

EXECUTIVE SUMMARY

The present written submission to the Committee Against Torture is for the purposes of the examination of the combined 3rd and 4th periodic reports of Sri Lanka (CAT/C/LKA/3-4) on its implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture). TRIAL will here focus on the topic of universal jurisdiction with a view to the effective prosecution of the crime of torture, considered as one of the most important measures to properly implement the Convention Against Torture, acceded to by Sri Lanka on 3 January 1994.

A detailed review of Sri Lankan criminal legislation leads TRIAL to highlight that the legal framework of the State party is not consistent with the Convention Against Torture. Whilst Sri Lanka has enacted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act 1994¹ in order to incorporate the Convention Against Torture into domestic law, this Act does not contain a definition of torture which is consistent with Article 1 of the Convention. Nor does the Act fulfil the requirements of Articles 5 and 7 of the Convention, as it is unclear whether it contains universal jurisdiction provisions establishing jurisdiction over foreigners present in Sri Lanka who have not been extradited, and prosecution of cases of alleged torture by Sri Lankan courts is contingent on the rejection of an extradition request. Furthermore, despite allegations of widespread torture in Sri Lanka, the low number of convictions under this Act is a cause for concern.

TRIAL

TRIAL (Swiss Association against Impunity) is an association under Swiss law founded in 2002. It is apolitical and non-confessional. One of its principal goal is the fight against impunity of the perpetrators, accomplices and instigators of genocide, war crimes, crimes against humanity and acts of torture.

In this sense, TRIAL:

- ▶ fights against the impunity of the perpetrators and instigators of the most serious international crimes and their accomplices

¹ Act No 22 of 1994.

- ▶ defends the interests of the victims before Swiss tribunals, international human rights organisms and the International Criminal Court
- ▶ raises awareness among the authorities and the general public regarding the necessity of an efficient national and international justice system for the prosecution of international crimes.

In particular, TRIAL litigates cases before international human rights bodies (UN Treaty bodies and regional courts) and files criminal complaints on behalf of victims before national courts on the basis of universal jurisdiction.

The organisation enjoys consultative status with the UN Economic and Social Council (ECOSOC).

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DEVELOPMENTS

TRIAL appreciates the opportunity to bring to the attention of the Committee Against Torture information regarding the implementation of the Convention Against Torture in Sri Lanka.

The following sections address the international legal status of universal jurisdiction and the principle of *aut dedere aut judicare*, and current Sri Lankan legislation establishing jurisdiction of Sri Lankan courts for the crime of torture.

Universal jurisdiction

Universal jurisdiction is the capacity or competence of a state to exercise jurisdiction where none of the traditional bases of jurisdiction exist (i.e. territorial, nationality, passive personality, or protective jurisdiction). It is a form of jurisdiction which does not require any particular nexus between the perpetrator and the forum, allowing for all States to prosecute perpetrators of international crimes, thereby combating impunity by ensuring there is no safe haven for the perpetrators of international crimes.

The importance of universal jurisdiction is highlighted by the fact that it is States that have the primary responsibility to prosecute suspected international criminals².

Whilst the status of universal jurisdiction in international law is not definitively established, there are a growing

² Indeed, the ad hoc international criminal tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) have concurrent primary jurisdiction in relation to States, whereas the International Criminal Court only has complementary jurisdiction which may only be exercised when States are not competent or not willing to exercise their jurisdiction. It is the States that retain, in most cases, the primary jurisdiction to investigate and prosecute international crimes.

number of States which have provided for universal jurisdiction in their national legislation³. The International Criminal Tribunal for the former Yugoslavia, the judicial body at the forefront of modern international criminal law, was less circumspect, stating that “universal jurisdiction (is) nowadays acknowledged in the case of international crimes.”⁴ In the case of *Furundžija*, the Tribunal noted, specifically in relation to torture, that:

“it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, “it is the universal character of the crimes in question (*i.e.* international crimes) which vests in every State the authority to try and punish those who participated in their commission”⁵

Aut dedere, aut judicare: States have an obligation to prosecute or extradite persons suspected of torture

The Convention Against Torture was the first human rights treaty to set out the obligation to establish universal jurisdiction.⁶ Articles 4 to 9 of the Convention set out a matrix of obligations which have the result that States may, and in certain circumstances, must exercise universal jurisdiction.

Article 4 provides that “each State Party shall ensure that all acts of torture are offences under its criminal law”. Article 5(1) provides that “each State Party shall take such measures as may be necessary to establish its

³ Such as, most notoriously, Belgium, as well as Australia, Austria, Canada, Denmark, Finland, France, Germany, Netherlands, Norway, Senegal, Spain, the United Kingdom and the United States of America, see <http://www.amnesty.org/en/international-justice/issues/universal-jurisdiction>, accessed 25 August 2011.

⁴ International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision of 2 October 1995 on the defence motion for interlocutory appeal on jurisdiction in the case of *Prosecutor v. Tadić* (no. IT-94-1), para 62.

⁵ International Criminal Tribunal for the former Yugoslavia, Trial Chamber, *Prosecutor v Furundžija*, Judgment of 10 December 1998 (no. IT-95-17/1-T), para 156.

⁶ Many international treaties dealing with international crimes provide for a form of universal jurisdiction through the principle of *aut dedere aut judicare*, including the Geneva Conventions of 1949, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 1973, the International Convention Against the Taking of Hostages of 1979, the International Convention for the Suppression of Terrorist Bombings 1997, the International Convention on the Suppression of the Financing of Terrorism of 1999, the United Nations Convention against Corruption of 2003, and the International Convention for the Protection of All Persons from Enforced Disappearance of 2006.

jurisdiction over the offences referred to in Article 4” and lists three heads of jurisdiction: territorial, nationality and passive personality. Article 5(2) sets out a further requirement for States to establish jurisdiction “over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.”

Article 6 requires States “in whose territory a person alleged to have committed any offence referred to in Article 4 is present (to) take him into custody or (to) take other legal measures to ensure his presence”. Article 7 requires States in whose territory a person who is suspected of torture is found, “if it does not extradite him, (to) submit the case to its competent authorities for the purpose of prosecution”. Article 8 sets out the requirement that “the offences referred to in Article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties” and Article 9 provides that “States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in Article 4, including the supply of all evidence at their disposal necessary for the proceedings.”

In particular, the combination of Articles 5(2) and 7(1) of the Convention requires States parties to either extradite alleged offenders or to both establish and exercise jurisdiction over alleged offenders, by submitting the case to the competent authorities for the purpose of prosecution. These provisions thus enshrine the principle of *aut dedere, aut judicare*.

Universal jurisdiction is a method of establishing jurisdiction over individuals. The principle of *aut dedere, aut judicare* is more specific. It requires States not only to establish jurisdiction over alleged perpetrators of international crimes who are in their territory (which may include universal jurisdiction, if there is no other applicable form of jurisdiction) but also to exercise such jurisdiction, i.e. to bring proceedings against the suspect – or to extradite the suspect.

If the authorities have reasonable grounds to believe that torture has been committed by a person present in their territory, the Convention Against Torture requires them to take the person into custody (or otherwise ensure his presence) and to commence a preliminary inquiry.⁷ Unless another State requests extradition,⁸ the forum State is required to prosecute the alleged offender. The presence of the perpetrator is the only condition to the requirement of a State to bring to justice an alleged torturer.⁹ Thus *aut dedere aut judicare* is an unequal choice – extradition is only an option if a request has been made and the extradition is not contrary to international law.¹⁰ Otherwise, the State must prosecute.

⁷ Article 6, Convention Against Torture.

⁸ The States listed in Article 5(1) of the Convention Against Torture, namely the territorial State, national State of the alleged offender or national State of the victim.

⁹ See *Suleymane Guengueng et al v Senegal*, CAT/C/36/D/181/2001, 19 May 2006 (*Habré Case*), paras 9.7-9.9 in which the Committee rejected the argument that an extradition request must be made and rejected by the forum State. See also M. Nowak, E. McArthur, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, 2008, which notes that the drafting process of Articles 5-9 bears out this interpretation.

¹⁰ Nowak and McArthur, above n 9.

Aut dedere, aut judicare is not a rule of jurisdiction but a principle of law. First, States parties are required to establish jurisdiction over the crime and the suspect, i.e. they must criminalise torture and subsequently ensure the prosecution of any alleged perpetrators of the crime. The purpose is to create jurisdiction without loopholes – using universal jurisdiction in a remedial manner where other approaches or heads of jurisdiction are not available. Second, States parties are required to cooperate in terms of extradition and judicial assistance. Article 8 of the Convention is aimed at removing legal obstacles to extradition from one State party to another, whilst Article 9 provides that all States parties are required to provide judicial assistance to the forum State.

Jurists have argued that the principle of *aut dedere aut judicare* is developing as a rule of customary international law, or indeed, that it has already attained customary status, at least as concerns certain categories of international crimes.¹¹ Consistent reaffirmation of the principle through its inclusion in treaties is put forward as proof that the principle is a positive norm of general international law and a condition for the effective repression of offences which are universally condemned by the international community.¹² The International Law Commission has included the topic “Obligation to extradite or obligation to prosecute” in its current programme of work, including the possibility of elaborating draft articles on the obligation *aut dedere aut judicare*.¹³ The Special Rapporteur, Zdzislaw Galicki, whilst noting that the varying positions of States on the question of the customary basis of the obligation to extradite or prosecute, pointed out that “the critical approach of States to the idea of a possible customary basis for the obligation *aut dedere aut judicare* has been to some extent relaxed.”¹⁴

Certainly the principle of *aut dedere aut judicare* is essential to the effectiveness of the Convention. The Committee has frequently expressed concern regarding the internal laws of States parties which do not confer jurisdiction for acts of torture.¹⁵ See, for example, the Committee’s Concluding Observations on Nepal in 2007, in which the Committee stated that it “regrets the absence of universal jurisdiction in domestic legislation for acts of torture, as well as the fact that certain provisions of the draft Criminal Code are not in line with articles 5 to 9 of the Convention” and recommended that the State “take the necessary measures to ensure that acts of

¹¹ M. Cherif Bassiouni, E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers, 1995; Z. Galicki, “Preliminary report on the obligation to extradite or prosecute, International Law Commission”, 58th Session, 2006, A/CN.4/571, paras 40-42.

¹² Above n 6.

¹³ Z. Galicki, “Second report on the obligation to extradite or prosecute”, International Law Commission, 59th Session, 2007, A/CN.4/585, para 18.

¹⁴ Z. Galicki, “Third report on the obligation to extradite or prosecute”, International Law Commission, 60th Session, 2008, A/CN.4/603, para 98.

¹⁵ See, *inter alia*, Concluding Observations of the Committee against Torture: Ukraine, A/57/44, 21 November 2001, para 5(d); Conclusions and Recommendations of the Committee against Torture: Uganda, CAT/C/CR/34/UGA, 21 June 2005, para 5(c); Conclusions and Recommendations of the Committee against Torture: Democratic Republic of Congo, CAT/C/DRC/CO/1, 1 April 2006, para 5(b); Conclusions and Recommendations of the Committee against Torture: South Africa, CAT/C/ZAF/CO/1, 7 December 2006, para 17; Conclusions and Recommendations of the Committee against Torture: Benin, CAT/C/BEN/CO/2, 19 February 2008, para 15; Concluding Observations of the Committee against Torture: Indonesia, CAT/C/IDN/CO/, 2 July 2008, para 29.

torture are made subject to universal jurisdiction under the draft Criminal Code, in accordance with article 5 of the Convention. The State party should also make every effort to ensure compliance with articles 6 to 9 of the Convention".¹⁶ The Committee has also expressed concern regarding limitations on universal jurisdiction provisions, such as the French legislative requirement that the suspect be normally resident on France.¹⁷

In the case of *Suleymane Guengueng et al v Senegal*,¹⁸ the Committee found Senegal to be in violation of Articles 5(2) and 7 of the Convention, in relation to the failure of the Senegalese courts to prosecute or extradite Hissène Habré, the former President of Chad, accused of acts of torture in Chad. Both the Court of Cassation of Senegal and the Dakar Court of Appeal found that they lacked jurisdiction to try Mr Habré, despite his presence on within their territory, in contravention of the obligation under Article 5(2). Further, in the absence of a request for extradition being made at the time when the complainants submitted their complaint in January 2000, Senegal did not prosecute Mr Habré, in contravention of the obligation under Article 7. The Committee found a separate contravention of Article 7 from the time that Belgium issued its extradition request, on 19 September 2005, for the refusal of Senegal to comply with the extradition request. The Committee also noted as a positive development the UK House of Lords judgment of 24 March 1999 in the case of *R v Bartle and the Commissioner of Police for the Metropolis, ex parte Pinochet*, in particular the findings that UK Courts have jurisdiction over acts of torture committed abroad, and that a Head of State does not have immunity for torture.¹⁹

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment also recently expressed concern regarding the prevalence of impunity as one the root causes of the widespread practice of torture, and disappointment with respect to the low number of prosecutions for torture. He highlighted the challenge of effective application of the international legal framework, noting that "torture occurs because national legal frameworks are deficient... Torture persists because national criminal systems lack the essential procedural safeguards to prevent its occurrence, to effectively investigate allegations and to bring perpetrators to justice."²⁰

Criminalisation of torture in Sri Lankan Law

Definition of Torture

Torture is prohibited under the Sri Lankan Constitution pursuant to Article 11, which reads:

"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

¹⁶ Conclusions and Recommendations of the Committee against Torture, Nepal, CAT/C/NPL/CO/2, 13 April 2007, para 18.

¹⁷ Conclusions and Recommendations of the Committee against Torture: France, CAT/C/FRA/CO/4-6, 20 May 2010, para 19.

¹⁸ CAT/C/36/D/181/2001, 19 May 2006.

¹⁹ Conclusions and Recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland, Crown Dependencies, and Overseas Territories, CAT/C/CR/33/3, 10 December 2004, para 3(d).

²⁰ Final report of Manfred Nowak: "Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment", A/65/273, 10 August 2010.

Torture is not criminalised in the Penal Code of Sri Lanka²¹ but instead through the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act 1994 (Torture Act) incorporating the Convention into Sri Lankan law.

Section 12 of this Act provides:

"torture" (...) 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 that is to say -

- (i) obtaining from such other person or a third person, any information or confession; or
- (ii) punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or
- (iii) intimidating or coercing such other person or a third person; or done for any reason based on discrimination,

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

Section 2 of the Torture Act provides:

"(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 Committee has previously noted that this definition does not correspond with the definition of torture under Article 1 of the Convention in its Conclusions and Recommendations on Sri Lanka in 2005. Absent are the words 'suffering', 'intentionally inflicted' and the phrase 'It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.²² The Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment of Punishment also noted that the word 'suffering' is absent from the definition in his report to the General Assembly in February 2008.²³ Sri Lanka's position is that there is no material difference between the Convention definition and the Torture Act definition, as the word "severe pain" encompasses

²¹ The Penal Code criminalises "voluntarily causing hurt" in ss 310 – 329 and "assault" in ss 340 – 349.

²² Conclusions and recommendations of the Committee against Torture: Sri Lanka, CAT/C/LKA/CO/2, 15 December 2005, para 5.

²³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Sri Lanka, A/HRC/7/3/Add.6, 26 February 2008, para 25.

suffering, and that the definition encompasses psychological torture, and therefore the threat of torture.²⁴ Nevertheless, the government stated in 2007 that it would take steps “to refer this matter for the consideration of the Sri Lanka Law Commission to recommend any changes if necessary to bring the domestic legislation in full conformity with the Convention.”²⁵

The Committee has frequently expressed concern at the lack of a comprehensive definition of torture,²⁶ and has recently made a number of recommendations that States Parties ensure that the definition of torture incorporates all elements contained in Article 1 of the Convention.²⁷ In General Comment No. 2, the Committee pointed out that “serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity... thus the Committee calls upon each State party to ensure that all parts of its government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State.”²⁸ The risk with the Sri Lankan definition is that acts of torture which do not cause ‘severe pain’ but instead constitute ‘suffering’ are not covered by the definition. Sri Lanka must ensure that all acts of torture and cruel, inhuman and degrading treatment and punishment are criminalised in its domestic legislation.

Jurisdiction of Sri Lankan Courts to prosecute acts of torture

Scope of jurisdiction

Section 4 of the Torture Act provides:

“(1) 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

²⁴ Combined third and fourth periodic reports to the Committee Against Torture: Sri Lanka, CAT/C/LKA/3-4, 23 September 2010, para 15.

²⁵ Comments by the Government of Sri Lanka to the conclusions and recommendations of the Committee against Torture, CAT/C/LKA/CO/2/Add. 1, 20 February 2007, para 10.

²⁶ Conclusions and Recommendations of the Committee Against Torture: Lithuania, CAT/C/CR/31/5, 5 February 2004, 5(a); Conclusions and Recommendations of the Committee against Torture: Bulgaria, CAT/C/CR/32/6, 11 June 2004, para 5(a); Conclusions and Recommendations of the Committee Against Torture: Bahrain, CAT/C/CR/34/BHR, 21 June 2005, para 6(b); Conclusions and Recommendations of the Committee Against Torture: Uganda, CAT/C/CR/34/UGA, 21 June 2005, para 5(a); Conclusions and Recommendations of the Committee Against Torture: Qatar, CAT/C/QAT/CO/1, 25 July 2006, para 10; Conclusions and Recommendations of the Committee Against Torture: Nepal, CAT/C/NPL/CO/2, 13 April 2007, para 12; Concluding Observations of the Committee Against Torture: Yemen, CAT/C/YEM/CO/2/Rev.1, 25 May 2010, para 7.

²⁷ Concluding Observations of the Committee Against Torture: Switzerland, CAT/C/CHE/CO/06, 25 May 2010, para 5; Concluding Observations of the Committee Against Torture: Ghana, CAT/C/GHA/CO/1, 15 June 2011, para 9; Concluding Observations of the Committee Against Torture: Monaco, CAT/C/MCO/CO/4-5, 17 June 2011, para 7; Concluding Observations of the Committee Against Torture: Kuwait, CAT/C/KWT/CO/2, 28 June 2011, para 7.

²⁸ Committee Against Torture, General Comment No 2: Implementation of Article 2 by States parties, CAT/C/GC/2, 24 January 2008, para 9.

(c) the person in relation to whom the offence is alleged to have been committed is a citizen of Sri Lanka.”

(2) The jurisdiction of the High Court of Sri Lanka in respect of an offence under this Act committed by a person who is not a citizen of Sri Lanka, outside the territory of Sri Lanka, shall be exercised by the High Court holden in the Judicial Zone nominated by the Chief Justice, by a direction in writing under his hand.”

Section 7(3) provides:

“Where it is decided that no order should be made under the Extradition Law, No. 8 of 1977, for the extradition of any person accused or convicted of the offence of torture pursuant to a request for his extradition made under that Law, by the Government of any State, 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.”

In its Conclusions and Recommendations on Sri Lanka in 2005, the Committee expressed its concern about the absence in Sri Lankan law of provisions establishing universal jurisdiction, and recommended that Sri Lanka “should ensure that Sri Lankan law permits the establishment of jurisdiction for acts of torture in accordance with article 5 of the Convention, including provisions to bring criminal proceedings under article 7 against non-Sri Lankan citizens who have committed torture outside Sri Lanka, who are present in the territory of Sri Lanka and who have not been extradited.”²⁹

Indeed, it is not clear that section 4 of the Torture Act provides for the mandatory establishment of jurisdiction vested in the High Court over acts of torture, once proceedings are instituted by the Attorney-General. The government of Sri Lanka has informed the Committee that the High Court has “continuously asserted its jurisdiction over alleged torture cases under the Convention Against Torture Act”³⁰ but has not confirmed that such jurisdiction is not exercised at the discretion of the High Court in the Judicial Zone nominated by the Chief Justice, as Section 4(2) seems to imply. Not a single case has been put forward that could confirm the State Party’s assessment.

Article 7 of the Convention Against Torture provides that a State Party in whose territory suspected torturers are found must submit the case to the competent authorities for prosecution, if it does not extradite the suspect. Section 7 of the Sri Lankan Torture Act provides for prosecution of persons accused of torture, in the absence of an extradition order. The Torture Act further provides that existing extradition agreements are deemed to include torture,³¹ the Convention may be treated as an extradition arrangement where there is

²⁹ Above n 22, para 10.

³⁰ Combined third and fourth periodic reports submitted to the Committee Against Torture, Sri Lanka, CAT/C/LKA/3-4, 23 September 2010, para 37.

³¹ Section 9(1) of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act 1994 (Torture Act).

none,³² as well as for the amendment of the Extradition Law No. 8 of 1977 to include torture.³³ However, section 7 appears to require the rejection of an extradition request before the requirement that the case be submitted to the authorities. Prosecution of torture should not be contingent on a request for extradition. The Committee has made this clear in the case of *Suleymane Guengueng et al v Senegal*, where it stated that “the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition. The alternative available to the State party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished.³⁴ The Convention Against Torture requires a country in which an alleged perpetrator of torture is found to bring that person to justice - regardless of the possibility of prosecution in another jurisdiction and regardless of any extradition requests from other countries.

Therefore, although it does provide for jurisdiction over alleged perpetrators of torture present in Sri Lanka, whether Sri Lankan citizens or not, for offences committed outside Sri Lanka, it is unclear whether Sri Lankan law provides for the mandatory establishment of universal jurisdiction, or whether this remains at the discretion of the High Court, as Section 4(2) of the Torture Act seems to imply. Furthermore, Sri Lankan law does not adequately incorporate the Convention requirements of *aut dedere, aut judicare*, as it does not expressly provide for jurisdiction over foreigners present in Sri Lanka who have not been extradited, in contravention of Article 5, and makes the submission of cases of alleged torture conditional on the rejection of an extradition request, in contravention of Article 7.

Prosecutions under the Torture Act

The Torture Act has rarely been used to prosecute acts of torture, despite reports of widespread torture in Sri Lanka.³⁵ To date, there have only been three convictions under the Torture Act in Sri Lanka.³⁶ According to the Asian Human Rights Commission, the government has stopped investigating cases of torture as a matter of policy, and since 2009 no cases have been investigated or prosecuted.³⁷ Part of the problem is the lack of an effective investigation mechanism, in violation of Article 12 of the Convention Against Torture.³⁸ Complaints under the Torture Act must be submitted to the Attorney General’s Department. The former practice was for the Department to refer cases to the Special Investigations Unit of the Criminal Investigation Division, which

³² Section 9(2) of the Torture Act.

³³ Section 8 and the Schedule of the Torture Act.

³⁴ Above n 9, para 9.7.

³⁵ Above n 22, para 12, in which the Committee expressed its “deep concern about continued well-documented allegations of widespread torture and ill-treatment as well as disappearances, mainly committed by the State’s police forces.” See also Report of the Special Rapporteur on torture, Mission to Sri Lanka, above n 23.

³⁶ Above n 23, para 51.

³⁷ Asian Human Rights Commission, “A review of Sri Lanka’s compliance with the obligations under the Convention against Torture and Ill-treatment”, 8 July 2011, www.humanrights.asia/news/ahrc-news/AHRC-STM-095-2011, accessed 5 September 2011.

³⁸ Above n 23, paras 55, 70, and 91.

reported back to the Attorney General's Department for consideration of filing indictments. In 2009 these referrals were discontinued as a matter of policy and no new mechanism has been established.³⁹ Further problems include insufficient evidence, due to intimidation of victims and witnesses,⁴⁰ a lack of thorough investigation by the police⁴¹ as well as delays in prosecution.⁴²

It is not enough for a State to enact legislation to fulfil the requirements of Article 5. A State is required to take such measures as may be necessary to establish its jurisdiction over alleged perpetrators of torture, which includes judicial and executive measures. Clearly it is not sufficient for Sri Lanka to rely on the legislation in its books – it must also ensure that this legislation is implemented as required by the Convention. A comparison of the number of allegations of torture,⁴³ the number of prosecutions under the Torture Act⁴⁴ and the number of convictions for torture in Sri Lanka show that this is not the case in Sri Lanka.⁴⁵

CONCLUSIONS

TRIAL respectfully submits to the Committee Against Torture that the current state of Sri Lankan legislation does not fully implement the Convention Against Torture, due to the absence of a definition of torture in conformity with Article 1 of the Convention, the absence of provisions providing jurisdiction over foreigners present in Sri Lanka who have not been extradited, in conformity with Article 5(2), and the requirement that cases be transmitted to the authorities after the rejection of a extradition request, in contravention of Article 7. TRIAL encourages Sri Lanka to ensure that its legislation is brought into conformity with the Convention Against Torture, and further encourages Sri Lanka to fully implement the Convention Against Torture by ensuring that no acts of torture over which Sri Lankan courts have jurisdiction go unpunished.

³⁹ Above n 37.

⁴⁰ Above n 37; above n 23, para 73.

⁴¹ Above n 37, see also K. Pinto-Jayawardena, "The Rule of Law in Decline: Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka", Rehabilitation and Research Centre for Torture Victims, Copenhagen, 2009, www.ruleoflawsrilanka.org/ accessed 5 September 2011.

⁴² Above n 22, paras 12 and 14; above n 23, para 51.

⁴³ The Asian Human Rights Commission refers to receiving complaints on a daily basis, and states that it has received "thousands" of complaints between the 46th and 47th sessions of the Committee Against Torture, see above n 37. the Special Rapporteur also referred to "the high number of indictments for torture filed by the Attorney General's Office, the number of successful fundamental rights cases decided by the Supreme Court of Sri Lanka, as well as the high number of complaints that the NHRC continues to receive on an almost daily basis are a clear indication that torture is widely practised in Sri Lanka", see above n 23, para 70. The Committee against Torture has also referred to the allegations of "widespread torture" in its Conclusions and recommendations on Sri Lanka, above n 22, para 12,

⁴⁴ According to the government of Sri Lanka, there were 40 indictments filed as at 2004, see Second periodic report of Sri Lanka to the Committee Against Torture, CAT/C/48/Add.2, 6 August 2004. According to the Special Rapporteur on Torture, there had been 34 indictments at the time he published his report, in 2008, see above n 23, para 77. According to the Asian Human Rights Commission, there were 60 indictments between 2006 and 2008, see above n 37.

⁴⁵ 3 convictions, above n 23, para 51.

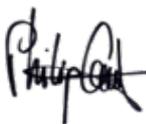
RECOMMENDATIONS

TRIAL respectfully suggests that the Committee Against Torture take the following action:

1. During the dialogue with Sri Lanka:
 - a. request the State Party to provide information regarding any steps taken to refer the issue of the definition of torture to the Sri Lanka Law Reform Commission;
 - b. request the State Party clarify the establishment of the jurisdiction of the High Court under the universal jurisdiction provisions of the Torture Act;
 - c. request the State Party to explain the absence of provisions establishing jurisdiction over foreigners present in Sri Lanka who have not been extradited, as well as the current requirement that extradition must be rejected before a case of suspected torture is submitted to the authorities; and
 - d. request the State Party to provide information regarding the existing complaint and investigation mechanisms for allegations of torture.

2. After the dialogue with Sri Lanka:
 - a. recommend that the State Party ensure that the definition of torture is brought into conformity with the definition contained in Article 1 of the Convention Against Torture;
 - b. recommend that the State Party ensure suspected perpetrators of torture present in Sri Lanka are capable of being prosecuted under universal jurisdiction provisions;
 - c. recommend that the State Party ensure that cases of suspected torture are brought before the authorities prosecutions whether or not an extradition request has been made; and
 - d. encourage the State Party to fully implement the Convention Against Torture by establishing effective and functioning complaint and investigation mechanisms for all allegations of torture.

TRIAL remains at the full disposal of the Committee Against Torture should it require additional information and takes the opportunity of the present communication to renew to the Committee the assurance of its highest consideration.



Philip Grant
TRIAL Director