in 1972 and 1978, and the events of the last 40 years, have undermined that functional system in which government actions had legitimacy and justifiability.²

The direct use of violence in independent Sri Lanka gained currency after the Janathā Vimukthi Peramuṇa (JVP) insurgency began 1971. After the declaration of a state of emergency, the Government introduced Emergency Regulations giving the Sri Lankan armed forces powers to search, arrest, and detain those suspected of having

1 Prof. Ravindra Fernando, “Torture in Sri Lanka - Excerpts from a lecture delivered on the invitation of the British Scholars Association”, 2013.

2 The Asian Human Rights Council, *State of Human Rights in Sri Lanka*, 2013.

connections to the JVP. During this period the army in particular increased the use of torture as a punitive method and to elicit confessions. These practices gathered momentum with the outbreak of war with the Liberation Tigers of Tamil Eelam (LTTE) in the early 1980’s and the second JVP insurrection in 1987, and continued beyond the end of the war in 2009.

II. Implementation of transitional justice mechanisms

After the end of armed conflict in 2009, the government of President Mahinda Rajapaksa did little to address the root causes of the war, moving directly to economic development of the war-affected northern and eastern areas. Because no transitional justice mechanisms were adopted, root causes remained unaddressed and physical and mental scars of thousands of victims and their families festered until the increasingly authoritarian Rajapaksa government was voted out in January 2015.

The new government changed course, entering into a transitional justice process and co-sponsoring a resolution before the UNHRC promising truth, accountability, reparation and non-recurrence through institutional reform. This process is progressing slowly. The Government appointed a Consultation Task Force to come up with recommendations for viable domestic mechanisms after nationwide consultations in March 2016.³ The Task Force will be responsible for setting up the following commissions: a commission for Truth, Justice, Reconciliation and Non-recurrence; an

3 The Task Force was established under the UN Division of the Ministry of Foreign Affairs in close collaboration with the Secretariat for Coordinating Reconciliation Mechanisms of the Prime Minister’s Office, which was established with cabinet approval. The Task Force has three levels of operation: the Consultation Task Force, Expert Advisory Panel and Representative (regional) Advisory Panel. So far, 11 members have been appointed to the Task Force and 15 members to the Expert Advisory panel.

Office for Missing Persons (with expertise from the ICRC); a Judicial Mechanism with a Special Counsel; and an Office for Reparations. The National Peace Council was appointed into the Expert Advisory Panel to the Task Force in March. At present, the Task Force is setting up zonal task forces by appointing members of CSOs to decentralize the fact finding and consultation process.

In the interim, the government introduced legislation to strengthen the function of the rule of law, thereby limiting impunity. The 19th Amendment to the Constitution strengthened the independence of the National Police Commission, Public Service Commission, Judicial Commission and Human Rights Commission, among other agencies.

The recently adopted Assistance to and Protection of Victims of Crime and Witnesses Act No. 4 of 2015 is an important step towards establishing transitional justice mechanisms. The first case under this Act was recently filed against the General Secretary of the *Bodu Bala Sena*, Ven. Galagoda Aththe Gnanasara Thero. Thero was taken into custody for threatening Sandya Eknaligoda, the wife of missing journalist Prageeth Eknaligoda when her husband's disappearance case was being heard at the Homagama Magistrate's Court. However, nearly a year later, the National Authority required to enable the functioning of Act fully, including a reparations policy, has not been set up.

What's more, Sri Lankan governments have a history of appointing committees and commissions to look into and report on atrocities with few concrete results. No less than 18 such bodies recorded thousands of pages of evidence from victims and witnesses. The Batalanda Commission, appointed to look into alleged mass torture and killings which took place during the height of the second JVP insurgency, has 6,780 pages in its 28 volume final report. However, no one was ever prosecuted, nor did victims or their next of kin ever receive any reparations.

III. Current legal context on laws on torture

The 1978 Constitution of Sri Lanka states, "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." In 1994, Sri Lanka ratified the Convention against Torture and introduced legislation reflecting the provisions of the Convention. However, Sri Lanka did not sign the treaty's Optional Protocol, which allows the Subcommittee on Prevention to conduct visits to places of detention and mandates an independent national preventive mechanism. In 2015, Sri Lanka signed the International Convention for the Protection of All Persons from Enforced Disappearances, although Parliament has not introduced implementing legislation.

Recent amendments to Sri Lanka's Constitution strengthened the independence of institutions, especially the Police Commission, the Public Services Commission and the Human Rights Commission. In 2010, the 18th Amendment to the Constitution shifted the Parliament's ability to appoint members to these Commissions to the President, undermined their independence and setting a dangerous precedent. However, through the 19th Amendment, appointments to these Commissions have once again become independent.

Two court cases illustrate police torture and torture of suspected terrorists, showcasing promising action by Court:

- Gerard Mervyn Perera was taken into custody for a crime he did not commit at Wattala Police Station. He was repeatedly tortured to elicit a confession for a triple murder, and was allegedly beaten, burned and then hung by his arms until they were paralyzed. Within ten days he developed acute renal failure and was treated at a private hospital. After his wife filed a Fundamental Rights application, the Supreme Court ordered the State to pay his hospital bill, as well as Rs 800,000 as compensation, the highest amount awarded in a torture case. Two weeks



before he was set to testify against the perpetrators, in a case filed by the Attorney General’s Department under the Convention against Torture Act No. 22 of 1994, Perera was gunned down. The case finally concluded in 2015, after ten years, with two defendants given death sentences.

- In a second important case, *Yogalingam Vijitha vs OIC Negombo*, a young woman suspected of being a LTTE suicide bomber was tortured at the Negombo Police station. She was beaten on her knees, chest, abdomen and back with a club and trampled repeatedly. She was stripped to her underwear and had her face covered with a shopping-bag containing petrol and chilli powder. Pins were inserted under her fingernails and toe nails. She also alleged that she was sexually assaulted. After an Assistant Judicial Medical Officer concluded that she had been tortured and sexually abused in the manner described by her, Supreme Court awarded her Rs 250,000. The Court directed the Attorney General to “consider taking steps” against the perpetrators under

the Torture Act, but this did not take place, as the victim left the country soon after.

According to statistics in civil society’s shadow report to the UN Committee against Torture, up to 2012, 95 cases of torture were referred to the Attorney General for further action. Only six of those cases have been filed against perpetrators.

The Human Rights Commission of Sri Lanka was established by Act No. 21 of 1996 to give force to Sri Lanka’s international commitments to protect human rights, to perform the duties imposed by international treaties, and to uphold the Paris Principles. The Act empowers the Commission to “inquire into, and investigate, complaints regarding or imminent infringement of fundamental rights, and to provide for resolution thereof by conciliation and mediation in accordance with the provisions hereinafter provided.” In recent times, the credibility of the Human Rights Commission has increased due to the independent appointment of a new commissioner through the Constitutional

Sri Lanka People’s Tribunal for Victims of Torture

Council. After the change in government in January 2015, the Sri Lankan Parliament through the 19th Amendment to the Constitution appointed the Constitutional Council. This is a positive step taken to ensure independence of commissions, including the Human Rights Commission.

IV. Situation of survivors of torture

The National Peace Council has worked with local partners to document stories of torture victims and their families. The narratives cover not just victims of war but also survivors of police torture, which has reached epidemic proportions in some parts of the country. There appears to be an acceptance that the police will torture those in custody to elicit a forced confession and to show their superiority.

In the context of war, there has been direct torture by the army and police, the LTTE and other paramilitary groups. There is also psychological torture and suffering faced by the families of those summarily executed, “disappeared”, or languishing in jail and detention centres under the Prevention of Terrorism Act (PTA), without any formal charges. There are thousands of families whose primary breadwinners died in the war, with the burden of taking care of children and households falling to the women left behind. These women and children have to struggle alone, bereft of empathy and without means of empowerment. Many people have refused to accept that their loved ones are dead, often resulting in their exclusion from official channels of support. Many family members feel that accepting support from the Government means accepting that they’re missing loved ones are no longer living.

For thousands of mothers, wives and siblings, knowing the truth is as important as getting on with their lives. Many victims in the north and east told us they want to know what happened to their loved ones and wanted prosecutions for the perpetrators. In the south, victims mainly experienced police torture, and wanted reparations and justice.

All types of victims, and all genders, felt that their voice was not heard enough and felt alienated from mainstream efforts. This sense of exclusion was especially acute for war-related victims. Police torture victims that we reached were better organised, and several reported not being scared to speak up for justice. This contrast highlights the importance of enabling and sustaining victim-based organisations and support groups. Very few instruments of support are available for victims, survivors, and family members to address torture. Government support for torture victims are almost non-existent and whatever available mechanisms are primarily offered by civil society organisations, voluntary groups and some faith-based organisations.

War-related secondary torture appears to affect more women. However, there are thousands of male victims who have lost limbs, livelihoods and loved ones as well. Direct torture of “suspected terrorists”, both male and female, has included sexual violence, with many recorded cases of rape, genital mutilation, etc. Police torture appears to more often affect male victims, though here too there are female victims as well.

V. Analyzing gaps and negligence

The resolution before the UNHRC, committing to investigate alleged violations of International Humanitarian Law during the final stages of the military campaign, is the first solid attempt by a Sri Lankan government to address alleged war crimes, crimes against humanity, and other serious crimes in the war. This effort, and many others, is needed to close major gaps that include in truth-seeking, providing remedies for past and present torture, and treating the long-term effects of torture and related trauma.

The previous Rajapaksa regime largely refused to acknowledge alleged crimes by the armed forces and other paramilitary groups during the war. President Rajapaksa’s Lessons Learnt and Reconciliation Commission is another

example of the consistent failure of such bodies. A 2012 online news report explained “the Commission declares itself satisfied that protection of civilians was given ‘the highest priority’ in the military strategy and that civilians were not targeted, thereby ducking the central issue of command responsibility for international crimes.”⁴ The 388-page report makes no reference to torture.

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The remarkable failure to acknowledge at all, let alone address, widespread use of torture by the Sri Lankan authorities – either during or following the conflict – makes a mockery of the [Lessons Learnt and Reconciliation]

4 “Sri Lanka’s truth commission ignores torture and evades accountability,” *Lanka News Web*, 5 January, 2012.

Commission’s objective to promote reconciliation by recognising the losses and suffering of the past. Either the Commission has chosen to paper over any testimony of torture that it received, or such testimony was withheld because the Commission lacked the confidence of Sri Lanka’s countless torture survivors and their families.”

—Keith Best, CEO, Freedom from Torture

According to a position paper by Transparency International-Sri Lanka, obtaining statistics of torture cases and their outcomes has proven unacceptably arduous. Of the cases initiated under the CAT Act in 2010, just 3 concluded in convictions and 19 in acquittals, with several pending. In 2011, it was reported

Transitional Justice
Workshop in
Colombo, 2015



Photo: NPC

that 529 cases had been filed against police officers since 2006.⁵

Government led efforts to address torture, from a societal point of view and from a psycho-social angle, are either limited or non-existing. Despite legal provisions prohibiting torture, concrete mechanisms are inadequate to enforce them.

The establishment of the National Human Rights Commission (NHRC), National Child Protection Association (NCPA), the National Police Commission (NPC), adopting of the National Human Rights Action Plan (NHRAP) and the Victim and Witness Protection Act are positive actions undertaken by successive governments. We worked with the NHRC, NCPA and the NPC to publish an informative poster on what actions to take, and which organisation to reach out to, when a person is tortured. In addition, NPC worked with local partners on information dissemination campaigns on torture and the Victim and Witness Protection Act, giving a platform to victims to their stories with the media.

The Convention against Torture says that States “shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment”. However, the section on prevention in the National Human Rights Action Plan only refers to capacity building of enforcement officials in arrest, detention and interrogation methods and awareness rising for the public. There is no mention of introducing any rules and procedure to operationalize the ‘zero tolerance’ policy that the State refers to.

Civil society organisations continue their efforts to document torture, file cases,

5 Concluding Observations of the Committee Against Torture dated 8th December 2011, CAT/C/LKA/CO/3-4, paragraph 29 & Position Paper - A Review of the Legal and Policy Framework – Preventing Torture in Sri Lanka (http://www.tisirilanka.org/wp-content/uploads/2015/06/PP_Tou_Eng.pdf)

upload video to social media, carry out pickets and peaceful protests to address incidents of torture, and lobby before national and international groups.

For those affected by war, there are little or no mechanisms to support victims and families to regain lost livelihoods, and significant red tape when attempting to apply for compensation or reparations. Families are often ostracised due to their financial status, with children unable to continue schooling due to financial worries. NGOs providing trauma counselling and healing are barely able to meet demand.

In cases of police torture, most victims are still unable to file cases due to fear of reprisals, the high cost of litigation, and the protracted time a case takes. Magisterial processes fail to take into account torture in police custody, while reports by Judicial Medical Officers that might document torture are deliberately delayed. As with victims of war, the few organisations providing legal counselling⁶ or psychosocial support⁷ for torture victims are overwhelmed by demand.

VI. Recommendations

Improving Rule of Law through Legal and Institutional Reform

Sri Lanka has been under emergency law for most of its post-independence period, with security concerns taking precedence over civil rights and liberties. The principal problem for Sri Lanka, recovering from over 30 years of a securitisation mindset, is the restoration of the rule of law and the supremacy of civic institutions over police and military apparatus.

6 These include Janasasadaya, Right to Life, Centre for Promotion and Protection of Human Rights (CPPHR) Trincomalee, Citizens Committee Gampaha District (CCGD), and Human Rights Office (HRO) Kandy.

7 Janasasadaya, Family Rehabilitation Centre (FRC), Human Rights Office (HRO) Kandy, Citizens Committee Gampaha District (CCGD), Centre for Promotion and Protection of Human Rights (CPPHR) Trincomalee and some faith based organisations.

- A key instrument in this process has been the Prevention of Terrorism Act (PTA) which gives unfettered powers for detention and provides the space for torture and abuse with impunity. **The repeal of the PTA** will be an important first step.
- Restoration of the legal framework or the rule of law will require the **independence of institutions** governing oversight and appointments, including the Police Commission, the Human Rights Commission and the Judicial Commission. The legal framework, in the form of the 19th Amendment to the Constitution, and a system is now in place to strengthen the institutions countering torture and related violations. However, there is much work to be done, primarily intense and continuous training, to build the capacity and professionalism of these institutions, giving them the confidence to exercise the full extent of their powers.
- Another element necessary to change the post-conflict mindset is to introduce **security sector reforms**. The most obvious need would be to reduce the military presence and engage in demobilisation. The restoration of civic authority and re-democratisation is still very much part of Sri Lanka's agenda for transition.
- Mere declarations by the Supreme Court and symbolic compensation has not contributed to ending serious human rights violations. Therefore, the constitutional remedy must be strengthened to be in keeping with Article 2 of the International Covenant on Civil and Political Rights (ICCPR). **An effective remedy for violations of rights must go far beyond the existing Article 126 of the 1978 Constitution.** More specifically The elimination of torture and ill treatment, with an effective remedy to prevent it, should become an integral part of the constitution.
- Introduce **local legislation** to make **war crimes, crimes against humanity, genocide and command responsibility** punishable offences. The lack of such legislation leads to impunity.

Because laws and institutions are not enough, concrete measures are necessary to develop credible system of **prevention, prosecution and redress.**

- An issue under much debate is the **appointment of hybrid courts** with international judges to look into war crimes and human rights violations that took place in during the last few months of the war. The adoption of a hybrid court system for specific violations would not only help restore the faith of victims in the judicial process, but also be an opportunity for Sri Lanka to make a clean break from impunity.
- Although Sri Lanka has signed and ratified the Convention against Torture, it **must still ratify the Optional Protocol.** The CAT Act has also been criticized for ineffectiveness, such as the lack of referrals by Magistrates, Judicial Medical Officers and police officers who come into contact with complaints of torture. Similarly, although Sri Lanka signed the International Convention for the Protection of All Persons from Enforced Disappearances, it **must be ratified by Parliament** to make it effective. In addition, ratification of these protocols does not necessarily entail an adherence to their provisions or the spirit in which they are formulated. An **internal review and monitoring system** is necessary to ensure that the legislation and implementation is in line with international covenants and instruments.
- A shift from the mind-set that puts national security concerns above all else, including guaranteed rights and freedoms, will require measures to train members of the armed forces and police on torture and preventive mechanisms, consistent with obligations under the CAT.
- Use the provisions of the **Assistance to and Protection of Victims of Crime and Witnesses Act No. 4 of 2015** to address torture. In addition, it is important to establish the National Authority the Act provides for, to make the reparations system effective. This will effectively take into account

'secondary victims' of torture, namely family members, who suffer unduly due to their loved ones being tortured and disappeared.

- **Delays in reviewing evidence, investigations, filing of prosecutions** should be considered **violations of a fundamental right to justice** and should be justiciable both under Fundamental Rights and other legal remedies.
- Raise **public awareness on the zero tolerance policy** of the State towards torture, the national rights framework preventing torture, and steps to be taken to make a complaint.
- **Provide a secure and impartial public complaints system** to address the refusal of police stations to record statements of victims of torture.

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