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C/O The Secretariate of the Committee against Torture

A Submission for the 47th Session of the Committee against Torture on Sri Lanka

The Asian Human Rights Commission is submitting this report on torture and ill-treatment in Sri Lanka for the consideration of the Committee against Torture at its 47th Session.

1. The Asian Human Rights Commission receives complaints relating to the practice of torture and ill-treatment by the police in Sri Lanka on an almost daily basis. After verification these reports are published by the Urgent Appeals programme of the AHRC and letter are written to the authorities of Sri Lanka and the relevant authorities in the UN agencies relating to each of these cases. During the time between the 46th Session of the Committee and the 47th Session literarily thousands of such cases have been received and dealt with in the manner described above by our commission.
2. The 323 cases which are summarised in the attached report are only a fraction of the actual number cases of torture. This report is submitted as a sample of the kind of complaints relating to torture which describes the circumstances under which torture takes place, the type of torture which is being practiced, the reasons for such practice and the deficiencies of the law, legal procedures and the mechanisms of the receipt of complaints, investigation of complaints, the prosecution of such complaints and the litigation process.
3. **The defects in the substantive aspects relating to the obligations of the state:**
   a. **The CAT Act is merely a paper law**: Sri Lanka has criminalised torture by the CAT Act , Act No. 22 of 1994 which has created a criminal offense relating to torture and ill-treatment and prescribed seven years of compulsory imprisonment and a fine of Rs. 10,000/=. However, this is by now merely a paper law. As a matter of policy the government has stopped investigations into complaints under this act and/or to prosecute under this law. Until about 2008 there were some investigations conducted due to international pressure. However, this practice has been officially abandoned since then. From 2009 there has not been a single case investigated or prosecuted under Act No. 22 of 1994 despite of the complaints related to torture being received almost on a daily basis from almost every police station in the country. The decision not to conduct investigations or prosecute under this Act was the government's response to the resistance developed by some sections of the police against such investigations and prosecution. The failure to implement this law is also for policy reasons in order to discourage complaints being received relating to torture and ill-treatment. In recent years the government has developed the public policy to the effect that making of complaints relating to torture and other human rights abuses are against the public image of the government and the government is being internationally embarrassed by such complaints. Internally the government carries on a heavy

propaganda attempt against human rights organisations who support the victims of torture and ill-treatment and other human rights abuses as being unpatriotic. Heavy pressure is exercised against the complainants of human rights abuses as well as organisations and individuals who support such victims. When the government openly pursues a public policy of portraying victims of abuse and human rights organisations as unpatriotic the whole purpose of Act No. 22 of 1994 is defeated.

b. **No law relating to compensation**: Sri Lanka does not a law relating to compensation for victims of torture and ill-treatment. Thus, the state fails to respect the requirements of article 14 of the CAT. There has never been any discussion at a legislative level of bringing a law to articulate the rights of the victims for compensation. The constant policy of discouraging victims from complaining also goes against the state obligation to create a conducing atmosphere for bringing legislation in order to meet with the obligations of the state in this regard. The civil society organisations are discouraged by such negative atmosphere against free speech for the promotion of human rights.

c. **No law relating to rehabilitation:** The Sri Lanka government has failed to recognise its obligation regarding rehabilitation of victims. The very idea of the legal responsibility to restore to the victim that which he has lost by way of abuse remains alien to Sri Lanka's legal culture. The obligation to provide trauma counseling or to provide medical assistance for acute stress disorder or post traumatic stress disorder and other psychological problems are not acknowledged in any manner by the state. No legislative provisions have been made for such ends. There are also no policy discussions and therefore it is most unlikely that any legislative measure will be created for this purpose in the near future. The general atmosphere of discouragement of public speech and debate affects negatively the development of law and practices regarding rehabilitation of victims.

4. **Procedural requirements for implementing the obligations of the state relating to the CAT**

a. **The absence of a credible and functioning complaint mechanism** regarding torture and ill-treatment. The state has failed to develop such a complaint mechanism and the tendency in recent years is to discourage the development of any such mechanism. Even some avenues which existed under the country's criminal procedure for making such complaints at police stations is not implemented due to negative practices which have been allowed to take place at police stations. The persons who go to make complaints are often sent away with having their complaints recorded and often are also abused and even threatened when they reveal that their complaint is relating to police officers. The higher ranking officers are not trusted by the people as being willing or capable to conduct investigations relating to their subordinates. Many complainants have repeatedly complained about various harassments they have suffered due to making such complaints. In the past there have been two assassinations of torture victims due to the complaints they has made against those who subjected them to torture. The cases of Gerard Perera and Sugath Nishanta Fernando are well known. Sugath Nishanta Fernando who was killed while pursuing a complaint against the police was assassinated and there has been no credible investigation into his murder despite of attempts by even international agencies to demand an inquiry. A case is pending before the United Nations Committee against Torture relating to the failure of the state regarding this murder. In the past there had also been some forms of complaint making at the Human Rights Commission of Sri Lanka (HRCSL). However, this commission has lost its credibility due to arbitrary appointments and for the absence of any serious actions regarding violations.

b. **The absence of a credible and functioning investigation mechanism** into torture and ill-treatment. For a short period between 2006 and 2008 the investigations into complaints of torture and ill-treatment was handled by a Special Inquiry Unit of the Criminal Investigation Division. During this period over 60 cases were found to have adequate information for the filing of indictments under the CAT Act, Act No. 22 of 1994. The practice of referring cases for investigation by the SIU was started as a result of interventions by Theo Van Boven, then the Special Rapporteur against Torture and Ill-treatment. The methodology adopted was for the Attorney General's Department to refer cases to the SIU and the SIU, after investigations would submit their report the Attorney General's Department for consideration for the filing of indictments. This practice was discontinued after 2009 when C.R. De Silva became the Attorney General and the present Attorney General, Mohan Peiris continues the same policy. The result is there is no credible investigator to investigate complaints under Act No. 22 of 1994. As pointed out earlier the result is the absence of prosecution under the CAT Act and thus this law of criminalising torture has just become a paper law. The non-prosecution of cases under torture is now a matter of GOSL policy.

c. **The change of policy relating to torture and ill-treatment at the Attorney General's Department.** The policy change which took place in the Attorney General's Department from the time that C.R. De Silva became Attorney General has been pointed out in the earlier paragraph. Besides this the overall approach of the AGD regarding torture has also changed drastically. Since the late 1990s there was a policy for the Attorney General not to represent any public servant accused of torture and ill-treatment under the fundamental rights provisions of the Constitution. After 2010 this policy has been changed by Mohan Peiris as the Attorney General. Now, when applications are filed under the Constitution on violations of fundamental rights relating to torture notice is issued to the Attorney General. The Attorney General's Department thereafter appears in the Supreme Court to take objections for continuing of applications under fundamental rights. Thus the Attorney General's Department contacts the police officers who are made respondents and assists them in filing objections and taking up objections against this application. Thus, the original policy of non-appearance for public servants has been altered by the Attorney General's Department. The present position of appearing for respondents is contrary to principles as the Attorney General is the prosecutor if cases are to be filed against respondents under the CAT Act. To defend respondents against accusations of torture under fundamental rights and at the same time to be officially responsible for prosecutions in torture cases is to play a self contradictory role. It is ironical that the Attorney General also usually accompanies the government delegation to the CAT Committee to present the government's position relating to the implementation of the CAT. The role that is usually played is to deny the violations of the CAT or to create a portrait that the obligation under the CAT is being carried out faithfully by the government. In playing these many roles the Attorney General's Department has to twist facts relating to allegations of torture. In any case the Attorney General's Department by now has become a department that directly functions under the executive president and carries out the instructions of the government. No impartial role regarding the protection of the victims of torture can be expected from this department by now.

5. **Defects in judicial interventions for the protection of victims of torture. Under the CAT Act, Act No 22 of 1994.** The problems relating to complaints, investigations and prosecutions mentioned in the earlier paragraphs affects the judicial interventions as virtually no new cases are filed under the CAT Act. The court can act only if investigations are made and prosecutions are filed. However, even regarding the earlier cases where such cases have been filed the defects in the judicial system seriously hamper the effective redress under the CAT Act.

The trials at the High Courts take many years, as much as four to ten years, and as a result the prosecutions have become ineffective. During the long periods many judges and prosecutors change while each case is taking place before a particular court. In many instances as much as six or seven judges many sit before a trial is completed. The judge who finally writes the judgement has not had the opportunity to see the demeanor of many of the witnesses. The judges have to rely on reading the written record of evidence alone in writing judgements. Some of the judgements create doubts as to whether the judges have, in fact, read the written report. For example in the case of Lalith Rajapakse which was heard before the Negombo High Court there was detailed medical evidence including a written medial report stating that the victim had suffered many injuries including injuries to the foot. The victim himself also gave evidence to that effect. However, the trial judge strangely held that there was no evidence to support the allegation relating to the beatings on the foot. An appeal on this case is now pending. The delays also provide the opportunity for witnesses to be threatened, physically harmed or even killed. As mentioned before two of the torture victims awaiting trials were assassinated. There are many instances where complainants either do not come for cases before courts to give evidence or even change their earlier versions of the statements due to threats or sometimes other incentives to abandon their claims. Besides this some witnesses die and other witnesses leave the country for employment and other purposes thus making it impossible for their testimonies to be recorded in courts. It can also be said that many of the Sri Lankan judges do not demonstrate adequate legal knowledge about torture and ill-treatment and often some tend to sympathise with the officers who are facing the charges. The victims of torture come from the poorer sections of society while often the officers are those who frequent courts for various official purposes. Besides the absence of adequate knowledge and seeming lack of interest there are also matters of policy in the time of civil conflict which seems to mitigate against the prosecutions against the torture. These prosecutions are often perceived as having a disturbing impact on police and military officers who enjoy privileged positions due to the overall security policies pursued in the country.

Fundamental rights -- the fundamental rights jurisdiction also suffers from many defects.

a. **Declarations do not lead to any consequences:** The declarations made under the fundamental rights jurisdiction by the Supreme Court stating that violations relating to torture have been done by the respondents, meaning police or military officers for the most part, does not have any direct practical consequence. It does not affect the further employment of these officers in their departments or their promotions. The respondents of many cases are still in the police and several of them have received promotions even to higher positions.

b. **Amounts in financial awards low:** Further, where compensation is awarded the financial awards are of very low amounts and in no way reflect the obligations of the state under the CAT for compensation of torture victims in terms of covering their medical costs, legal costs as well as compensation for the psychological damage. The Sri Lanka Supreme Court has not yet adopted legal principles relating to the assessment of responsibilities for causing psychological damage to the victims. Many of the victims suffer serious abuse at the hands of the respondents which can cause trauma, acute stress disorder, post traumatic stress disorder as well as many other forms of psychological damage. A few years ago the Supreme Court adopted better standards for the assessment of compensation, for example, in the case of

Gerard Perera and also a few other cases. In Gerard Perera's case the total compensation came to Rs. 1.6 Million which is around US$ 16,000. That was even then not calculating the damages from the point of view of psychological injury. However, in recent cases where the torture is proved damages may run to around Rs 5,000 to 100,000 in very rare instances. That is between US$ 50 to 1,000. Perhaps the reasons for reducing the amounts of damage may be to discourage more persons from pursuing cases. However, the clear policy reason for such reduction has not been stated.

c. **Attorney General plays a negative role:** A further defect of the fundamental rights jurisdiction is that from very recent times even before notice is issued to respondents the Attorney General is given notice and he comes before the court to object to notice being given on these applications. As the objection taken by the Attorney General at this stage is on the instructions of the respondents there is no evidential basis for the Attorney General to appear at this stage. The Constitution provides that the court can issue notice if they are satisfied that there are grounds for a *prima facie* case. This new practice of hearing the Attorney General before issuing notice for the respondents acts in favour of the respondents and is quite open to abuse.

d. **Evidence on affidavits alone is adverse to the victim:** An even further defect in the fundamental rights jurisdiction is that the entirety of the proceeding depends on affidavits and no credible inquiry by an investigating unit makes an inquiry into torture and submits a report to the court. When the Supreme Court received a complaint of torture by way of a fundamental rights application it could refer the matter to a Special Investigation Unit of the CID through the IGP who is always an official respondent. If a special unit makes such an inquiry under the instructions of the Supreme Court they are likely to conduct a credible inquiry and thereby an inquiry into torture by the state in terms of its obligations could be ensured. Mere reliance of affidavits is often to the disadvantage of the applicant who is a lay person and more often than not, a person from the poor classes of society. Thus such torture victims cannot be expected to have all the resources and the capacity in order to find out all the matters relating to the violations of their rights to be placed before the courts. In cases where an SIU of the CID have conducted investigations into torture complaints they have come out with a great deal of evidence which the ordinary layman is unable to have access to. For example in such SIU inquiries documents in the possession of the police stations have been looked into and often much evidence has been found to support the victim's allegations. All the considerations shown above require a reexamination of Article 126 of the Sri Lanka Constitution and ways to improve this remedy should be found. However the present policy of the GOSL to discourage investigations into torture and other allegations of human rights is likely to affect the fundamental rights as a remedy adversely.

6. **GOSL's constitutional impediments to implement the obligations under the CAT.** The 1978 Constitution of Sri Lanka places the executive president above the law and thus diminishes the power of the judiciary to protect the individual as against the state. Sri Lanka's Constitution is incompatible with the principles of rule of law. The country has been suffering from a collapse of the rule of law since 1978. Sri Lanka is, in fact, incapable of implementing the obligations under the CAT due to the nature of the constitution in the country. Without a fundamental change to the constitution to bring the executive under the rule of law it is not possible for the GOSL to implement the obligations under the CAT within a legal framework. In fact, this is the most important factor in dealing with the human rights problems in Sri Lanka.

The impunity relating to human rights abuses including violations relating to torture and ill-treatment are guaranteed by the constitution itself. Sri Lanka has a system of constitutionally entrenched impunity.

Perhaps this may not be an issue that the CAT Committee can deal with in their usual procedure. However, without dealing with this issue the GOSL will not have the capacity to implement any of the recommendations of the CAT Committee.

It is respectfully submitted that in order to have any practical impact the CAT Committee needs to go beyond their normal procedures and to question the GOSL regarding the constitution itself particularly in relation to the impunity guaranteed to the executive and the diminishment of the capacity of the courts to protect the rights of the individual

Conclusion

The GOSL is neither willing nor capable of implementing the obligations under the CAT. That is the challenge that the CAT Committee needs to deal with if any kind effective remedy regarding the implementation of the state obligations relating to the CAT is to achieve any tangible results in keeping with article 2 of the International Covenant on Civil and Political Rights (ICCPR). As Jean-Jaques Rousseau has said in his Discourse: What is the Origin of Inequality Among Men, and is it Authorized by Natural Law:

> *I should have wished then that no one within the State should be able to say he was above the law; and that no one without should be able to dictate so that the State should be obliged to recognise his authority. For, be the constitution of a government what it may, if there be within its jurisdiction a single man who is not subject to the law, all the rest are necessarily at his discretion."*

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